



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

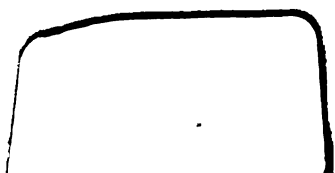
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



J2S
JAE
v.3



~~78~~ Privy Council, Judicial Committee.

JUDGMENTS
OF
THE PRIVY COUNCIL
ON
APPEALS FROM INDIA

BY
D. SUTHERLAND,
MIDDLE TEMPLE.

VOL. III.

Under the Patronage of the Governments of Madras and the N. W. Provinces.

CALCUTTA: THACKER, SPINK, AND CO.
BOMBAY: THACKER AND CO., LIMITED.
LONDON: W. THACKER AND CO., 87, NEWGATE STREET.
1880.



PREFACE.

THE Prospectus of the first volume of my edition of the Privy Council Judgments, which I brought out in 1867, stated as follows:—

“The decisions of the Judicial Committee of Her Majesty's Privy Council, in cases heard on appeal from the Courts of British India, are at present in a great measure unknown to and beyond the reach of a great majority of the Judges of our Courts. From the year 1836 regular reports of the decisions on Indian Appeals have been published by Mr. Moore. But the earlier volumes of this series are not to be procured without great difficulty (the first volume alone, I believe, not being procurable for even Rs.100); while the high price of all of them is an obstacle to their wide circulation. In 1855 the Privy Council first began to print their Indian judgments, and I have been furnished with the whole series of these printed judgments from that time to the present. I have also been furnished with the earlier judgments commencing from 1831 to 1834, as published in what is known as the Folio Edition of the Privy Council Cases, a still more inaccessible work than Moore's Reports. From these materials I propose to reprint the whole of the judgments in a single volume, with carefully prepared marginal notes, and a copious Index, so that, in a convenient form for reference, the judgments of the highest tribunal will be brought within reach of every local Court.”

By “the Folio Edition of the Privy Council Cases” above referred to, were meant the printed cases in appeals which were bound up together with the judgments. A complete set of these was kept up in the Library of the late Sudder Court at Calcutta. I may also here mention that previous to Mr. Moore's Reports, the earlier judgments of the Privy Council from 1829 to 1836 were reported by Mr. Knapp.

My first volume was brought out under the patronage of the Governments of Bengal, Madras, and the North-Western Provinces; under whose patronage a

second volume, containing a continuation of the Privy Council judgments from 1867, and including some earlier ones inadvertently omitted from the former volume, is now published. The work is, for the most part, a reprint of the judgments published in my "Weekly Reporter." To these have been added several judgments which have been placed at my disposal by the Registrar to the Privy Council, to whom my best acknowledgments are due for his kindness.

The two volumes will be found to contain, in a convenient form, the judgments of the Privy Council from 1831 to 1874.

December, 1878.

INDEX.

ACCOUNT.

In a suit for a sum of money on an unadjusted —, plaintiff filed a memorandum (A) with her plaint, from which the amount claimed in the plaint could not be made out. In her examination by the Court, plaintiff put in another memorandum (C) to explain memorandum A. Defendant admitted that memorandum C was signed by him. It had reference to a period immediately preceding that from which the suit was brought: *Held* that memorandum C was rather evidence to support the originally stated cause of action, than an amendment of the claim in the substitution of one claim or cause of action for another. The case was one which should have been decided, not merely on the discrepancy between the two statements made by plaintiff, but on the whole of the evidence.—355.

The omission of an accountable party framing his own — to carry forward into a new — a balance against himself existing in a former — can constitute no evidence in his own favor.—*Ibid*.

See ARBITRATION, MORTGAGE, PARTNERSHIP.

ACCUMULATIONS. *See* HINDOO WIDOW, WILL.
ACQUIESCENCE.

It is not the practice of the Courts in India or of the Privy Council to press against either an infant or a Hindoo female a presumption by — in a rival claim from the mere contestation for a limited time of an adverse title.—493.

ACT V of 1836. *See* JURISDICTION.

ACT I of 1845.

s. 9. *See* MORTGAGE.

ACT XXXV of 1858. *See* LUNACY.

ACT VIII of 1859.

s. 2. *See* CAUSE OF ACTION, ESTOPPEL, RES JUDICATA.

s. 7. *See* RELINQUISHMENTS, SPLITTING CAUSE OF ACTION.

s. 14. *See* JURISDICTION.

s. 15. *See* DECLARATORY DECREE.

s. 26. *See* PLAINT.

s. 29. *See* PLAINT.

s. 33. *See* EVIDENCE.

s. 200. *See* HUSBAND AND WIFE.

s. 205. *See* ARBITRATION, ATTACHMENT.

s. 260. *See* BENAMKE.

s. 351. *See* ISSUES.

ACT IX of 1859.

s. 20. *See* FORFEITURE, LIMITATION.

ACT X of 1859.

s. 15. *See* ENHANCEMENT.

s. 16. *See* ENHANCEMENT.

s. 23 cl. 6. *See* UNDER TENURE.

s. 32. *See* LIMITATION, PUTNEE.

ACT XIV of 1859. *See* DIVORCE, LIMITATION.

s. 1 cl. 9, 12, 13. *See* LIMITATION.

s. 1 cl. 15. *See* MORTGAGE.

s. 5. *See* LIMITATION.

s. 14. *See* LIMITATION.

s. 20. *See* LIMITATION.

ACT XXIII of 1861.

s. 11. *See* EXECUTION OF DECREE.

ACT II of 1863.

s. 14. *See* PRIVY COUNCIL.

ACT X of 1866.

s. 174. *See* JOINT STOCK COMPANY.

ACT XX of 1866.

ss. 2, 49, 84. *See* REGISTRATION.

ADVOCATE.

Where the Privy Council reversed an order of a High Court suspending an — from practice.—505.

ALLUVIAL LAND.

Title by accretion to a new formation.—171, 199, 587.

The custom to be established under s. 2 Reg. XI of 1825 as to the disjunction and junction of — by the encroachment or recess of a river, must be a local custom. Canooongoe papers are not sufficient to prove the existence of such custom.—217.

Title to — which originally formed part of plaintiff's estate, but which had been washed away and subsequently re-formed.—386, 640.

The presumption against those who slumber on their rights is the stronger when the subject-matter, as in the case of —, is in a constant state of change, and the difficulty of proof increased by lapse of time.—587.

Review of the law of alluvion in Bengal as declared by Reg. XI of 1825 and decided cases.—640.

Nature of the custom which plaintiff was required to establish in order to disturb defendant's long uninterrupted possession of land, once alluvial, lying between two branches of a river, or between two rivers, the volume of water in which continually shifted so that alternately one of those channels was deep and the other fordable.—650.

A contract between two former zemindars that the ownership and right of possession in the land should shift with the volume of water attaching to the riparian proprietor on the fordable side of the channel is not binding on one who was a stranger to the arrangement.—*Ibid*.

In a suit to recover — of which he had been ordered by the Magistrate to be put in possession according to certain boundaries, plaintiff was held to have failed in sustaining the burden of proof that the land he now claimed was identical with that of which he was put into possession by the Magistrate's order.—758.

Though an island or land thrown up and surrounded by a river may become vested in Government under Reg. XI of 1825 s. 4 cl. 4, it does not follow that if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accretion within the meaning of cl. 1.—891.

The onus of proving gradual accretion, and usage that a certain channel was to be the boundary of two zemindari's, is on plaintiff.—910.

ANCESTRAL DEBT. *See* SALE, SUBSTITUTION.

ARBITRATION.

No party to an agreement to refer to — can revoke his submission unless for good cause.—164.

Procedure when the reference to — fixes no time for the award to be made.—*Ibid*.

A claim under a future award of arbitration, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled, is not liable to attachment and sale in execution under s. 205 Act VIII of 1859.—484.

See PARTITION.

ATTACHMENT.

Construction of the words "all other property

whatsoever, moveable or immovable" in s. 205 Act VIII of 1859.—434.

A private alienation of attached property during the continuance of an — is void, under s. 240 Act VIII of 1859, only as against the attaching creditor and those who claimed under or through the —.—559, 878.

Under Act VIII of 1859 the process of — and the order for sale may be distinct and separate, and there may be complete execution of a decree under an — without an order for sale.—560.

To invalidate an — on the ground that no copy of the decree was sent, it would be necessary to prove non-transmission.—*Ibid.*

A conveyance executed by the judgment-debtor after one — has been permanently struck off and before a new — is issued, is valid.—878.

See ARBITRATION.

AUCTION-PURCHASER. *See* EJECTMENT, ENHANCEMENT, LIMITATION, MORTGAGE, UNDER TENURE.

BADSHAPORE.

Settlement of the claim set up by Dyce Sombre's representatives to the — estate consequent upon its resumption by the British Government on the death of Begum Sumroo.—628.

BARRISTER. *See* ADVOCATE.

BENAMES.

Where a purchase of real property is made by a Hindoo in the name of one of his sons, the presumption of Hindoo law is that it is a — purchase, and the *onus* is on the party in whose name it was purchased to prove his sole title to the legal and beneficial interest in such property.—13.

The purchase of a talook in Bengal by a Hindoo in his eldest son's name, though the conveyance was in the English form of lease and re-lease, was held to be —; the son being declared a trustee for the father and the talook part of the father's estate.—*Ibid.*

The habit of holding land — though inveterate in India, does not justify the Courts in making every presumption against apparent ownership.—59.

The real criterion in an alleged — transaction is to consider from what source the purchase-money came. The presumption is that a purchase made with A's money in the name of B is for the benefit of A; and it cannot be presumed from the purchase by a father, whether Mahomedan or Hindoo, in the name of his son, that there was an advancement made in favour of that son.—279.

The law as to — conveyances should be considered conclusively settled by the decision reported at p. 13, whether as regards Hindoos or Mahomedans; but that decision was held not applicable where a father had purchased property with his own funds, but had the conveyance drawn up in his son's name with a view to affect the interests of his daughters and to vary the rule of succession between sons and daughters in his family.—843.

Plaintiff sued for the recovery of certain property on the allegation that, though the property was purchased by his adoptive mother (A) — in the name of B, she purchased it out of her own separate income so as to make it her property, and that plaintiff, as her heir, was entitled to it on her death. Held that the *onus* was on plaintiff to prove his title; and that even if he proved that A purchased the property with her own money, it did not follow that the purchase was —.—377.

— purchases in India, not having been declared to be illegal, must be recognised and have effect given to them by the Courts.—575.

Principle of equity in cases where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner.—656.

There is nothing in the position of a vendor being a Mahomedan woman living with her children

upon the estate, and sometimes letting it, which should put any one upon enquiry whether she was the real owner or not.—*Ibid.*

Nor the mere fact of a man building upon or improving property belonging to the woman with whom he was living; nor the circumstance of the deed of sale from a Mahomedan woman containing the clause that she had made the sale with the consent of the family.—*Ibid.*

s. 260 Act VIII of 1859 was designed to check — purchases at execution sales, and cannot affect the rights of members of a joint Hindoo family who are by law entitled to treat as part of their common property an acquisition, however made, by a member in his sole name, if made by the use of family funds.—840.

See VENDOR AND PURCHASER.

BILL OF EXCHANGE. *See* PARTNERSHIP.

BOND.

A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings. Thus, where plaintiff sued upon a simple money —, and afterwards tendered in evidence another —, by which the principal defendant purported to secure a further advance on the security of her zemindari estates: Held that plaintiff's cause of action upon the first — lay only against the principal defendant, and that plaintiff could not, relying on the second —, proceed against the other defendants.—107.

See INTEREST, PRINCIPAL AND SURETY, REGISTRATION.

BOUNDARY.

Nature of evidence required to establish a — dispute.—286.

Construction of a decree which directed that plaintiff should obtain possession of land according to the boundaries given in the plaint and also specified the quantities incorrectly.—442.

Great weight should be given to reports of Deputy Collectors upon local investigations in dealing with — questions.—549.

See PRIVY COUNCIL.

BROTHER. *See* ILLEGITIMATE.

CANOONGOE. *See* ALLUVIAL LAND.

CAUSE OF ACTION.

The words — in Act VIII of 1859 s. 2 should be construed with reference rather to the substance than to the form of action.—899.

See BOND, HINDOO LAW (RELIGIOUS CEREMONIES), HINDOO WIDOW, SPLITTING CAUSE OF ACTION.

CAZEE. *See* MARRIAGE.

CHAKERAN LAND.

Lands granted by Government before the Permanent Settlement as a hereditary Jagheer tenure in consideration of services rendered to the Government in the repression of incursions of wild elephants upon the cultivated lands of the pergunnah, differ from the ordinary — contemplated by s. 41 Reg. VIII of 1798, and are liable to forfeiture only on wilful failure to perform that duty, but not to resumption because the occasion for the service no longer exists.—358.

The above principle was applied to a case where *ghatwalees* services ceased to be necessary.—491.

See JAGHEER, SERVICE TENURE.

CHAMPERTY.

A suit cannot be maintained upon an agreement which does not operate as a transfer of the property, but only as an agreement to transfer so much of it as might be recovered in a suit to be thereafter instituted.—616.

See VENDOR AND PURCHASER.

COMPROMISE.

A — of a suit should be carried out by proper deeds and be filed in Court, particularly where infants are concerned.—462.

A — of a claim of debt, confirmed by a decree of Court, cannot be set aside after many (16) years

without distinct proof of fraud, the *onus probandi* lying with the party alleging fraud.—586.

How the Privy Council decided where one defendant jointly with another appealed to the High Court, but having compromised the case against him, did not join in the appeal to the Privy Council.—766.

See HINDOO LAW, HINDOO LAW (RELIGIOUS CEREMONIES), JOINT STOCK COMPANY, LIMITATION.

CONJUGAL RIGHTS. *See* HUSBAND AND WIFE.

CONSENT. *See* DEED, ENDOWMENT, HINDOO WIDOW, PUTNER.

CONSIDERATION. *See* CONTRACT, MORTGAGE, PURCHASE-MONEY, REGISTRATION, SUBSTITUTION.

CONSTRUCTION.

Native deeds and contracts ought to be construed liberally, regard being had to the real meaning of the parties, rather than to the form of expression.—29.

Where general descriptive terms (such as "villages" or the like) are used in a grant, and both the parties have by their acts put a particular—upon them, and rights depending upon that—have been enjoyed for many years, it lies upon those who impugn that—to show that it is erroneous.—814.

See ATTACHMENT, CAUSE OF ACTION, COURT OF WARDS, HINDOO LAW, HINDOO LAW (INHERITANCE AND SUCCESSION), ILLEGITIMATE INTEREST, JAGHEER, LIMITATION, PURDAH-WOMAN, WILL.

CONTRACT.

In cases of—in India it has never been held that a—under seal of itself imported that there was a sufficient consideration for it.—225.

Where plaintiff alleges that he agreed to sign and did execute a deed of sale for a consideration of a sum of money, in consequence of pressure put upon him, he cannot be allowed to treat the deed as a nullity, and both to avoid the—and retain the money.—429.

See CONSTRUCTION, COURT OF WARDS, MORTGAGE, SUBSTITUTION.

CO-SHARRERS.

Plaintiff and defendants were heirs of a deceased creditor, in satisfaction of part of whose debt a large sum was paid by the debtor, which was appropriated by defendants, so that plaintiff lost a part of his share and defendants got more than they were entitled to. In a suit by plaintiff for his full share, it was held that all he could recover was the excess received by defendants, and that limitation ran not from the date of the original payment, but from the time that defendants received more than their proper share.—459.

See LIMITATION, MORTGAGE.

COSTS. *See* PRIVY COUNCIL.

COURT OF WARDS.

On a consideration of Regs. X of 1798 and LII of 1803 it was held that the mere fact that the—has charge of the estates of a female did not necessarily disqualify her from contracting debts.—107.

COUSIN.

See HINDOO LAW (INHERITANCE AND SUCCESSION).

CUSTOM.

Although a zemindary had been held entire for a long period, yet it was held that family usage could not exempt it from the operation of Reg. XI of 1798. *Appendix V.* Reg. X of 1800 does not apply to undivided zemindaries in which a—may prevail that the inheritance should be indivisible.—161d.

The general Hindoo law with respect to inheritance, as well as other matters, may, in the case of great families, where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be positive law to the contrary.—20.

Under the Hindoo law, clear proof of usage will outweigh the written text of the law.—135.

The prevalence in any part of India of a special

course of descent in a family differing from the ordinary course of descent in that place, stands on the footing of usage or—of the family, capable of attaching and of being destroyed equally whether the property be ancestral or self-acquired.—147.

Where a—is proved to exist, it supersedes the general law; but the general law still regulates all beyond the custom.—248.

Where it is contended that the succession to property is regulated by any special family—, that—ought to be alleged and proved with distinctness and certainty.—418, 608.

A settlement of an estate, made at the time of the Perpetual Settlement, will not *per se* destroy a family usage regulating the manner of descent, either in the case of a well-established raj, or even where the origin could not be shown. A manner of usage of descent may be discontinued. It is of the essence of family usage that it should be certain, invariable, and continuous.—744.

See ALLUVIAL LAND, HINDOO LAW (COPARCENARY), RAJ.

DAMAGES.

Each and every person co-operating in a plunder is liable for—. Evidence in such a case.—268.

See DECLARATORY DECREE, HINDOO LAW (RELIGIOUS CEREMONIES), MINOR.

DAYABHAGA. *See* HINDOO WIDOW.

DEBTOR AND CREDITOR.

Where there is a large debt (*eg.* dower), and delivery and transfer of something equivalent to what the debtor ought to have provided, the presumption is that such thing was given in payment or satisfaction, and not as an additional gift, leaving the original debt unsettled.—420.

See CO-SHARRERS, INSOLVENT.

DECLARATORY DECREE.

A—was set aside where there was nothing to enable the Appellate Court to limit the decree to the share to which plaintiff had established his right.—219.

The High Court was held to have exercised a sound discretion in entertaining a suit for a—, where a zemindar, in a suit for enhancement, had had his zemindary right denied.—785.

Procedure wherea—issought under s. 15 Act VIII of 1859, without consequential relief in the same suit.—161d.

The prayer in a plaint that certain deeds be set aside is a prayer for substantial relief.—964.

See ENHANCEMENT, HINDOO LAW (ADOPTION), MESNE PROFITS, POSSESSION.

DEED. *See* CONTRACT, DEED OF SALE.

DEED OF SALE.

Where a vendor sells that of which he has not possession, and to which he may never establish a title, the—can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency.—225, 616.

The mere attestation of a—by a relative does not necessarily import his concurrence.—275.

Where a Hindoo executes a—in favour of another at a time when he has no title to the property, his subsequently becoming entitled as heir would not make the—good.—388.

The question being whether plaintiff, a pleader, had obtained the property in dispute by a valid—, it was held somewhat dangerous for the High Court to allow plaintiff, a professional man, who did not give evidence in his own suit on his own behalf, to be called to support his case (after it had broken down) as to the payment of the consideration money.—768.

DELHI. *Ex-King of—.*

See JURISDICTION, LIMITATION.

DEPOSIT. *See* VOLUNTARY PAYMENT.

DISCLAIMER. *See* HINDOO WIDOW, WILL.

DIVORCE.

Where the Privy Council held that Act XIV of 1859 did not apply to suits for—a *vinculo*, that

co-respondent's application for a commission to examine him should have been acceded to; that the statements of the respondent were not evidence against the co-respondent, and that there was not sufficient evidence to support the decree.—721.

Documentary evidence, though not necessary, is still desirable to prove a — under Mahomedan law.—882.

DOMICIL.

Whether a person, if his — of origin were Scotch, loses that — and acquires an Indian — by settling as an indigo planter in India and there dying.—505.
See LEGITIMACY.

DONATIO MORTIS CAUSA. See GIFT, PURDAH WOMAN.
DOWER.

Where in a deed of — it was not mentioned that any property was pignorated for the —, and the — was not demanded during the husband's lifetime, the widow was held entitled to take possession of her husband's effects by virtue of her claim for — the amount of her —, and to alienate a part of them in satisfaction of the same.—Appendix I.

Upon a true construction of this settlement, the widow was held entitled to sue without a previous demand, and therefore limitation under Reg. III of 1798, s. 14, did not apply.—*Ibid*.

Mode of ascertaining whether the — was paid off where the widow was put into possession of her late husband's property and she and her heir continued in possession for fifteen years.—884.

Where the Privy Council authorised the Lower Court to determine what plaintiff's mother's share of — was.—462, 823.

Hypothecation of an estate for —; right of widow in possession; presumption as regards amount of —.—531.

A widow's claim for unpaid —, when it does not become a preferential charge on the estate, constitutes a debt payable *pari passu* with the demands of other creditors.—599.

Limitation, how applied in a case of prompt — under the Mahomedan law, in which there is nothing to limit the amount fixable for —.—766.

Where it is not expressed whether the payment of the — is to be prompt or deferred, the rule is to regard the whole as due on demand.—823.

See DEBTOR AND CREDITOR, MAHOMEDAN LAW, PRACTICE.

EJECTMENT

of talookdars by auction-purchasers before and after Reg. XI of 1822.—306.

In an — suit the *onus probandi* is on plaintiff.—879.

See UNDER TENURE.

ENAM GRANT.

Resumption or forfeiture of — under Reg. IV of 1881 (Madras Case).—254.

Where appellants claimed to be entitled to redeem property held by respondents as mortgagees, and the latter claimed to hold it as an — free from the payment of Government revenue, and were found to have so held it since 1824, the Privy Council refused to disturb their title thus fortified by long enjoyment without clear and unmistakable proof of the alleged mortgage.—501.

ENDOWMENT.

Effect of a will by a *mohunt* appointing his spiritual brother as his successor with a direction as to who should be the latter's successor.—86.

When land is dedicated to the religious services of an idol, the rents of the land legally constitute the property of the idol, and the *sebit* has not the legal property but only the title of manager of a religious —, and cannot alienate the property though he might create proper derivative tenures and estates conformable to usage, but not a *mouroose* tenure, or a tenure at a fixed invariable rent.—300.

The appropriation of property to the religious services of a family does not require the assent of

the State; and where such a trust appears to have been established as to the lands dedicated, it lies on the opposite party to show some legal conversion of the lands to the ordinary uses of property.—512.

The purchaser of joint family property, with notice of its dedication to religious purposes, and without enquiry as to the termination of the trust, cannot exonerate the property from the trust.—*Ibid*.

A former breach of trust cannot be pleaded against a trustee, though it would be a reason for excluding him from the administration of the property as *sebit*.—*Ibid*.

Presumption arising from general Hindoo usage as to — of idols.—661.

The purchase of property in the name of an idol where the purchase-money did not come from funds appropriated to the use of the idol, was held not to be an —.—869.

Nature of the relations subsisting between the *muth* of Tirpunal, Zillah Tanjore, in the Madras Presidency, and the *muth* at Benares.—896.

ENHANCEMENT.

Where a tenure was or has become hereditary and transferable, and the rent has not been changed from the time of the Perpetual Settlement, the tenants (being intermediate between proprietor and ryots) are protected from — by s. 15 Act X of 1859.—92.

The right of — conferred on an original purchaser at a sale for arrears of revenue, by the repealed sections of Reg. XI of 1822, cannot be exercised by his successor.—180.

In a suit for — of rent under Reg. VIII of 1798, the *onus* is on the zemindar to prove that a dependent talookdar is liable to —, the nature and extent of proof varying according as the tenure falls within s. 49 or s. 51. To bring a talook within s. 51, it is sufficient to show that the tenure existed and was capable of being registered at the date of the Decennial Settlement.—293.

Where, in a suit for enhanced rent after notice, it appeared from the kuboolat that a howaladaree amulnamah had been granted at defendant's request, without any rent for the first year, at varying rates less than a certain rate up to 1864, and at that certain rate afterwards.—794.

In a suit for enhanced rent where liability to — is disputed, a declaratory decree for — may be given without proof of notice, and such decree is sufficient to rebut the presumption referred to in s. 16 Act X of 1859.—798.

A claim to exemption from — founded on the tenure being a *kudeemee* ryotry one does not fall within s. 51 Reg. VIII of 1798, which relates to dependent talookdars.—886.

An auction-purchaser of a zemindary at an execution sale in a suit by the mortgagee has no higher title to enhance the rent of the ryots than a purchaser from the former zemindar.—*Ibid*.

ESTOPPEL.

A pleading by two defendants against the suit of another plaintiff never can amount to an — as between them.—886.

The rule as to — laid down in the *Duchess of Kingston's* case is not technical or peculiar to the law of England, but is perfectly consistent with s. 2 Act VIII of 1859.—404.

An incidental finding as to the validity of an *ikrarnamah* in a suit for rent is no bar to a suit for redemption in which the same *ikrarnamah* is set up.—*Ibid*.

A representation of the fact of an adoption erroneously believed to be valid in law, is not misrepresentation, so as to estop the party from setting up the true facts of the case.—752.

See HINDOO WIDOW, MORTGAGE, WILL.

EVIDENCE.

The admission of documentary — subsequently to the filing of the plaint is not a ground of appeal when it is received under s. 81 Act VIII of 1859, with the sanction of the Court.—253.

The ordinary legal and reasonable presumptions of fact must not be lost sight of, nor an entire history thrown aside, because the —, or some of the —, was incredible or untrustworthy.—493.

Secondary —, when admissible, 549.

Duty of Court to act upon —, and not mere suspicions.—678.

The duty of observing the High Court Circular of 1867 regarding the reception of documentary — enjoined.—869.

Where a document, which is not proved because of its great age, and of there being no witnesses to prove it, is put forward as a document intended to operate as a *merasi* tenure, it is necessary to show that it was accompanied by possession.—919.

See ACCOUNT, ALLUVIAL LAND, BOUNDARY, DIVORCE, GHATWALS, HINDOO LAW (ADOPTION), PARTNERSHIP, POSSESSION, PRIVY COUNCIL, REGISTRATION, SALE, SURVEY, WITNESS.

EXECUTION OF DECREE.

Appellant brought a suit under Act X of 1859 for rent due by a deceased person against his widow as widow and guardian of her infant son, but obtained a decree against the widow only as sole heiress and representative, on the ground that the son having been adopted into another family was not the heir of his father. He then brought a suit in the Civil Court and obtained a decree declaring that the son was the heir. *Held* that the estate was sold in execution for the debts of the deceased, and that the interest of his widow as well as of his son (if any) was bound by that decree.—579.

The representative of a deceased judgment-debtor is a party to the suit within the meaning of s. 11 Act XXIII of 1861, and entitled to sue to set aside a sale in —.—680.

Effect of striking an execution proceeding off the file.—873.

See JURISDICTION, LIMITATION, PRIVY COUNCIL.

FAMILY CUSTOM. See CUSTOM, RAJ.

FATHER. See BENAMES, GIFT, INSOLVENT, WILL, FORFEITURE.

Act IX of 1859 s. 20, relating to suits brought in respect of property forfeited to Government as the property of rebels, is of a general nature irrespective of whatever Court before which they are brought.—957.

See CHAKERAN LAND, ENAM GRANT.

FORGERY.

Judgment of the High Court, reversing a decision of the Lower Court which held a deed to be a —, upheld on a consideration of the evidence in the case.—454.

FRAUD.

No legal presumption of — arises from the mere fact of a lease being obtained for the manager of an estate at an unusually low rate of rent.—959.

See COMPROMISE, MINOR, SOLICITOR.

FRESH SUIT. See RES JUDICATA.

GHATWALS.

The long uninterrupted possession of — was held entitled to greater weight than the *isumnovisse* returns.—469.

The omission of words of inheritance does not show conclusively that the sunnud was not hereditary.—491.

Where lands are held by — subject to certain services, so long as they are willing and able to perform the services, the zemindar has no right to put an end to the tenure, whether the services are required or not, and notwithstanding an arrangement come to between the Government and the zemindar by which the Government increased the revenue of the zemindary in consideration of the dispensation with those services by the Government.—818.

An auction-purchaser at a revenue sale is not entitled to turn out of possession — whose tenures

were granted subsequent to the Permanent Settlement, his only right (if any) being to enhance the rent.—*ibid*.

GIFT.

Nature of proof necessary to establish validity of a deed of — by a woman stricken with a mortal disease, and in expectation of death.—49, 389.

Where a Mahomedan transferred certain Government papers to his son, reserving the interest to himself for life, the object of the disposition being to give the son a larger share of the father's property than would come to him by succession *ab intestato*: *Held* that the transaction could not be impeached on moral grounds, nor did it violate any provision of the Hedaya.—98.

Mode of construing deeds of — by Ranees Bhowanee.—661.

See DEBTOR AND CREDITOR, ENDOWMENT, HINDOO LAW (ADOPTION), PURDAH - WOMAN, WILL.

GOVERNMENT.

To question an act of State directly or indirectly, the contention must be raised on a suit to which the — must be made a party.—98.

The — is bound by the acts of an officer acting within the limits of his authority.—322.

See ALLUVIAL LAND, BADSHAPORE, CHAKERAN LAND, ENDOWMENT, FORFEITURE, LAHERAJ, LIMITATION, SALE, SETTLEMENT, UNDER TENURE.

GRANDSON.

Great-great-great —. See HINDOO LAW (INHERITANCE AND SUCCESSION).

See PRIVY COUNCIL, SETTLEMENT.

GRAND UNCLE. See HINDOO LAW (INHERITANCE AND SUCCESSION).

GUARDIAN. See MINOR.

HEIRS.

The shares of — cannot be ascertained until all debts have been satisfied.—766.

Liability of — for a father's misrepresentations.—809.

See HUSBAND AND WIFE, ILLEGITIMATE, WILL.

HEREDITARY. See GHATWALS, MOKURUREE, MOURSEE, POLLIAM, POTTAH, SERVICE TENURE.

HIGH COURT.

Should record the grounds of its decision in a case appealed to the Privy Council.—206.

One of the Judges of the — N. W. P., sitting as single Judge, had jurisdiction under s. 27 of the Letters Patent, to hear and determine a case, the review of which was heard by four Judges of the late Sudder Court, but left undecided when the — was established.—868.

It is competent to the —, on an application for review, to delay its final decision until a doubtful question of law has been settled by a Full Bench.—484.

See LIMITATION, SOLICITOR.

HINDOO LAW.

Duty of European Judge in administering —.—185.

The Viromitrodataya is properly receivable as an exposition of what may have been left doubtful by the Mitacshara, and is declaratory of the law of the Benares School.—159.

The principle that a family ceasing to be Hindoos in religion may still enjoy their property under the —, applies *inter se* to the members of a Hindoo family entering into possession of an estate under a compromise by which the members divided the estate among themselves on certain terms.—865.

It is entirely opposed to the spirit of the Hindoo race to allow the words of the law to control its long-received interpretation as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country.—474.

See MINOR, WILL.

HINDOO LAW (ADOPTION).

Power of a childless Hindoo widow to adopt a son to her husband, with or without his permission

under the various schools of Hindoo law, considered. Rule as to kinsmen whose consent is essential in the Dravada country.—185.

Where a widow adopts a son under the authority of her husband, such authority must be strictly pursued. The son adopted is adopted to the husband, and not to the widow; and an adoption by the widow alone would not for any purpose required by the Hindoo law, give to the adopted child, even after the widow's death, any right to the property inherited by her from her husband.—219.

In a case of alleged adoption by deed of gift of a son as *paluk pootro*, it was held that the terms of the deed did not import the adoption of a son by gift, and that it was only by reason of the gift that the filial relation to the natural father was extinguished, or the right of the son to the estate of the giver ceased.—257.

The Privy Council in this case, in the absence of strong documentary evidence confirmatory of an adoption, reversed the judgment of the High Court, upholding the adoption, and confirmed that of the Judge below who saw and heard the witnesses in support of the adoption, and considered them unworthy of credit.—*Ibid*.

Registration is not necessary to the validity of a deed of adoption.—383.

Case of adoption under a will which was put forward shortly after testator's death, and not questioned until 27 years after it had been recognised by the whole family.—422.

Registration of deeds giving power to widows to adopt, recommended.—608.

Where the presumption against an adoption arising from widow's neglect to adopt for 6 or 7 years after the husband's death was considered not so great as the presumption arising from the husband's power to adopt.—*Ibid*.

Neither a man, nor his widow, can adopt a son while an adopted son is still living.—752.

Where the deeds in form were not mere agreements to give and take, but deeds of gift and adoption where interchange was not necessary, the Privy Council held that, if the father gave or was willing to give the child, plaintiff had no right to sue for a declaratory decree on the ground that the deeds were null and void because of the non-performance of certain religious ceremonies; that the High Court ought not to have decided the issue as to actual delivery of the child when that issue had not been tried by the Lower Appellate Court; that the deeds were not actually necessary to render the adoption valid; and that the adoption could have been proved *aliunde*.—774.

See ESTOPPEL.

HINDOO LAW (ALIENATION).

In a suit to set aside a sale of ancestral property by a minor's father as made without necessity and enquiry, defendants pleaded pressure under a foreclosure suit on account of a demand under a former mortgage for an ancestral debt. Plaintiff, having failed to establish his case, was not allowed to go back and open the consideration for the mortgage made 22 years ago.—519.

HINDOO LAW (COPARCENARY).

The presumption of Hindoo Law, as to a joint undivided family, is that the whole family property is joint, and the *onus probandi* is on any party claiming any part of such property as separate property.—18.

A Hindoo family may separate and then reunite; part also may re-unite, and such re-united members may impress on their re-united property by common family consent such trusts as their law will support.—296.

By the common law of Hindoostan the descent is in coparceny where no other custom or right is proved. The fact that a settlement was made by the Government in the name of an elder son, and that he has continued to be solely registered from

that time to this, affords no conclusive evidence against the title of the younger brother in property which was once his father's.—381.

The cesser of commensality serves to remove and qualify the presumption of Hindoo law that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate.—591.

Where R's title to two lots which were no part of the zemindary which was the principal family estate, was held to be the same as his title to the zemindary, the burden of proof lay on those who insisted that the two lots did not form part of the joint family estate.—805.

See BENAMES, HINDOO LAW (RELIGIOUS CEREMONIES), HINDOO WIDOW, LIMITATION, WILL, HINDOO LAW (INHERITANCE AND SUCCESSION).

The Mithila law is against the claim of any relation on the mother's side until those on the father's side to the seventh degree have been exhausted; and so a maternal first cousin of the last male proprietor was held not entitled to succeed.—1.

The list of Bundhoos given in Article 1 s. 6 ch. 2 of the Mitacshara is not exhaustive but illustrative, and therefore a maternal uncle or granduncle is a Bundhoo, and as such entitled to succeed.—159.

The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession of separate estate.—302.

Under the Mitacshara, a great-great-grandson of a common ancestor is not too remote in degree to inherit as a Gentile.—380.

Questions of precedence among heirs to be settled by the principle of superior efficacy of oblations.—*Ibid*.

A sister and her descendants find no place in the tables of succession framed according to the Mitacshara law.—474.

Apart from special custom, where there are sons by different wives, priority of birth and not of marriage must determine the succession of an impartible inheritance.—603.

Where ancestral property has apparently descended in the ordinary way of Hindoo property, first to the son and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case and show by some custom that that was the proper construction of the grant.—802.

Accepting the High Court's finding that plaintiff had established his legitimacy, the estate, which was ancestral and presumed to be joint, was held, in the absence of a special family custom, to descend to him and his brother in equal moieties. Whether plaintiff was entitled to more, would depend on the general law of succession to be applied.—922.

See CUSTOM, HINDOO LAW, HINDOO LAW (PARTITION), HINDOO WIDOW, MAINTENANCE, RAJ.

HINDOO LAW (MIGRATION).

Where a Hindoo family migrates from one territory to another, if it preserves its ancient religious ceremonies, it also preserves the law of succession to which it has been subject. If the family can be shown to have continued in the observances of the natural law and usages of Mithila, the rule of inheritance as established in that province must be followed, although part of the property may be locally situate in Bengal and the last proprietor may have been domiciled there.—1.

HINDOO LAW (PARTITION).

By the general law prevailing in Tirhoot, and indeed under the Hindoo law generally, estates are divisible amongst the sons when there are more than one son; they do not descend to the eldest son, but are divisible amongst all, except as to a Raj or Principality, which, in its very nature, excludes the idea of division.—20.

An agreement for a partition is binding although

it has not been carried out by actual partition by metes and bounds.—265, 939.

Where plaintiffs sought to establish a religious trust upon certain lands in the occupation of defendants (plaintiffs and defendants being members of a joint Hindoo family), and stated that the trust was created by a deed of date subsequent to another deed by which the property had been partitioned by the joint family, but which latter deed they alleged had never been acted on, having been a mere device to protect the property from the creditors of one of its members who had become insolvent: *Held* that it lay on plaintiffs to make out a sufficient case to set aside the prior deed of partition, which was found to be a registered document, and was *prima facie* a good and operative deed.—296.

The mere fact that there had been no partition of a family estate for six or seven generations cannot control the operation of the ordinary Hindoo law, or deprive the parties, if members of a joint undivided family, of the right to demand a partition when they are so minded.—916.

See HINDOO LAW, HINDOO WIDOW. HINDOO LAW (RELIGIOUS CEREMONIES).

Where a compromise gave the elder of two brothers certain lands and rents coupled with the performance of a trust of a nature constantly vested in the managing or elder brother of a joint Hindoo family, and the younger brother sued the elder brother for damages alleged to have been sustained in the performance by the younger brother at his own cost of religious ceremonies which the elder brother had undertaken under the compromise but had not performed: *Held* that, in order to have his cause of action, the younger brother must show that the non-performance of the trust was not owing to any default on his part.—204.

HINDOO WIDOW.

Power of — to dispose of moveable and immoveable property inherited from her husband, according to the Mitachara and Bengal law.—49, 810.

Devolution of *streedhan* from a childless — how regulated under the Mitachara.—49.

And how under the law of the Benares School.—124.

Where a party entitled to impeach an alienation by a — of her husband's estate sues to set aside such an alienation, and defendant establishes not only that he had a charge on the estate in virtue of a mortgage deed executed by the —, but that the debt to him was an account of advances for necessary purposes, if plaintiff alleges that the mortgage deed was not *bond fide*, the *onus* lies on him to prove his allegation.—108.

The estate of two widows is one of co-parceners; their acquiescence in a partition only binds each other not to disturb the other's possessions, but does not affect the right of survivorship.—124.

Alienation of her husband's property by a —. The *onus probandi* is on the party seeking to uphold such a sale.—275.

A —, by putting in petitions in the course of legal proceedings disclaiming her right to property which had descended to her son and in which she then had no interest at all, cannot be prevented from setting up her real right as heir of her son when that right actually accrued, i.e. upon the death of her son.—388.

The assumption of an absolute power of disposition by a — over her husband's estate, and the exercise of the limited power of charging the estate for certain defined purposes, are essentially different causes of action.—474.

The *onus* is on those who rely upon a mortgage from a person having only a limited power to grant it (as in this case a —), to show that the money was raised for a legitimate purpose.—*Ibid*.

The wife of a Hindoo who predeceased his father

without male issue, is entitled, as his — and heiress, to succeed to his separate estate. Even if the son survived his father, but died subsequently, and before a partition, his share, according to the Mithila law, would pass to his brothers to the exclusion of his —, who would be entitled only to maintenance.—591.

A — does not lose her right to maintenance by reason of leaving her husband's house, provided she does not leave for unchastity or other improper purpose.—846.

The doctrine of the right of a — to accumulations does not apply where the — intended to make her purchases as accretions to her deceased husband's property.—975.

See EXECUTION OF DECREE, HINDOO LAW (ADOPTION), MORTGAGE, PRINCIPAL AND SURETY, WILL.

HUSBAND AND WIFE.

In a suit by a Mahomedan wife for recovery of her property which has passed to a *bond fide* purchaser under conveyances executed by her to her husband or such purchaser, the *onus probandi* is on her.—59.

A Mahomedan husband may sue for the restitution of conjugal rights, to be enforced, in case of disobedience, by imprisonment, or attachment of property, or both, under s. 200 Act VIII of 1859.—*Ibid*.

Where a Hindoo during his lifetime represented certain immoveable property to be his wife's, purchasers of it from her could not after his death be equitably turned out of the property in favour of the heirs.—809.

IDOL. See ENDOWMENT, WILL.

ILLEGITIMATE.

In the Sudra caste, — children may inherit and have a right to maintenance.—267.

In this case the word "children" was held to include — children.—824.

According to Mahomedan law, the acknowledgment of — children as sons and heirs does not constitute them brothers and heirs to each other.—981.

See LEGITIMACY, MARRIAGE.

INHERITANCE. See HEIRS, HINDOO LAW (INHERITANCE AND SUCCESSION, ILLEGITIMATE.

INSOLVENT.

Where a father, being — when he purchased a property, mortgaged it, and the mortgagees, who had foreclosed and become absolute owner of the property, out of consideration for the father and the family, made a conveyance of his interest under the foreclosure in consideration of money raised by the son to satisfy the real amount of his debt: *Held* that the arrangement was made for the benefit of the family, and that the father's creditors had no equitable or moral right to the property.—490.

INTEREST.

Where in a previous suit on a bond (which suit was lost on account of want of jurisdiction) plaintiff sued for a specific sum and for — as from a certain date, he was declared, in a subsequent suit instituted by him on the same bond, entitled to — on the bond, only from the date from which he sued for it in the first suit to the date of the present decree.—76.

Where payment was on account of a bond debt (the amount paid being less than the — due) it was held that the payment ought to be deducted from the —; s. 6 Reg. XV of 1793 being construed to apply to cases where the — at the time of the suit had accumulated so as to exceed the principal.—461.

Compound —. See MORTGAGE.

How the Privy Council construed the following words in a previous order passed by them: "the plaintiff is to have judgment for his moiety with — at the full legal rate."—754.

How the Privy Council decided a dispute as to — on municipal debentures.—952.

See GIFT, MORTGAGE.

ISSUES.

Principles upon which the Courts in India are to decide — depending before them.—29.

An appeal ought not to be determined on —, or grounds not considered or taken on trial in the Courts below.—199.

Where the Privy Council remanded a case for ascertaining the amount of maintenance to be awarded out of an estate and for decision under s. 851 Act VIII of 1859, it was held that it could not be objected that no — was directed.—206.

Observations on the settling of — by Courts of original jurisdiction under the Code of Civil Procedure, and on the duty of an Appellate Court when an objection is made before it that the first Court did not lay down — in a case.—887.

Duty of a Court (whether original or Appellate) to act upon the — and evidence in the case.—678.

JAGHERR.

Where a sunnud granted to the holder of a — was only a confirmation by the Government and the Rajah of the tenure under which the — was held, and authorized the jagheerदार to remain in possession and in the performance of the services with his brothers, without describing the kind of service: Held that the Rajah could not resume the land without proof, that the services to be performed by the jagheerदार were personal services only to the Rajah.—718.

In a suit to recover possession of certain lands as granted as a — tenure by plaintiff's ancestors to one P and his lineal descendants, and that such descendants had failed, the *onus* is on plaintiff to prove the grant alleged in his plaint.—788.

JOINT STOCK COMPANY.

The power of sanctioning a compromise allowed to the Courts by s. 174 Act X of 1866 should be exercised with great caution, and will not be interfered with by the Privy Council unless shown to be based upon some erroneous principle. The compromise may be entered into before the list of contributories has been settled or the liabilities or competence of the shareholders has been ascertained.—250.

JUDGMENT IN REM. See LEGITIMACY.

JULKUR.

Title to — lands claimed by the proprietors of two adjacent estates, which originally formed one talook in the occupation of the ancestors of one of the proprietors, and which talook was severed into two estates at a sale for arrears of revenue.—169.

Where an auction-purchaser brought a suit to obtain possession of certain julkurs as forming part of his zemindary against defendants, whose possession had been confirmed in an Act IV case, the burden was held to lie on plaintiff to show that the julkurs in dispute formed part of the assets of the zemindary at the time of the Permanent Settlement.—865.

JURISDICTION.

A former decision by the Courts of India confirmed by the Privy Council, adjudging the land in dispute to be an accretion to respondent's settled estate in Shahabad, was held to be a bar, under s. 14 Act VIII of 1859, to the — of the Ghazee-pore Courts to try the present suit for the same land.—660.

The — of a Principal Sudder Ameen to deal with a decree referred to him for execution by the Zillah Judge under Act V of 1836 does not cease by his striking the case off his file after partial execution.—711.

In a suit against the Secretary of State to recover principal and interest on certain mortgage bonds executed by the late King of Delhi, it was held that Municipal Courts had no — to enforce engagements between Sovereigns founded on treaties.—726.

See HIGH COURT, LIMITATION, UNDER TENURE.

LAKHERAJ.

The general presumption is in favour of the liability to assessment of land; and by Regs. XIX of 1798 and XIV of 1825 the *onus probandi* lies on a claimant to — to establish his title to exemption, not by inferences, but by positive proof of a grant made by someone to hold in — and by hereditary right prior to 12th August, 1765, and that possession was *bonâ fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at and since that time.—8.

The right of Government to institute proceedings, under Regs. II of 1819 and III of 1828, for resumption of lands, is barred by limitation under cl. 2 s. 2 Reg. II of 1805.—*Ibid*.

In a suit by a dur-putneedar for a declaration that certain lands claimed by the defendants as their — were held under an invalid title, and that they were the plaintiff's *mâl* lands liable to pay rent to him: Held that the *onus* was on plaintiff to prove a *primâ facie* case, i.e., that the land which he contends has since 1790 been converted into —, was once *mâl*; and that this burden is not met by the mere fact of the land being within the ambit of his estate.—484.

See POLLIAM.

LEASE. See FRAUD.

LEGITIMACY.

The legal presumption is in favour of a child born in his father's house of a mother lodged and apparently treated as a wife, who was treated as a legitimate child by his father, and whose — was disputed after his father's death.—498.

Whether a son of a Scotchman, retaining his domicile though resident in India, can, if born out of wedlock, become legitimate *per subsequens matrimonium*.—505.

Without considering whether a Zillah Court could pass a judgment *in rem* determining the — of a party against all the world, the Privy Council held that the judgment pleaded in bar in this case could not be treated as one of that nature.—517.

See ILLEGITIMATE, MAHOMEDAN LAW.

LIMITATION.

Right of Government to plead — in a suit brought against the estate of the ex-King of Delhi.—76.

There is no distinction to be made in favour of a person claiming under an execution sale, as contra-distinguished from the representatives of any person claiming under an ordinary assignment or conveyance.—202.

Meaning of "clear and positive proof" as used in s. 14 Reg. III of 1798.—261.

Meaning of "some proceeding" in s. 20 Act XIV of 1859. Proceedings in execution shall be considered as being *bonâ fide* carried on every day of the time and every hour of every day, until a final decision is passed upon any pending point.—851, 615, 926.

Cl. 18 s. 1 Act XIV of 1859 does not apply to a suit in which one member of a joint Hindoo family, representing the rest of the members, sues to redeem a mortgage in which the title of the plaintiff to redeem is questioned, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.—397.

Before a person can obtain the benefit of s. 5 of the above Act, he must show (1) that he is a purchaser (the meaning of which term defined), (2) that he is a purchaser *bonâ fide*, and (3) that he is a purchaser for valuable consideration.—*Ibid*.

How applied in a suit to recover excess rents collected by one of two co-sharers who hold their shares separately and collect their rents separately.—438.

A suit against a *del-credere* agent on a balance of accounts in respect of dealings regarding which there is no express written contract is governed by cl. 9 s. 1 Act XIV of 1859.—482.

The execution of decrees of the High Court made on appeal from the District Courts was governed by a. 20 Act XIV of 1859.—564.

Whether the orders of Her Majesty in Council, made on the recommendation of the Judicial Committee of the Privy Council, are orders of a Court and subject to any law of —.—*Ibid.*

A petition presented *bond fide* by a decree-holder for execution in one suit of money attached in another suit is a proceeding taken under a. 20 Act XIV of 1859 to keep it in force, its abortiveness in the end notwithstanding.—615, 926.

The — applicable to a suit for rent under Act X of 1859, is that provided by s. 82 of the same Act, and not that provided by Act XIV of 1859.—740.

How applied in a suit for the recovery of a share of an estate conveyed to plaintiff by a deed of gift.—750.

According to a. 14 Act XIV of 1859, a plaintiff is entitled to deduct the whole time in which he has been fruitlessly engaged in prosecuting a suit *bond fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination that the Court had no jurisdiction.—903.

A right to *toda giras huk* was held to be an "interest in immovable property" and governed by cl. 12 s. 1 Act XIV of 1859.—938.

A suit upon a deed of compromise based on an assumption of antecedent title, and acknowledging and defining that title, is governed by cl. 12 s. 1 Act XIV of 1859.—948.

The — prescribed in a. 20 Act IX of 1859, for claims of property of rebels forfeited by Government, is general and without exception of minors and other persons under disabilities.—957.

See CO-SHARERS, DIVORCE, DOWER, LAKHERAJ, MESNE PROFITS, MOKURRUBEE, MORTGAGE, POSSESSION, PUTNEE.

LOAN. See MINOR.

LOCAL INVESTIGATION.

An Appellate Court ought not to interfere with the result of a — except upon clearly defined and sufficient grounds, which must be expressed in its judgment.—898.

See BOUNDARY, PRIVY COUNCIL, SURVEY.

LUNACY.

Act XXXV of 1858 contemplates only the question of — or sanity at the time of the enquiry: there is no provision in the Act that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind. The report of an officer at such enquiry has not the effect of *res judicata* upon the issue between two parties who allege that the — commenced at different times.—871.

MAHOMEDAN LAW.

According to Reg. IV of 1798 s. 15, the — of succession applicable to each sect (Sheeah or Soonnee) ought to prevail as to litigants of that sect.—*Appendix V.*

Rights of a widow according to —.—525.

According to — a renunciation of right to inherit may be implied from ceasing or desisting from prosecuting a claim.—*Ibid.*

Where by an arrangement between a widow (a claimant to unpaid dower) and son, whereby the latter relinquished his share in his late father's property, which arrangement was construed as giving the mother only a life-interest, the son retaining the legal reversion; the creation of such a life-interest was held inconsistent with Mahomedan usage.—599.

Presumption of — as to puberty and legitimacy by acknowledgment.—880.

See DIVORCE, DOWER, GIFT, HUSBAND AND WIFE, ILLEGITIMATE.

MAINTENANCE.

It is not essential to the title to — out of his father's estate of the natural son of a deceased

Hindoo that he should be shown to have been born in his father's house, or of a concubine possessing a peculiar *status* therein.—175.

The natural son of a deceased Hindoo zemindar may have a right to — out of private property which descended from his father to the present zemindar, but not out of private property which the latter has acquired in any other way. *Ibid.*

See HINDOO WIDOW, ISSUES, PRIVY COUNCIL, SUDRA, WILL.

MALICIOUS PROSECUTION.

What a plaintiff is bound to prove in a suit for —.—947.

MANAGER. See ENDOWMENT, MINOR.

MARRIAGE.

A — between two persons of the Sudra caste is not invalid because they belong to two different classes or divisions of that caste, or because the wife was the offspring of an illegitimate father.—267.

Where a man and woman, after cohabiting for some time, became Mahomedans and contracted a Mahomedan —, the man being already the husband in Christian — of a living Christian wife, the validity of the Mahomedan — was doubted.—521.

Mahomedan law as to — of minors among Soonees and Sheeahs.—830.

A Cazeer who was present at a Mahomedan — should be called as a witness when the — is to be proved.—882.

See MINOR.

MESNE PROFITS.

Where in a suit by L for recovery of certain lands with — a decree was given by the Privy Council declaring L absolutely entitled to two mouzahs, and also to certain lands as to which the High Court was ordered to institute certain enquiries: Held that he might have waited the result of these enquiries before applying for execution in respect of the two mouzahs; and that, although the decretal order of the Privy Council did not specifically mention anything about the — of those two mouzahs, the right to — was consequential on the declaration for possession in the decree and upon possession.—353.

Where the final rectification of shares of land results in one party getting a larger portion than he had before, his right to — for such portion follows as a matter of course, and limitation for such — runs from the time when the rightful partition was completed.—418.

MINOR.

Under the Hindoo Law, the power of a manager for an infant heir to charge an ancestral estate is a limited and qualified one, to be exercised in a case of necessity or for the benefit of the estate. The lender is merely bound to enquire into the necessity for the loan and to satisfy himself that the manager is acting for the benefit of the estate.—29.

The *onus* is on the guardian or manager, or any one claiming under him, to show that the charge was for the benefit of the estate.—39.

Where a transaction between a *purdah* woman acting as guardian and manager of a minor's estate and a keen man of business at that time a debtor to the estate, was held to be a fraud upon the —.—*Ibid.*

Where certain minors on attaining majority sued to set aside a sale by their guardians as collusive: Held that it was incumbent on the defendants to show that they had paid the purchase-money to plaintiffs, or that the money had reached plaintiffs' hands when they came of age.—462.

A —, the issue of a Christian marriage, was removed from the custody and guardianship of her mother and the mother's second husband, who had both become Mahomedans and contracted a Mahomedan marriage while the second husband was already the husband in Christian marriage of a living Christian wife.—521.

Choice of a school in such a case, how to be regulated.—*Ibid.*

The religion of a — must be presumed to be that of his father.—*Ibid.*

It is the duty of a guardian to regard the interests of his —, but not to contest every claim against the estate of the —, whether well or ill founded.—586.

The purchaser of property belonging to a — who is injured by such sale, cannot sue the vendor for damages.—666.

See ACQUESCENCE, COMPROMISE, HINDOO LAW (ALIENATION), MARRIAGE, MINOR, PRIVY COUNCIL.

MISREPRESENTATION.

A man who has represented to an intending purchaser that he has not a security in the property to be sold, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.—917.

MITASBARA. See HINDOO LAW, HINDOO LAW (INHERITANCE AND SUCCESSION), HINDOO WIDOW, SELF-ACQUIRED PROPERTY.

MITHILA. See HINDOO LAW (INHERITANCE AND SUCCESSION), HINDOO LAW (MIGRATION), HINDOO WIDOW, SELF-ACQUIRED PROPERTY.

MOHUNT. See ENDOWMENT.

MOKURRUREE.

Where a zemindar sues to set aside a — deed set up by defendant and to recover possession of the lands covered by the deed, it lies upon defendant to defeat that right by proving the grant of an intermediate tenure, and the case must be decided not on the defect of plaintiff's title, but on defendant's right to hold under a perpetual and hereditary tenure at a fixed rent.—226, 806.

Limitation does not begin to run in favour of a mokurruredar against the zemindar until the latter has had notice that the former claims under a — grant.—806.

Where a — *istemrarse* was held to be hereditary.—818.

MOOKHTARNAMAH.

A — was held to be invalid, there being no legal proof of its execution, and the whole of the transactions relative to the execution being of a very questionable character.—88.

MORTGAGE.

Under the Hindoo law, the right of a *bond fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.—29.

The question as to the *onus probandi* in such cases is one not capable of a general and inflexible answer; but the presumption proper to be made will vary with circumstances. Thus, a mortgagee, who is setting up a charge in his favor made by one whose title to alienate he knew to be limited, must prove the facts which embody the representations made to him of the alleged deeds of the estate and the motives influencing his immediate loan; but such proof must not be required from one not an original party, after a lapse of time and enjoyment and apparent acquiescence.—*Ibid.*

Mode of taking accounts when the defendant is mortgagee in possession.—29, 190.

A mortgagee cannot sue a Hindoo lady (widow of the original mortgagor) under s. 9 Act I of 1845, to obtain repayment from her personally of the money paid by him (mortgagee) to save the sale of the property for arrears of revenue.—77.

In a suit for redemption of a usufructuary —, interest was allowed to be calculated, under s. 10 Reg. XV of 1793, at 12 per cent. instead of 9 per cent. as expressed in the deed.—190.

The *onus probandi* is on a plaintiff who sues to set aside a — executed by him under which posses-

sion passed to the mortgagees, on the allegation that consideration had not passed to him.—226.

Plaintiffs were purchasers of the equity of redemption in a portion of certain mortgaged premises which were sold in lots; and they brought this suit against the mortgagees, who were also purchasers of the equity of redemption of several of the lots. They made the purchasers of the other lots parties to the suit, and sought to redeem their own portion of the estate and to recover possession of their own portion and the portion purchased by the purchasers other than the mortgagees on payment into court of a sum sufficient to cover the — debt attributable to the said parcels. Mode of applying the whole of the — debt between the different mouzahs of the mortgaged estate in such a case pointed out.—846.

The principle that when a creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the principal) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand, is not applicable to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting a claim to redemption and the final settlement of the account.—*Ibid.*

It is open to a mortgagor to deny that the money, the receipt of which is formally acknowledged under his hand and seal, ever was advanced.—886.

The interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of contract by the mere failure of the mortgagor to redeem within the stipulated period.—410.

A decree for sale made by the Supreme Court in a suit for foreclosure of a — has no operation upon the title of a person in the *Mofussil* who was no party to the foreclosure suit.—457.

A suit by a mortgagee against a *bond fide* purchaser under a judgment decree without notice of the —, founded on a title to enter into possession by reason of default, ought to be brought within 12 years after the commencement of the purchaser's possession.—*Ibid.*

In a suit to recover possession under a — (made in the English form), limitation was held to count as against the mortgagee from the date of default, the pendency of a foreclosure suit not preventing limitation from running.—480.

The Privy Council held a — to be not *bond fide* because it was not only necessary for, but in the power of, the mortgagee to produce better evidence than he had given to establish the reality and *bona fides* of the transaction.—508.

Where it was contended that, according to an agreement, the mortgagee was entitled to the payment of the principal and interest on the debt, but that the payments of interest carried no interest themselves, the intention of the parties was construed to be that the interest might be set off against the rents and profits and interest on the same, which he might receive over and above the interest due to him upon the debt, s. 7 Reg. XV of 1793 not applying to such a case.—546.

The limitation enacted in Act XIV of 1859 s. 1 cl. 15 applies to every kind of —, including usufructuary.—897.

The owner of an undivided share in a joint estate cannot, by mortgaging his share, affect the interests of the other sharers and their right to enforce a partition.—942.

Remedy of the mortgagee when such partition is affected under Reg. XIX of 1814.—*Ibid.*

See ENAM GRANT, ENHANCEMENT, HINDOO LAW (ALIENATION), HINDOO WIDOW, INSOLVENT, LIMITATION, SUBSTITUTION.

MOUROSE. See ENDOWMENT, EVIDENCE. MUNICIPAL DEBENTURES. See INTEREST.

NECESSITY. See HINDOO LAW (ALIENATION), MINOR.
NOVATION. See PRINCIPAL AND SURETY.

ONUS PROBANDI. See BENAMER, COMPROMISE, CONSTRUCTION, EJECTMENT, ENDOWMENT, ENHANCEMENT, HINDOO LAW (COPARCENARY), HINDOO LAW (PARTITION), HINDOO WIDOW, HUSBAND AND WIFE, JAGHEER, JULKUR, LAKHERAJ, MALICIOUS PROSECUTION, MINOR, MORTGAGE, PURCHASE-MONEY.

PARTITION:

Case of disputed —, subject to a final rectification hereafter.—418.

The Privy Council agreed with the findings of the Lower Courts that the documents proving the agreement to refer the dispute to arbitration, and the award of the arbitrators, were not spurious, and that the property in question was joint property, and was partitioned in the way declared in the award.—857.

See HINDOO LAW (PARTITION), MESNE PROFITS.
PARTNERSHIP.

Every one of the partners in a mercantile firm, whether his name appear on the face of the instrument or not, and whether he be a sleeping and secret partner, is liable upon a bill drawn by a partner in the recognized trading name of the firm for a transaction incident to the business of the firm, unless it be shown that the holder of the bill knew, at the time he received it, that the transaction was the private affair of a single partner.—312.

Where two firms entered into a joint adventure to be conducted by an agent specially appointed by both firms, and one of the firms brought a suit against the other to recover their share of the alleged loss upon the joint adventure: *Held* that books of accounts kept by the plaintiffs themselves and two corresponding branches of their firm, and adduced by the plaintiffs in support of their claim, were not like books of a — and were not sufficient to entitle them to a decree without evidence showing that the sums mentioned in the books as paid to the agent were really applied by him to the purpose of the joint adventure.—320.

Participation in profits a strong test of —.—715.

PAYMENT.

Under protest. See VOLUNTARY PAYMENT.
 See MINOR, MORTGAGE.

PLAINT.

The improper omission from a — of the titles by which a defendant is known is opposed to the requirements of s. 26 Act VIII of 1859, and renders the — liable to rejection if it be not amended.—689.

POLLIAM.

A — is not necessarily a hereditary tenure exempt from payment of revenue.—967.

POSSESSION.

Registration of the name of a person or his ancestor in the Government books, coupled with payment of revenue, is strong evidence of —, though not of title.—208.

Where plaintiff brought a suit in 1856 to recover landed property which was in the — of defendant since 1845 and at the time of the institution of the suit, it was held that, before plaintiff could recover he must prove (1) — within 12 years, and (2) title to —.—805.

Appellant had obtained a decree, establishing her *mokurree* right as purchaser from the heir to a former proprietor, against grantees from deceased widows, and was opposed in execution by respondents, who claimed as holding a *dur-putnee* granted in 1849 by the purchaser at a sale for arrears due by the former *putneedar*. This claim was tried as a regular suit and decided in favor of respondents. *Held* in appeal that a proceeding before the Magistrate in 1841, which showed that actual — was in the grantees of the widows, was conclusive,

and that the — of the grantees was referable solely to the title which was now vested in appellant and which could not be affected by the acquisition of the *putnee* title in 1849.—561.

Defendant's admitted — for upwards of ten years was not allowed to be disturbed by plaintiffs, who had not proved either title or —.—618.

Where plaintiff sues for confirmation of — and seeks a declaratory decree, he must make out his title affirmatively.

See DOWER, EVIDENCE; GHATWALS, JAGHEER, MESNE PROFITS, MORTGAGE, SURVEY, UNDER-TENURE.

POTTAH.

A — cannot *prima facie* be assumed to give a hereditary interest though it contains no words of inheritance; but where proof exists of long uninterrupted enjoyment of a tenure, accompanied by recognition of its hereditary and transferable character, it is sufficient to supply the want of the words "from generation to generation."—92.

A — may be a confirmatory grant only; and there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed.—836.

PRACTICE.

Where there is a general feeling in a district against a party to a suit, and such party feels that he is not likely to have a fair trial before the local Judge, with that feeling in the district against him, his proper course is to petition the European Judge to remove the case into his Court and to try it in the first instance.—879.

Even if a plaintiff has been misled, by various representations of the defendant, into framing his suit in a particular way, still he can only recover according to his allegations and proofs, and cannot be allowed to set up an entirely new case.—752.

Where no defence was set up in the Court of original jurisdiction that the amount of dower fixed was a mere sham and never intended to be acted upon, the Court of Appeal ought not to suggest or give effect to such a defence.—766.

Where a judgment holding that a suit was barred by limitation, was reversed on remand, a plaintiff who did not appeal against the original decision was held not entitled to the benefit of the reversal of that judgment.—161d.

See BOND, COMPROMISE, DEED OF SALE, HIGH COURT, ISSUES, PLAINT, PRIVY COUNCIL.

PRESUMPTION. See ACQUISITION, ALLUVIAL LAND, BENAMER, DEBTOR AND CREDITOR, DOWER, ENDOWMENT, EVIDENCE, FRAUD, HINDOO LAW (COPARCENARY), LAKHERAJ, LEGITIMACY, MORTGAGE, POTTAH, SUBSTITUTION.

PRINCIPAL AND AGENT.

Del-credere Agent. See LIMITATION.

Agents buying indigo seed in a rising market under an order to purchase on the most favourable terms, cannot experiment by sowing a sample and waiting before they purchase to see whether it will germinate. They are only bound to act to the best of their judgment, and to use proper care and skill as agents in purchasing what they are ordered to purchase, and their action cannot be repudiated unless they are shown to have been guilty of negligence.—756.

PRINCIPAL AND SURETY.

Plaintiff sued the widow Ranees and the infant son of a deceased Rajah, and based his claim on a bond signed by the Ranees. The plaintiff alleged that the debt was the Rajah's; but the bond recited that the Rajah had borrowed moneys from the plaintiff, and that the Ranees had also borrowed from the plaintiff, and it drew a distinction between the dealings and estates of the Rajah and the dealings and estates of the Ranees: *Held* that the suit against the Ranees was in the nature of a claim against sureties, and that in the absence of proof that they knew the circumstances under which

the Rajah contracted the loan, it could not be maintained against the Ranees.—216.

The renewal of a surety bond was held not to operate as a discharge of the old bond in a case where, after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence.—448.

PRIVY COUNCIL

will not reverse decrees of the Courts of India (except in very extraordinary cases) merely on the effect of evidence or the credibility of witnesses.—57.

will not interfere with discretion of Courts in India as to *quantum* of maintenance, except on strong grounds.—135.

A party who did not, in his grounds of appeal from the judgment of the Zillah Judge, urge that the Judge had improperly rejected evidence tendered to him, cannot in appeal to the — raise that objection.—206.

will not interfere with the concurrent judgments of the Courts below on questions of fact.—208, 376, 442, 684, 785, 816.

The pendency of an appeal to the — does not put the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.—225.

An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late before the — at the hearing of the appeal. The costs of the suit should not be taken into consideration in estimating the amount in dispute.—257.

In calculating the period of six months for appealing to the —, the date on which the decree was pronounced or dated should be excluded.—291.

Rules to be observed by Proctors, Solicitors, Agents, and other persons admitted to practise before the —.—329.

When evidence of doubtful admissibility has been received in a cause in India, the — will deal with the case as substantial justice requires, and will not allow any merely technical objections to prevail.—371.

The guardian of an infant, who filed an appeal to the —, has no right to insist that the appeal should go on, when the infant, on coming of age, applies to withdraw from the appeal. The guardian is only entitled to be recouped his costs, if he has incurred any, from the estate of the infant.—891.

Where the certificate of the High Court was to the effect that in consideration of the Court deciding the appeal before it upon one point only, i.e., the validity of the mookhtarnamah, the counsel for the appellant, in the presence and with the consent of the son and agent of the appellant, stated to the Court that he would not appeal from the decision as to the validity of the mookhtarnamah, it was held that there was good and sufficient consideration for such an agreement, and that the appeal having been brought in violation of good faith, could not be entertained. In awarding costs, the case was held to be one to justify the — in giving a sum of money *nomine expensarum*.—479.

Inclusion of superfluous documents in the records of a case prohibited.—519.

will not interfere with a finding upon a boundary question, except in a case of plain miscarriage.—549.

Where the — reversed a decision of the High Court as based upon the assumed probabilities of the case, instead of the evidence before it.—648.

will allow but one set of costs to respondents in the same interest.—658.

Execution of orders of the —; procedure under s. 14 Act II of 1868.—668.

will only under special circumstances grant an appellant from a judgment of the High Court in

special appeal, *nunc pro tunc*, special leave to appeal from the decrees of the inferior Courts in India on the facts.—686.

A plaintiff, who did not object before the High Court to the first Court having delegated the decision of the main point in the case to an Ameen, was not allowed to take that objection before the —.—865.

See DOWER, HIGH COURT, HINDOO LAW (ADOPTION), ISSUES, LIMITATION.

PUNDITS.

Extent of authority to be given to the opinions of —.—135.

PURCHASE-MONEY.

Where the *onus* of proving non-payment was thrown upon plaintiff in a suit to recover the balance of — alleged to have been due upon the sale of a decree, where plaintiff's case was that the consideration money was not paid, but a *rooqua* given for it, payable when the mutation of names took place.—790.

See BENAMEE, ENDOWMENT, MINOR, VENDOR AND PURCHASER, WILL.

PURDAH WOMAN.

A document obtained by the chief male member of a family from a — should receive a strict construction.—282.

Where a deed of gift purports to have been executed by a —, the Court should see that it was fairly taken from her, and that she was a free agent and duly informed of what she was about; and so when the disposition is in the nature of a death-bed disposition.—839.

A suit against purdah women was held to have failed, as there was no proof that the deed upon which the suit was brought had been signed by them or by any person authorised by them.—572.

Effect of registration in such cases.—585.

When a transaction of such a kind is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the — had the means of knowing what she was about.—585, 964.

See MINOR.

PUTNEE.

Where a — sale was set aside, after long litigation, a suit brought to recover the arrears of rent, for which the — had been sold, was held not barred by s. 82 Act X of 1859.—178.

The inadvertent omission by a zemindar of one of the formalities prescribed by Reg. VIII of 1819 does not render all the proceedings taken by him inoperative, or constitute his act of selling the tenure into an act of trespass.—178.

Reg. VIII of 1819 considered with reference to the relative rights of zemindars and — talookdars. When a share in a — talook is transferred by a registered putneedar, without the express consent of the zemindar, and in disregard of the regulation, the transfer is not binding on the zemindar.—269.

Where the assignees of a dur— talook, although the transfer was not registered in the putneedar's books, deposited in the Collector's Court the amount due to the zemindar as an arrear of rent, to stay the sale of the —, and protect their own interest, they were held entitled to recover the amount from the putneedar.—908.

The sale of a — for arrears of rent destroys all incumbrances created by the putneedar, e.g., a dur—.—961.

See POSSESSION.

RAJ.

Upon a consideration of the circumstances of the case, the zemindary of Tirhoot was held to be a —, and the usage to prevail there, whereby the reigning Rajah has the power of abdicating, and by deed assigning the — in favour of his eldest son or next immediate male heir.—20.

The Hunsapore (Hosapore) property was held to be a —, and descendible as such.—114.

Reg. XI of 1793 does not affect the descent of large zemindaries held as — or subject to family custom.—*Ibid.*

Succession to the Tipperah —. Consideration of the family custom governing the succession to the —.—243.

The general rule of Hindoo law, which gives a preference as heir to the whole blood over the half blood, extends also to a — in the absence of evidence of family custom to the contrary.—*Ibid.*

Succession to the Nattore —.—608, 661.

See HINDOO LAW (PARTITION).

REBEL. See FORFEITURE, LIMITATION, SALE, REGISTRATION.

An instrument acknowledging payment of consideration money for what was to be ultimately an absolute sale, requires — under s. 2 Act XX of 1866, and cannot be received in evidence under s. 49 if not registered.—468.

Where a person alleged to have executed a deed denies execution of it before the Registering Officer, the Zillah Judge, having regard to s. 84 and the form of petition given in the Schedule to Act XX of 1866, has jurisdiction to determine such a question.—*Ibid.*

The mere circumstance of a bond not being registered is not sufficient *per se* to counter-balance the evidence, if it is generally satisfactory, in proof of the validity of the bond.—471.

Where certain letters were held not to require —, as not amounting to a lease or an agreement for a lease, but as being evidence of a contract of a special character not coming within any of the definitions in the — Act.—952.

See HINDOO LAW (ADOPTION), HINDOO LAW (COPARCENARY), POSSESSION, PUTNEE.

REG. III of 1793.

s. 14. See DOWER.

REG. IV of 1793.

s. 15. See MAHOMEDAN LAW.

REG. VIII of 1793. See ENHANCEMENT.

REG. X of 1793. See COURT OF WARDS.

REG. XI of 1793. See CUSTOM, RAJ.

REG. XV of 1793. See MORTGAGE.

s. 6. See INTEREST.

s. 7. See MORTGAGE.

REG. XIX of 1793. See LAKHERAJ.

REG. VII of 1799. See SALE.

REG. X of 1800. See CUSTOM.

REG. LII of 1803. See COURT OF WARDS.

REG. II of 1805. See LAKHERAJ.

REG. XIX of 1814. See MORTGAGE.

REG. II of 1819. See LAKHERAJ.

REG. VIII of 1819. See PUTNEE, SALE.

REG. XI of 1822. See ENHANCEMENT.

REG. XI of 1825. See ALLUVIAL LAND.

REG. XIV of 1825. See LAKHERAJ.

REG. III of 1828. See LAKHERAJ, SOONDERBUNDS.

REG. IV of 1831 (MADRAS CODE). See ENAM GRANT.

RELINQUISHMENT.

Whether a particular claim arising out of the same cause of action is relinquished voluntarily or by mistake, the result would be the same, and a second suit for that claim would be barred under s. 7 Act VIII of 1859.—59.

A former suit for a share of property purchased in the name of G, in which it was claimed as joint property, does not bar plaintiff under the same section, from suing for other property bought in the name of M at another time.—906.

See MAHOMEDAN LAW.

RENT. See FRAUD, LIMITATION, SERVICE TENURE, REPRESENTATIVES.

Form of decree against the —.—766.

See EXECUTION OF DECREE.

RES JUDICATA.

The reservation by a Court in a decree in a former case of liberty to plaintiff to bring a fresh suit, does not prevent the Court, when such fresh suit is brought, from entering into the question of —.—269.

A suit to recover possession, as part of her own talook, of land which plaintiff had claimed in a former suit as *tenant* reclaimed and occupied, is barred by s. 2 Act VIII of 1859.—658.

See LUNACY, WILL.

RESUMPTION. See BADSHAPORE, CHAKKARAN LAND, ENAM GRANT, GHATWALS, JAGHEER, LAKHERAJ.

REVENUE. See JULKUR, MORTGAGE, POLLIAM, POSSESSION.

REVIEW.

A mere refusal to grant a — of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it.—906.

See HIGH COURT.

REVOCATION

of invalid order by Court.—484.

RIGHT TO LIGHT

The length of user necessary to establish a — —801.

RIGHT TO SUE. See PRIVY COUNCIL.

SALE.

At a — of the confiscated property of rebels to the highest bidder, the Government cannot, subsequent to the bid and the deposit of the earnest-money, impose any conditions not contained in the original notice of —, but is bound to make over possession to the highest bidder, whatever his character may be. The Government, in selling as aforesaid, does not perform an act of state, but stands in the situation of an individual selling his property by auction, and is liable to be sued by the purchaser if it refuses to give up or transfer possession.—288.

Where a suit to set aside a — of immoveable property is brought after the death of all the parties who could have explained the transaction, the evidence must be looked at with great jealousy.—543.

A — for arrears of rent under Regs. VII of 1799 and VIII of 1819 is not free from incumbrances created by the defaulter.—554.

In execution of a decree certain lands belonging to the judgment-debtor were sold and purchased by the decree-holder, from whom security was required for the proceeds of — before she could obtain security; meanwhile the lands were attached and sold in execution of another creditor's decree, and purchased by him and possession given to him. *Held* that the first decree-holder's omission to give security could not affect her title by the previous —, and that the order for the second — was an error.—560.

Where the proceeds of an execution — were not applied to satisfy only a liability incurred after the owner's death, but also decrees for other debts for which the estate was liable, no substantial ground was held to have been shown to impeach respondent's long title.—863.

See ARBITRATION, ATTACHMENT, EXECUTION OF DECREE, HINDOO LAW (ALIENATION), INSOLVENT, MINOR, PUTNEE, REGISTRATION.

SEBAIL. See ENDOWMENT.

SELF-ACQUIRED PROPERTY.

Acquisition of — according to the Mithila and the Mitachara.—878.

SERVICE.

Substituted — how to be made.—896.

SERVICE TENURE.

A Maafee-birt tenure must be taken to mean a hereditary tenure.—802.

Where the original donee of a — ceases to do any service and pays in lieu a rent which his descendants continue to pay, the condition of the tenure becomes altered from service to rent.—*Ibid.*

See CHAKKARAN LAND, GHATWALS, JAGHEER.

SETTLEMENT.

A — with Government and possession under it do not necessarily constitute proprietary right, much less can they destroy trusts to which the settlor was subject.—512.

Ratio decidendi in a suit between two grandsons as to proprietary right in a village in Oudh registered in the name of the elder branch of the family.—589.

SISTER. See HINDOO LAW (INHERITANCE AND SUCCESSION).

SOLICITOR.
Power of High Court to strike a — off the rolls.—155.
Fraud of — in making false statement in a deed.—*Ibid.*
See FRAUD.

SON.
Natural —. See MAINTENANCE.
See BENAMER, INSOLVENT, RAJ.

SOONDERBUNDS.
Finality of decree of special commissioners under Reg. III of 1828.—184.

SPECIFIC PERFORMANCE. See VENDOR AND PURCHASER.

SPLITTING CAUSE OF ACTION.
A true test of the application of s. 7 Act VIII of 1859 to any case is whether there has been any —.—474.

STAMP.
A document may be refused to be admitted for want of a —; or if insufficiently stamped, it may be required to be properly stamped and the penalty paid into Court. But for an Appellate Court to leave a deed insufficiently stamped as part of the evidence in a case, and to qualify its effect and the extent of its operation by making it a deed of release, releasing so much of that which plaintiff might otherwise claim as would be covered by the insufficient —, was held to be a course entirely without principle, precedent, and authority.—407.

STREEDHUN. See HINDOO WIDOW.

SUBSTITUTION.
Where a charge is created by the — of a new security for an older one, and the consideration for the older one was an old precedent debt of an ancestor not previously questioned, the presumption will arise in favour of a consideration that binds the estate.—29.
See SERVICE.

SUCCESSION.
The — of a Hindoo is regulated by Hindoo law, of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged. If no specific rule can be ascertained to be applicable to a case, then it should be determined according to equity, justice, and good conscience.—324.
See CUSTOM, HINDOO LAW (INHERITANCE AND SUCCESSION), MAHOMEDAN LAW.

SUDRA. See ILLEGITIMATE, MARRIAGE.

SURVEY
— proceedings are evidence of actual possession, but not conclusive evidence of title.—286.
Where the Privy Council considered the *thakbust* proceedings preferable to a local investigation by a Sudder Ameen.—851.

SURVIVORSHIP. See WILL.

TALOOK. See EJECTMENT, UNDER TENURE.

TIRHOOT. See HINDOO LAW (PARTITION), RAJ.

TITLE. See DEED OF SALE, LIMITATION, POSSESSION, POTTAR, SALE, SURVEY.

TRUST.
The very principle of a resulting — is that the property has been purchased with money belonging to another with an implied — that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such —, no such implied — can arise by implication.—543.
See BENAMER, ENDOWMENT, WILL.

UNCLE. See HINDOO LAW (INHERITANCE AND SUCCESSION).

UNDER TENURE.

Tenant intermediate between proprietors and ryots are subject to the jurisdiction of the Collector under Act X of 1859, which contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes.—92.

A suit by an under-tenant, claiming possession of land from which he has been dispossessed, whether brought against the zemindar or the Government as the auction-purchaser of the zemindaree rights, was held properly brought under cl. 6 s. 23 Act X of 1859.—806.

See ENHANCEMENT.

USAGE. See CUSTOM.

VALUE OF SUIT OR APPEAL. See PRIVY COUNCIL.

VENDOR AND PURCHASER.

Where it was held that the execution and transfer of a deed of sale from B to A, to enable B to carry on a suit for the recovery of the very lands for a share of which A now sued, and the partial payment of the purchase-money by A to B, did not pass to A a complete title to the lands; and that B, in retaining possession, could not be regarded as having only a lien for the unpaid portion of the purchase-money, or liable to account to A as a mortgagee in possession of the rents and profits; and that even if part of the purchase-money had been paid by A to B at the time of the execution of the deed, and A tendered to B the remainder of the purchase-money, A would not have been entitled to a decree for specific performance, the contract sued on being a speculative, not to say a gambling, one.—225.

See BENAMER, MINOR.

VIROMITRODATATA. See HINDOO LAW.

VOLUNTARY PAYMENT.

A deposit of money in Court by a judgment debtor under protest, in order to prevent an injurious sale, and accompanied by declaration of intention to bring a regular suit to set aside the summary order rejecting his claim, is not a —.—145.

WILL.

The extent of a Hindoo's testamentary power of disposition must be regulated by the Hindoo law, and cannot interfere with a widow's right to maintenance.—37.

According to the true construction of the — in this case, it was held that, although the — purported to begin with an absolute gift in favor of an idol, the property granted to the idol was effectually granted for the benefit of the testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies, and festivals, and to the provisions for maintenance contained in the —; and that the surplus income was in like manner given for the benefit of the four sons and their offspring in the male line as a joint family.—*Ibid.*

In a former suit an alleged testamentary paper was produced by plaintiff to show that the property in dispute was conveyed by it to his father, but on the trial and the appeal, when the Privy Council was about to enter upon the question as to the validity of the testamentary paper, plaintiff gave up the point that the paper was testamentary, and disclaimed having any title under it as a testamentary devise: Held, in a subsequent suit by plaintiff to recover the same property, that he could not set up the same paper as a valid — and testament.—46.

Mode of construing the — of a Hindoo, directing his sons "living jointly in respect of food," to take care of and look after his property, and carry on his trading business, and giving no directions as to the accumulations of the profits of a deceased son's share.—90.

He who rests his title on a nuncupative —, or the spoken words of a man since deceased, is bound to allege and prove the words relied on.—114.

The construction and effect of a — must depend on the law of the domicile, if that can be ascertained.—324.

In this case property purchased out of accumulations of surplus rents of devised estates was held, not as an accretion to the devised estates, and as passing with them under the gifts made by the —, but as following the ownership of the purchase-money.—*Ibid.*

Construction of Prosonno Coomar Tagore's —; operation of trusts in India; and right to estates-in-tail.—692.

Where an heir-at-law sued to recover immoveable property devised by his father to another person, and to set aside the — on the ground that the testator could not devise ancestral property: *Held* that the Court had the power, with the consent of the parties, to substitute for the relief specially sought (viz., the cancellation of the —), the simple declaration that certain deeds of sale and gift sought to be set aside could not affect the ancestral property.—899.

See ENDOWMENT, GIFT, HINDOO LAW (ADOPTION), ILLEGITIMATE;

WITNESS.

Effect of a defendant not coming forward as a — to exculpate himself.—268.

The *ex parte* deposition of a — who might have been called and cross-examined at the trial ought not to have any weight given to it.—448.

It may be objected to a man's credit that he is a professional —; but not to state broadly and generally that a — is unworthy of credit because he has given evidence in other cases.—714.

Where a — who does not come to give an opinion upon an isolated fact in the cause, but to prove the whole of plaintiff's case, is shown to have come to prove a case false in its material features, much reliance cannot be placed on his evidence as to any particular questions in the cause.—732.

See DEED OF SALE, MARRIAGE, PRIVY COUNCIL.

WOMAN.

Disqualified Female. *See* COURT OF WARDS.

Mahomedan Widow. *See* DOWER, MAHOMEDAN LAW.

Mahomedan Woman. *See* BENAMES.

See ACQUIESCENCE, GIFT, HINDOO WIDOW, PURDAH WOMAN.

ZEMINDARY OF TIRHOOT. *See* RAJ.

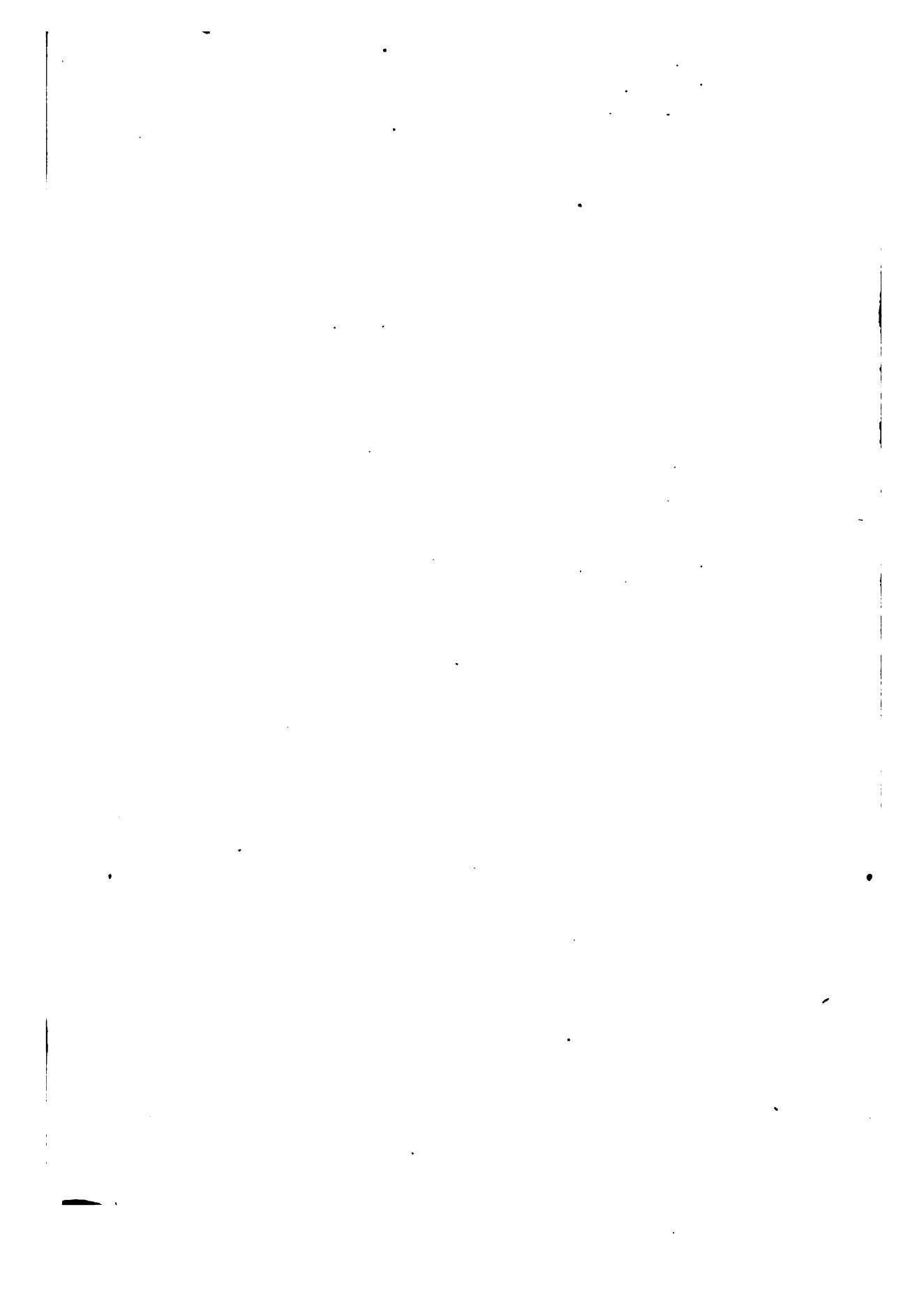


TABLE OF CASES.

- ABDOOL ALI v. Mozuffer Hossein Chowdry**, 462.
Abdool Azeez v. Hamid Hossein, 531.
Abdool Gunnee v. Zamoorudoonessa, 785.
Administrator-Genl. of Bengal v. Anundo Chunder Bose, 959.
Allee Shah v. Amanee Begum, 790.
Ahmed Reza v. Khujooroonissa, 438.
Ajoodhya Pershad v. Omrao Singh, 371.
Ameer Ali v. Inderjeet Koer, 479.
Ameeroonissa v. Mooradoonissa, App. I.
Ameeroonissa v. Achrufoonissa, 543.
Annudai alias Kunjara Nachear v. Purvata Vurdany Nachear, 135.
Anund Lall Doss v. Jullodhur Shaw, 559.
Anundee Koonwur v. Khedoo Lal, 591.
Anundmoyee Dossee v. Dhondro Chunder Moor-kerjee, 457.
Assanoollah v. Obhoy Churn Roy, 306.
Azeeroonissa v. Baqur Khan, 572.
Azhur Ali v. Ultaf Fatima, 279.
Azimut Ali Khan v. Hurdwaree Mull, 343.
 „ **Jowahir Singh**, 346.
BAHUNS KOONWUR v. Lalla Buhoree Lall, 575.
Bachun v. Hamid Hossein, 531.
Baboo Lall v. Luttoo Ram, 684.
Bamasoondaree Dossee v. Radhika Chowdrain, 293.
Bank of Hindoostan, China, and Japan v. Eastern Financial Association, 250.
Barlow v. Orde, 324, 668.
Beerchunder Jobraj v. Deputy-Collector of Bhulloah, 306.
Beerpertab Sahee v. Rajender Pertab Sahee, 114.
Betta v. Arbuthnot, 756.
Bhabosoonduree Dossee v. Issur Chunder Dutt, 616.
Bedar Bukht Mahomed Ali v. Khurram Bukht Yahya Ali Khan, 823.
Benoderam Sein v. Brojendro Narain Roy, 926.
Bhoopnarain Chowbey v. Rughoonath Gobind Roy, 665.
Bhugwan Doss v. Hunooman Pershad Sahoo, 678.
Bissessur Bhuttacharjee v. Lamb, 919.
Bissessur Nath v. Mohessur Bux, 650.
Bishen Perakash Narain Sing v. Bawa Misser, 878.
Bhugwandeem Doobey v. Myna Baee, 124.
Bistoopria Putmadaye v. Nund Dhul, 391.
Bodh Sing Doodhooria v. Guinessh Chunder Sen, 840.
Brett v. Ellaiya, 254.
Brindabun Chunder Sircar v. Brindabun Chunder Dey, 961.
Brojonauth Koondoo Chowdry v. Khelut Chunder Ghose, 480.
Brojosoondery Debea v. Luchmee Koonwaree, 869.
Bunarsee Doss v. Gholam Hossein, 312.
Burrodakant Roy v. Chunder Coomar Roy, 169.
 „ **Commissioner of Soonderbunds**, 184.
Buzloor Ruheem v. Shumsoonissa, 59.
Byjnath Lall v. Ramooden Chowdry, 942.
CAVALY VENCATA NARAINAPAH v. Collector of Masulipatam, 103.
Chand Hurree Maitee v. Norendro Narain Roy, 805.
Chundernath Roy v. Gobindnath Roy, 608.
 „ **Ramjoy Mozoomdar**, 377.
Collector of Madura v. Muttu Ramalinga Saththupatty, 135.
Collector of Moorsheadabad v. Shebessuree, 661.
Collector of Trichinopoly v. Lukhamani, 967.
Court of Wards v. Ramaput Singh, 579.
DEBENDRO NARAIN ROY v. Chundernath Roy, 863.
Deedar Hossein v. Zuhooroonissa, App. v.
Dehraj Mahtab Chund v. Bulram Singh, 351.
 „ **Government of Bengal**, 8.
Devaji Goyaji v. Godubhai Godbhai, 208.
Dhunput Singh v. Gooman Singh, 92.
 „ **Madhmotee Dabee**, 615.
Doorga Pershad v. Kundun Koowar, 939.
Dukur Pershad Bustooree v. Foolcoomaree Dabee, 482.
Durbungah Raj, Manager, v. Ramaput Singh, 579.
Durriao Sing v. Davi Sing, 916.
ECKOWRIE SING v. Heeralall Seal, 171.
Ehsan Beebee v. Baqur Khan, 572.
Elliott v. Bhoobun Mohun Bannerjee, 801.
Enayet Hossein v. Girdharee Lall, 202.
 „ **Sumeer Chand**, 202.
FAEZ BUKSH CHOWDREY v. Tukeerooddeen Mahomed, 490.
Farquharson v. Government of Bengal, 469.
Fatima Khatoon v. Mahomed Jan Chowdry, 145.
Forbes v. Luchmeeput Singh Doogur, 554.
 „ **Mahomed Tuquee**, 358.
 „ **Meer Mahomed Hossein**, 865.
Forester v. Secretary of State for India, 628.
Futteh Chund Sahoo v. Leelumber Singh Doss, 467.
Futtehsangji Jaswantsangji v. Dessai Kullianrajja Hekoomutraji, 933.
Fuzzul Hossein v. Amjud Ali Khan, 585.
GAJAPATHI RADHIKA PATTA v. Gajapathi Nilamani Patta, 365.
Gajapathi Radhika Patta v. Gajapathi Hari Krishna, *Ibid.*
General Manager Durbungah Raj v. Ramaput Sing, 579.
Gobind Soonduree Debia v. Juggodumba Debia, 375.
Golab Sing v. Kurun Singh, 474.
Golam Ally v. Kalikisto Tagore, 686.
Gonda Kooer v. Oodey Singh, 975.
Gobee Kishen Goshamee v. Bindabun Chunder Sircar Chowdry, 261.
Gopee Lall v. Chundraolee Buhoojee, 752.
Goshain Tota Ram v. Rickmunee Bullub, 253.
Gossain v. Gossain, 13.
Gour Ali Khan v. Ahmed Khan, 882.
Gourmonee Dossee v. Jogutindronarain, 711.
Greedbaree Doss v. Nundokishore Doss, 86.
Greedharee Lall Roy v. Government of Bengal, 159.
Grija Kant Lahory v. Hurish Chunder, 758.
Grish Chunder Lahooree v. Bhuggobutty Debia, 339.

TABLE OF CASES.

- ABDOOL ALI v. Mozuffer Hossein Chowdry**, 462.
Abdool Azeez v. Hamid Hossein, 531.
Abdool Gunnee v. Zamoorudoonnessa, 785.
Administrator-Genl. of Bengal v. Anundo Chunder Bose, 959.
Allee Shah v. Amanee Begum, 790.
Ahmed Reza v. Khujooroonissa, 438.
Ajoodhya Pershad v. Omrao Singh, 371.
Ameer Ali v. Inderjeet Koer, 479.
Ameeroonnissa v. Mooradoonnissa, App. i.
Ameeroonnissa v. Achrufoonnissa, 545.
Annudai alias Kunjara Nachear v. Purvata Vurdany Nachear, 135.
Anund Lal Doss v. Jullodhur Shaw, 559.
Anundee Koonwur v. Khedoo Lal, 591.
Anundmoyee Dossee v. Dhonendro Chunder Moorkerjee, 457.
Assanoollah v. Obhoy Churn Roy, 306.
Azeeroonnissa v. Baqur Khan, 572.
Azhur Ali v. Ultaf Fatima, 279.
Azimut Ali Khan v. Hurdwaree Mull, 343.
 " **Jowahir Singh**, 346.
- BAHUNS KOONWUR v. Lalla Buhooree Lal**, 575.
Bachun v. Hamid Hossein, 531.
Baboo Lal v. Luttoo Ram, 684.
Bamasoondaree Dossee v. Radhika Chowdrain, 293.
Bank of Hindoostan, China, and Japan v. Eastern Financial Association, 250.
Barlow v. Orde, 324, 668.
Beerchunder Jobraj v. Deputy-Collector of Bhulloah, 305.
Beerpertab Sahee v. Rajender Pertab Sahee, 114.
Betts v. Arbuthnot, 756.
Bhabosoondaree Dossee v. Issur Chunder Dutt, 616.
Bedar Bukht Mahomed Ali v. Khurram Bukht Yahya Ali Khan, 823.
Benoderam Sein v. Brojendro Narain Roy, 926.
Bhoopnarain Chowbey v. Rughoonath Gobind Roy, 665.
Bhugwan Doss v. Hunooman Pershad Sahoo, 678.
Bissessur Bhuttacharjee v. Lamb, 919.
Bissessur Nath v. Mohessur Bux, 650.
Bishen Perkash Narain Sing v. Bawa Misser, 878.
Bhugwandeem Doobey v. Myna Bae, 124.
Bistoopria Putmadaya v. Nund Dhul, 391.
Bodh Sing Doodhooria v. Gunnessh Chunder Sen, 840.
Brett v. Ellaiya, 254.
Brindabun Chunder Sircar v. Brindabun Chunder Dey, 961.
Brojonaath Koondoo Chowdry v. Khelut Chunder Ghose, 480.
Brojosoondery Debee v. Luchmee Koonwaree, 869.
Bunarsee Doss v. Gholam Hossein, 312.
Burrodakant Roy v. Chunder Coomar Roy, 169.
 " **Commissioner of Soonderbunds**, 184.
Buzloor Ruheem v. Shumsoonissa, 59.
Byjnath Lal v. Ramooddeen Chowdry, 942.
- CAVALY VENCATA NARAINAPAH v. Collector of Masulipatam**, 103.
- Chand Hurree Maitee v. Norendro Narain Roy**, 805.
Chundernath Roy v. Gobindnath Roy, 608.
 " **Ramjoy Mozoomdar**, 377.
Collector of Madura v. Muttu Ramalinga Saththupatty, 135.
Collector of Moorshedabad v. Shebessuree, 661.
Collector of Trichinopoly v. Lakhmani, 967.
Court of Wards v. Ramaput Singh, 579.
- DEBENDRO NARAIN ROY v. Chundernath Roy**, 863.
Deedar Hossein v. Zuhooroonissa, App. v.
Dehraj Mahtab Chund v. Bulram Singh, 351.
 " **Government of Bengal**, 8.
Devaji Goyaji v. Godubhai Godbhai, 208.
Dhunput Singh v. Gooman Singh, 92.
 " **Madhmotee Dabee**, 615.
Doorga Pershad v. Kundun Koowar, 939.
Dukur Pershad Bustoree v. Foolcoomaree Dabee, 482.
Durbungah Raj, Manager, v. Ramaput Singh, 579.
Durriac Sing v. Davi Sing, 916.
- ECKOWRIE SING v. Heeralall Seal**, 171.
Ehsan Beebee v. Baqur Khan, 572.
Elliott v. Bhoobun Mohun Bannerjee, 801.
Enayet Hossein v. Girdharee Lal, 202.
 " **Sumeer Chand**, 202.
- FAEZ BUKSH CHOWDREY v. Tukeerooddeen Mahomed**, 490.
Farquharson v. Government of Bengal, 469.
Fatima Khatoon v. Mahomed Jan Chowdry, 145.
Forbes v. Luchmeeput Singh Doogur, 554.
 " **Mahomed Tuquee**, 358.
 " **Meer Mahomed Hossein**, 865.
Forester v. Secretary of State for India, 628.
Futteh Chund Sahoo v. Leelumber Singh Doss, 467.
Futtehsangji Jaswantangji v. Dessai Kulliapraja Hekoomutraji, 933.
Fuzzul Hossein v. Amjud Ali Khan, 585.
- GAJAPATHI RADHIKA PATTI v. Gajapathi Nilamani Patta**, 365.
Gajapathi Radhika Patta v. Gajapathi Hari Krishna, *Ibid.*
General Manager Durbungah Raj v. Ramaput Sing, 579.
Gobind Soonduree Debia v. Juggodumba Debia, 375.
Golab Sing v. Kurun Singh, 474.
Golam Ally v. Kalikisto Tagore, 686.
Gonda Kooer v. Oodey Singh, 975.
Gobee Kishen Goshamee v. Bindabun Chunder Sircar Chowdry, 261.
Gopee Lal v. Chundraolee Buhoojee, 752.
Goshain Tota Ram v. Rickmune Bullub, 253.
Gossain v. Gossain, 13.
Gour Ali Khan v. Ahmed Khan, 882.
Gourmonee Dossee v. Jogutindronarain, 711.
Greedharee Doss v. Nundokishore Doss, 86.
Greedharee Lal Roy v. Government of Bengal, 159.
Grija Kant Lahory v. Hurish Chunder, 758.
Grish Chunder Lahooree v. Bhuggobutty Debia, 339.

Gunesh Dutt Singh v. Moheshur Singh, 20.
 " Mugneeram Chowdry, 547.
 Gunesh Sing v. Ram Rajah, 263.
 Gunga Gobind Mundul v. Bhoopal Chunder Biswas, 750.
 Gungapershad v. Mowjee Lall, 471.
 Guthrie v. Abool Mozuffer Nooroodin Ahmed, 429.
 HABEEBOULLAH v. Gouhur Ali Khan, 732.
 Hay v. Gordon, 721.
 Humeeda alias Bebee Khajoo v. Amatoool Mehdee Begum, 519.
 Humeeda v. Budlun, 599.
 Hunooman Pershad Pandey v. Babooee Mundraj Koonweree, 29.
 Hurmutool Nissa Begum v. Allahdia Khan, 525.
 Hurryhur Mookerjee v. Madhub Chunder Baboo, 484.
 Hyder Hossain v. Mahomed Hossain, 539.
 IFTIKARONISSA BEGUM v. Umjid Ali Khan, 420.
 Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver, 267.
 JARIUTOOL BUTOOL v. Hoseinee Begum, 56.
 Judoonath Bose v. Shumsoonissa, 59.
 Jogendur Deb Roy v. Funinder Deb Roy Kut, 517.
 Jotendro Mohun Tagore v. Ganendromohun Tagore, 692.
 Joynarain Giri v. Sheeb Prosad Giri, 816.
 Juggernath Sahee v. Ahlad Kowur, 783.
 Juggutmohinee Dossee v. Sookhemony Dossee, 512.
 Jyram Gir v. Sheoraj Kooer, 216.
 KALEE CHUNDER CHOWDREY v. Shib Chunder Bha-
 doory, 383.
 Kalee Pershad Tewaree v. Perhlad Sein, 225.
 Kashi Bashi Ramling Swamee v. Chitumbornath
 Koomar Swamce, 886.
 Katchy Kullyan Kalika Thola Oodiar v. Kachivijaya
 Rungappa, &c., 206.
 Khugowlee Singh v. Hossein Bux Khan, 404.
 Khujooroonissa v. Ahmed Rezah, 438.
 Kooldeep Narain Singh v. Government of India, 491.
 Kristo Kinker Ghose v. Burroda Kant Singh, 564.
 Kurallee Persaud, Mir v. Anuntoram Hajra, 454.
 Kurun Singh v. Fyz Ali Khan, 474.
 LAKHPUTHY THAKOORAIN v. Leelanund Sing, 818.
 Lall Beharee Lall v. Gopce Beebee, 714.
 Lalla Bunseedhur v. Bindesseree Dutt Singh, 39.
 " Government of Bengal, 448.
 Leelanund Sing v. Lakhputhy Thakoorain, 818.
 " Lukhmissar Sing, 353.
 " Mohendro Narain Sing, 286.
 " Munoorunjun Sing, 818.
 Lekraj Roy v. Mahtab Chund, 536.
 Lootf Ali Khan v. Afzuloonissa Begum, 459.
 Lopez v. Muddun Mohun Thakoor, 336.
 Luchmee Bux Roy v. Runjeet Ram Panday, 897.
 Luchmeswar Singh v. Lootf Ali Khan, 461.
 Luchmun Chunder Geer Gossain v. Kalli Churn Singh,
 809.
 Luckhinarain Mitter v. Khettro Pal Sing Roy, 903.
 Luckhnee Chund v. Indra Mull, 320.
 MAHARAJAH OF VIZIANAGRAM v. Rajah of Bobbili,
 689.
 Mahendra Singh v. Jokha Singh, 802.
 Mahomed Ameenooddeen Khan v. Mozuffer Hosein
 Khan, 334.
 Mahomed Bahadoor Khan v. Collector of Bareilly,
 957.
 Mahomed Zahoor Ali Khan v. Rutta Kooer, 107.

Manick Chund v. Madhoram, 217.
 Mankee Koonwur v. Khedoo Lal, 591.
 Mantappa Nadgowda v. Baswantrao Nadgowda, 407.
 Mewa Kooer v. Hulas Kooer, 948.
 Mirza Himnut v. Sahebzadee, 931.
 Mitna v. Fuzl Rub, 387.
 Moheshur Buksh Singh v. Megburn Singh, 442.
 Mohur Singh v. Ghureeba, 379.
 Mollwo March & Co. v. Court of Wards, 715.
 Mulka Jehan Sahiba v. Mahomed Ushkurree Khan,
 830.
 Mulka Mukhdra v. Tekaeth Roy, 355.
 Mulleka v. Jumeela, 766.
 Munnoo Lall v. Choonee Lall, 917.
 Munnoorunjun Sing v. Leelanund Sing, 818.
 Muttasawmy Jagavera Yettapa Naicken v. Ven-
 cataswara Yetteya, 175.
 NABAIN DOSS v. ex-King of Delhi, 76.
 Neel Kisto Deb Burmono v. Beerchunder Thakoor,
 243.
 Newton. *In re* Thomas, 505.
 Nil Comul Lahoree v. Gonomonee Dabea, 413.
 Nil Madhub Doss v. Bishumbur Doss, 257.
 Nilmonee Singh Deo v. Government, 713.
 Nobokisto Mookerjee v. Koylash Chunder Bhutta-
 charjee, 484.
 Nogender Chunder Ghose v. Kishen Soondory Dossee,
 774.
 " Mahomed Esoff, 640.
 " Sreemutty Dossee, 77.
 Nuffer Chunder Paul v. Poulson, 798.
 OODEY KOOWUR v. Ladoo, 388.
 PATTABHIRAMIER v. Vencata Row Naiken, 410.
 Perhlad Sein v. Budhoo Sing, 225.
 " Doorga Pershad Tewaree, 225.
 " Rajender Kishore Sing, 225.
 " Run Bahadoor Sing, 225.
 Pestonjee Nesserwanjee v. D. Manockjee & Co., 164.
 Pirthee Sing v. Raj Kower, 846.
 Poonpoon Koonwur v. Khedoo Lal, 591.
 Port Canning Co. v. Smith, 952.
 Prankisto Chunder v. Bamasoondery Dossee, 90.
 Protab Chunder Burrooah v. Surnomoyee, 851.
 Puddomonee Dossee v. Muthooranath Chowdry, 873.
 Pudum Sing v. Oddey Sing, 219.
 Puhlwan Singh v. Moheshur Buksh Singh, 442, 660.
 RADHABENODE MISSER v. Kripa Moyee, 546.
 Radhajeetun Moostaffy v. Taramonee Dossee, 204.
 Radhanath Doss v. Gisborne and Co., 397.
 Rajendro Nath Holdar v. Jogendro Nath Bannerjee,
 422.
 Rajlukhee Debia v. Gokool Chunder Chowdry, 275.
 Rajender Pertab Sahee v. Lalljee Sahoo, 910.
 Rajkishen Sing v. Ramjoy Surma, 744.
 Ram Singh v. Ugur Singh, 330.
 Ramalakshmi Ammal v. Sivananantha Perumal
 Sethurayer, 603.
 Ramamani Ammal v. Kulanthai Nauchear, 493.
 Ramanooza Narain, *In re*, 291.
 Ramchunder Dutt v. Jugesh Chunder Dutt, 836.
 Ramcoomar Koondo v. McQueen, 656.
 Ramgopal Roy v. Gordon Stuart and Co., 549.
 Ramhurree Mondul v. Mothoor Mohun Mondul, 906.
 Ramrudeegowda v. Dessai Saheb, 501.
 Ram Surun Singh v. Pran Pearce, 386.
 Rughoobur Dutt Chowdry v. Futeh Narain Chowdry,
 648.
 Runjeet Ram Panday v. Goberdhun Ram Panday,
 857.
 Rutcheepetty Dutt Ila v. Rajender Narain Roy, 1.

SADUT ALI KHAN *v.* Abdool Gunnee, 785.
 Salig Ram *v.* Secretary of State for India, 726.
 Saroda Prosad Mullick *v.* Lutchmeeput Sing Doogur,
 560.
 Sawitree Koor *v.* Oodey Singh, 975.
 Secretary of State for India in Council *v.* Khanzadi,
 322.
 Seetul Pershad *v.* Doolhin Badam, 83.
 Serumah Umah *v.* Palathan Vitol Marya Coothy
 Umah, 418.
 Shah Mukhun Lall *v.* Sreekishhen Sing, 190.
 Sham Chand Bysack *v.* Kishen Prosad Surma, 587.
 Sheo Lall Bohra *v.* Sheikh Mahomed, 283.
 Sheo Soondoree *v.* Pirthee Sing, 922.
 Shibessuree Debia *v.* Mothooranath Acharjo, 300.
 Skinner *v.* Orde, 521.
 Sonatun Bysack *v.* Juggutsoondree Dossee, 37.
 Sookhemoonhee Dossee *v.* Mohendro Nath Dutt,
 296.
 Sookyaboye Ammal *v.* Latchmi Ammal, 282.
 Soorasonderee Debea *v.* Golam Ali, 794.
 Soorjomonee Dayee *v.* Suddanund Mohapatter, 899.
 Sorendronath Roy *v.* Heeromonee Burmonee, 147.
 Sreemuthoo Raghoonadha Perya Oodya Taver *v.*
 Kattama Nauchear, 46.
 Sreemutty Dossee *v.* Lalunmonee, 199.
 Stewart, *In re.*, Augustus, 155.
 Suraneni Venkata Gopala Narasimha Row *v.* Suran-
 eni Lakshmi Venkama Row, 265.
 Surnomoyee *v.* Jardine Skinner and Co., 891.
 „ Shooshee Mokhee Burmonia, 173.
 „ Watson and Co., 879.

Surut Soonduree Dossee *v.* Prosmno Coomar Tagore,
 393.
 Suttosurran Ghosal *v.* Mohesh Chunder Mitter, 180.
 „ „ Tarinee Churn Ghose, 180.

TACORDEEN TEWARRY *v.* Ali Hossein Khan, 964.
 Tekaetnee Goura Coomaree *v.* Saroo Coomaree, 806.
 Thakoor Dayhee *v.* Balack Ram, 49.
 Torab Ally *v.* Mahomed Tukkee, 735.
 Tuffuzool Hossein Khan *v.* Rughoonath Persad,
 434.

UMJAD ALLY KHAN *v.* Mohumdee, 98.
 Umritnath Chowdry *v.* Gourcenath Chowdry, 381.
 Unnoda Persaud Mookerjee *v.* Kristo Coomar Moitro,
 740.
 Ushruffoonnessa *v.* Gridharee Lall, 763.

WAHED ALI *v.* Jumaee, 680.
 Watson *v.* Collector of Rajshahye, 269.
 Wise *v.* Brojendro Coomar Roy, 618.
 Woomatara Debea *v.* Kristokaminee Dossee, 653.
 Woomesh Chunder Roy *v.* Gooroodoss Roy, 503.

YANUMULA VENKAYAMAH *v.* Yanumula Boochi
 Venkondora, 302.

ZUHOOROODDEEN *v.* Collector of Goruckpore, 314.

Rules to be observed by Proctors, Solicitors, Agents,
 and other persons admitted to practise before the
 Privy Council, 329.

J U D G M E N T S
OF THE
P R I V Y C O U N C I L
ON
APPEALS FROM INDIA.

The 12th February 1839.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine,
Sir S. Lushington, and Sir E. H. East.

Hindoo Law.—Mithila.—Migration.—Succession.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rutcheeputty Dutt Iha and others,

versus

Rajender Narain Roy and another.

Where a Hindoo family migrates from one territory to another, if it preserves its ancient religious ceremonies, it also preserves the law of succession to which it has been subject. If the family can be shown to have continued in the observances of the natural law and usages of Mithila, the rule of inheritance as established in that province must be followed, although part of the property may be locally situate in Bengal and the last proprietor may have been domiciled there.

The Mithila law is against the claim of any relation on the mother's side until those on the father's side to the seventh degree have been exhausted; and so a maternal first cousin of the last male proprietor was held not entitled to succeed.

This was a case relating to the succession to the zemindary of Haveelce Purneah, upon the death of Rajah Inder Narain Roy, the last male proprietor, who was related in the sixth degree to the ancestor who originally emigrated from Purneah, adjacent to Mithila or Tirhoot, to Bengal. The father of the appellants and maternal first cousin of the late Rajah claimed to be entitled according to the Shasters of Bengal.

The Zillah Judge of Purneah, before whom the suit was brought, referred the matter for the opinion of the Pundit attached to his Court, and afterwards for the opinions of the Pundits of the Sudder Dewanny Adawlut of Bengal, and dismissed the suit. The plaintiff then appealed to the Provincial Court of Appeal at Moorshedabad, which, entertaining some doubts on the law, again referred the matter for the further opinion of the Pundits of the Sudder Court, and on receipt of the same, affirmed the decree of the Zillah Court.

The plaintiff then appealed to the Sudder Court, which directed a reference to the Pundits of the Zillah Court of Tirhoot, for their opinion upon the following question :—"In the case of a person of the Mithil tribe dwelling in Bengal (in whose family, through *purohits* of the Mithil tribe, the observances of joy and grief have been in usage according to the Mithil Shasters) dying and leaving persons related to him in the sixth descent, his *Ilumgoturs*—i.e. the descendant's children of his great grandfather's great grandsire—and also leaving the son of the sister of his mother, with no other nearer heirs than these living; to which of these persons, i.e. the descendant in the sixth degree, or the mother's sister's

son, does the right of inheritance to the real and personal property of the deceased belong?"

The opinions of the Pundits were considered by Mr. Harrington, the first Judge of the Sudder Court, who delivered the following opinion thereon:—

"The decision of this cause rests entirely upon a point of Hindoo law, whether appellant, as maternal first cousin of Rajah Inder Narain (viz. of the sister of Inder Narain's mother), be the legal heir to the estate of Inder Narain, vacated by the death of his widow, Ranee Indrawuttee, or whether on the Ranee's death, the right of succession to her husband's estate devolved to Sree Narain and Lullit Narain, lineally descended in the sixth degree from Sumroo Chowdry, also called Somer Sing, ancestor in the sixth degree of Rajah Inder Narain, viz. his paternal great grandfather's great grandsire.

"2. The Pundits of the Zillah Courts of Purneah and Tirhoot, of the Provincial Court for the division of Patna, and of the Sudder Dewanny Adawlut, concur in declaring that, according to the received and most authoritative books of law of the Mithila or Tirhoot system (by which the parties, though resident within the limits of Bengal, are regulated in their religious ceremonies, marriages, etc.), the paternal kindred are entitled to succeed before the maternal; and consequently appellant (the plaintiff in this cause) has no legal right to the succession claimed by him.

"3. In support of this opinion the following authorities are cited (besides others less conclusive), which expressly declare a preference of the *Gotraja* kindred of the same *Gotr*, or paternal stock, to the *Bundhoo* or kinsman of a different stock, namely, the maternal kindred and the issue of daughters married into another family.

"*Firstly*.—A passage of Jagnyavalkya, cited in the Mitacshara, ch. 2 s. 1 par. 2: 'The wife and the daughters also, both parents, brothers likewise, and their sons, the paternal kinsman (*Gotraja*), kinsman of a different family (*Bundhoo*), a pupil and a fellow student; on failure of the first among these, the next in order is heir to the estate of one who is deceased, leaving no male issue. This rule extends to all persons and classes.'

"*Secondly*.—The Mitacshara itself, which declares the order of succession according to the above text (see p. 324 of Mr. Colebrooke's Translations), and afterwards in two distinct sections (5 and 6 of chap. 2), the one entitled 'Succession of kindred of the same family name, termed *Gotraja*, the other on the succession of *Bundhoo*, or kindred of a different family name,' states the order in which the paternal and maternal kindred are to succeed respectively. From these, it will be sufficient to extract the commencement of each section, viz.: 'If there be not even brother's sons, the *Gotraja*, or more distant paternal kinsman (translated by Mr. Colebrooke *Gentiles*), share the estate. On failure of Gentiles, the *Bundhoo*, or kinsman of a different family (translated *Cognates*), are heirs.' For the remainder of the Mitacshara, as applicable to the case, I beg to refer to the translation of that work, pp. 349 to 352, including also in notes the explanations of commentators, and sentiments of other writers upon the subject.

"*Thirdly*.—The Vivada Chintamani, the author of which, after citing different authorities on the order of succession, gives the following recapitulation:—

"The abstract is this: First the son, after him the grandson, then the great grandson; on failure of these, the virtuous wife; failing her, the daughter; in her default, the mother; if she be dead, the father; if he be so, the brother; on failure of him, his son; in default of him, the near and more remote *Sapinda* or kindred, connected by the funeral oblation (for want of such *Saculya*, also called *Samanoduca*), or those connected by a common libation of water, in order; on failure of them, the mother's family (*Matrical*) and the rest; and in default of all, the King, excepting the property of a Brahmin.

"*Fourthly*.—A passage from Balarupa, referring to the text of Jagnyavalkya

above cited, in proof that, on failure of heir down to the brother's son, the succession devolves on the *Gotraja*; and after explaining it as meaning the *Sapindas*, and comprising six ancestors and their issue, concluding with the following quotation from Virhut Menu: The relation of *Sapinda* ceases with the seventh person, and that of the *Samanoduca* extends to the fourteenth degree. The *Samanoduca*, too, are *Gotraja* (or paternal kinsman); on failure of such, the succession devolves on the *Bundhoo* (or kinsman of a different stock), conformably with the text of Jagnyavalkya above cited, *Gotraja, Bundhoo, &c.*

"*Fifthly*.—The following extract from the Vivada Chandra:—

"The wealth of one dying without male issue goes to his wife; if he leave none, it goes to his daughter; if there be none, it devolves on his father; if he be dead, it passes to the mother; if she be deceased, it comes to the brothers; in default of brothers, it goes to the *Sagotra*; for want of such, it descends to the *Bundhoo*; on failure of whom, it accrues to the disciple; if there be none, it goes to the King, except the property of a Brahmin. Among *Sagotras* the nearest shall take property of the childless man; conformably with text of Vrihaspati and quotations from the Shasters, where many claim the inheritance of a childless man, whether near or distant, paternal kindred or kinsmen, or of a different stock (*Geanli, Saculya, or Bundhoo*), he who is the nearest of them shall take the estate."

"*Sixthly*.—A text from Apostamba, cited in the Chintamani, importing that, if a person die childless, his estate, moveable and immoveable, goes to his *Sapinda*; if there be no *Sapinda*, to his *Saculya*; if there be no *Saculya*, to his *Bundhoo*.

"4. This last text is quoted by the Pundit of the Patna Provincial Court, and the Pundit of the Zillah Court of Tirhoot, but not by the Pundits of the Sudder Dewanny Adawlut, who cite only from the Smrite Sara another dictum of Apostamba, that, on failure of male issue, the nearest *Sapinda* is the heir.

"5. Jimuta Vahana, the author of the Dayabhaga, considering a text of Menu, which directs that the inheritance be given 'to the nearest *Sapinda*,' or those who are connected by funeral oblations, to refer not so much to nearness of kin or family relation, as to the presentation of offerings, and that the maternal uncle and other maternal kindred present oblations to the maternal grandfather and other ancestors, which the deceased was bound to offer when living, and consequently partakes when offered by others after his death, declares them entitled to succeed on failure of near *Sapinda* among the paternal kindred, viz., 'on failure of any lineal descendant of the paternal grandfather, down to the daughter's son, who might present oblations in which the deceased would participate.' He adds that, on failure of such maternal kindred, viz., those who offer oblations which the deceased was bound to present, and of which he partakes when presented by others after his death, the *Saculya* or distant paternal kinsman is the successor, and defines the '*Saculya*' to be 'one who shares a divided oblation, as the grandson's grandson, or other descendant within three degrees reckoned from him, or as the offspring of the grandfather's grandfather, or other remoter ancestor.' (See Mr. Colebrook's Translation of the Dayabhaga, pp. 216 to 219; and the rule in p. 171, that he who, while living, presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person.)

"6. This order of succession, however, which has been adopted in Bengal, and which Nanda Paudila, a modern author, is desirous of extending to Benares, in opposition to Camalacara and the author of the Viramitrodaya, who follow the Mitacshara (see note to Translation of Mitacshara, pp. 350, 351) is not admitted by the Mithila school, who uniformly prefer the paternal to the maternal kindred, whilst any of the former, or at least any within the fourteenth degree, may be living. In the Bengal law of inheritance, a *pind* or oblation at obsequies is chiefly regarded in Mithila the *Gother* or relation of the same family. This point appears

to me incontrovertibly established by the authorities cited in the *berustas* of the law officers of this Court, the Zillah Courts of Purneah and Tirhoot, and the Patna Provincial Court, and I see nothing whatever to prove the contrary. The *berusta* of the Pundit of the Moorshedabad Provincial Court, which is founded on his own construction of texts that are cited by the under Pundits to prove the opposite doctrine. The whole of the objections of the appellant to the *berustas* in favor of the distant kindred of Rajah Inder Narain, also appear to me unfounded, or irrelevant to the present case, in which the contest is not between a *Sapind* and *Saculya*, both of the paternal kindred, but between a paternal and maternal kinsman.

"7. In the appellant's replication in the Zillah Court he states his claim to be supported by a text of Vrihaspati, cited in the Vivada Chandra, importing that when there are several claimants, of whom some are paternal and others maternal kinsmen, whichever may be nearest in affinity shall succeed to the estate; but the extract above given from the Vivada Chandra shows that the author of this work, which is held authoritative in Mithila (see Preface to Translation of Dayabhaga and Mitacshara) expressly prefers the *Sagotra* to the *Bundhoo*; and the text cited from Vrihaspati, which is also relied upon by the Pundit of the Moorshedabad Provincial Court, is constructed to mean only that among several kinsmen, whether paternal or maternal, who may claim an estate, those of each who may be nearest of kin are entitled to succeed, in preference to the more distant. In his petition of appeal to this Court, the appellant cites the Rutnacara and Smrite Sara to prove that Sree Narain and Lullit Narain, not having descended from an ancestor of Rajah Inder Narain within the third or fourth degree, are not *Sapindas*. But the author of the Rutnacara, after citing a text from Menu, saying, 'The relation of *Sapinda* ceases with the seventh person, and that of *Samanoduca* reaches as far as memory of birth and name extends,' adds, according to the signification of the word *Sapinda*, as deducible from its etymology, it comprehends the offspring of the seventh person; and he adduces the authority of the Matsyapurana to prove that 'the relation of *Sapinda* extends to the seventh degree.' In the Smrite Sara also, although reference is made to a text of Bandhyana (see Translation of the Dayabhaga, chap. ii. s. 1 pt. 37), in which those partaking of undivided oblations are pronounced '*Sapinda*,' whilst those who share divided oblations are called '*Saculyas*;' yet this very text adds, 'On failure of *Sapindas* or near kindred, *Saculyas* or remote kinsmen are heirs;' and the author of the Smrite Sara himself expressly adds, 'The wealth of one who leaves no male issue goes to his father and his offspring; on failure of offspring of his father, the succession devolves on the paternal grandfather and his offspring; on failure of issue of the paternal grandfather, it goes to the paternal great grandfather and his offspring, in regular order, and so on to the seventh degree.'

"8. As to the further argument of appellant in the representations delivered through his vakeel and mookhtar, on the 18th February last and 6th instant, in which he endeavours to show that his claim is supported by the Mitacshara, it appears to me, on a careful examination of the English version, which we happily possess, of that work, to be totally without foundation. I have already noticed the two sections which declare the succession of the *Gotraja*, or paternal kindred, before the *Bundhoo*, or kindred of a different stock, and which in my judgment are conclusive against the appellant, who acknowledges himself to be one of the *Bundhoo* of Rajah Inder Narain, and claims as his maternal first cousin.

"9. The term *Putra*, or son, in the Mitacshara and its commentary, the Sabodhene, is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the Mitacshara, or the grandson, as well as the great grandson, would be excluded from the immediate succession, though acknowledged in every system of Hindoo law to represent their deceased father

and grandfather, and entitled with sons to share the estate of a person leaving sons, grandsons, and great grandsons, the father of the grandson and father and grandfather of the grandson being previously dead. This principle appears to be recognized in the Mitacshara and both its commentaries, in the third paragraph of the introductory section and notes referring thereto (see page 242 of Mr. Colebrooke's Translation). In that paragraph, after stating that 'the wealth of the father, or of the paternal grandfather, becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons, and this is an inheritance not liable to obstruction, it is immediately added, 'but property devolves on parents or uncles, brothers and the rest, upon the demise of the owner, if there be no male issue, and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor, in right of his being uncle or brother: this is an inheritance subject to obstruction. The same holds good in respect to their sons and other descendants. Here it is manifest the words translated 'male issue' and 'a son,' were not meant to exclude the grandsons before mentioned, and the two commentators agree in construing the last clause to intend 'the sons or other descendants of the son and grandson.' The same construction must, I think, be put on the words 'sons' and 'issue' (*Putra* and *Sunava*) in the 4th and 5th paragraphs of the 5th section and 2nd chap. of the Mitacshara, and this interpretation is indeed indicated by expressions on the same paragraphs; viz., 'on failure of the father's descendants' (*Sontana*), and 'on that of the paternal grandfather's line' (*Sontana*). To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grandfather, and every other ancestor, and would render nugatory the provisions in the Mitacshara, as well as in the other books of law, which expressly state 'the succession of kindred belonging to the same family, and connected by funeral oblations to the seventh degree; or if there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend.' (See Translation of Mitacshara, chap. ii s. 5 par. 5 & 6.)

"10. It may be added that the respondent, Sree Narain Roy, as descendant in the sixth degree from Sumroo Chowdry, the ancestor of Rajah Inder Narain, does actually make oblations to the manes of ancestors, in which those of Inder Narain are supposed to participate, and consequently that he is not only of the same family or paternal stock as Inder Narain, and related to him within the seventh degree, but is also connected with him by oblations to a common ancestor, in which the manes of Inder Narain are supposed to participate; which notion, to use the words of the late Sir William Jones (see note in Translation of Digest of Hindoo Law, vol. iii. par. 146), is the key to the whole Indian law of inheritance.

"11. Sir William Jones further observes 'that for this reason the law of obsequies promulgated by Menu must be carefully studied.' And it will accordingly be found on reference to the 3rd chap. of Menu (which contains the law of obsequies), text 216, that 'the person offering three balls or cakes to the manes of his father, his paternal grandfather, and great grandfather, is directed to wipe the same hand with the roots of *cusa*, which he had before used for the sake of his paternal ancestors in the fourth, fifth, and sixth degrees, who are partakers of the rice and clarified butter thus wiped off.' This explains another text of Menu (chap. v. text 60) in which it is stated 'that the relation of *Sapindas*, or men connected by the funeral cakes, ceases with the seventh person, or in the sixth degree of ascent or descent,' which, without attention to the distinction between complete oblations of the *pind* or funeral cake, made to the manes of the three nearest ancestors, and the wipings (*leep*) received by the three more remote ancestors, would appear at variance with a third text in chap. ix. text 186—'To three ancestors must water be given at their obsequies; for three (the father, and his father,

and the paternal great grandfather) is the funeral cake ordained; the fourth in descent is the giver of oblations to them, and is their heir if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake.' The three texts of Menu above cited are perfectly reconcileable, without supposing (as some authors have done) the second text to relate to *Sapindas* required to mourn for a deceased person, not to his heirs. And a fourth text, which follows that last quoted, and directs that 'to the nearest *Sapinda*, male or female, after him in the third degree, the inheritance next belongs; then, on failure of *Sapindas* and of their issue, the *Samanoduca*, or distant kinsman, shall be the heir,' proves that not only other *Sapindas* beside the son, grandson, and great grandson, but their descendants also, are included by Menu among the legal heirs.

"12. The only shadow of pretension which appears left to the appellant is that which he has further urged, of the estate in dispute being partly situated within the limits of the province of Bengal, and of the late Rajah and Ranee, as well as the parties in this cause, being resident within that province. It is, however, acknowledged by appellant that all ceremonies of mourning and rejoicing (viz., all religious ceremonies, and some of a civil nature, including marriage) are performed in the families of both appellants and respondents (as they were in the family of the late Rajah and Ranee, whose ancestors came into Purneah from the adjacent districts of Mithila or Tirhoot) by a Mithila *purohit* or priest, and according to the Mithila Shaster. It appears too that Roojput Iha, the son of appellant, has succeeded (under a summary decision of the Judge of Zillah Purneah, passed on the 27th November 1809) to the estate of Madhoo Dai, half sister of Rajah Inder Narain, as her *kirta pooter*, which form of adoption is not sanctioned by the current law of Bengal. And in a former cause before this Court (that of Rajchunder Narain, appellant, and Goculchund Goh, respondent, decided 22nd June 1801), it was determined on a *bevusta* of the Pundits. In chap. viii. of Menu's Institutes on Judicature and Law, it is prescribed in text 41, that 'a king who knows the revealed laws must enquire into the particular laws of classes, the laws of usages of districts, the customs of traders, and the rules of certain families, and establish their peculiar laws, if they be not repugnant to the law of God; that if a person of Mithila family, resident in Bengal, have Mithila *purohit*, and perform his domestic ceremonies of mourning and rejoicing, according to the Mithila Shaster, his right of inheritance is governed by the Mithila Shaster, or *vice versa*.'

"13. On the whole, therefore, I see no ground whatever for altering the decrees of the Zillah and Provincial Courts in this cause, whereby the claim of appellant was declared inadmissible, and am of opinion that his appeal to this Court should be dismissed with costs."

The cause then came on for decision before the First Judge and the Third Judge, who declared themselves of opinion that there was no sufficient cause exhibited for altering the decisions of the Zillah and Provincial Courts, because "it was clear that, at the time of the death of Ranee Indrawuttee, the widow of Rajah Inder Narain, the respondents Sree Narain Roy and Lullit Narain Roy, the descendants of Sumroo Chowdey, the great grandsire of the great grandfather of Inder Narain, with others, his *Humgotur* relations, were in existence, while the appellant, the son of the sister of the Rajah's mother, was amongst the *Bundhoo* of the Rajah, and according to the *bevustas* of the Pundits of that Court, and those of the Zillah and Provincial Courts of Purneah, Tirhoot, and Azeemabad, and the result of the examination of the Mitacshara and other *Pothees* venerated by the Mithilas, in usage in the families of the parties in the cause, it appeared that the right of inheritance of the *Humgoturs* was prior to that of the *Bundhoos*."

From this decision an appeal was preferred to the Privy Council, whose judgment was delivered as follows by—

Mr. Baron Parke.—In this case their Lordships concur in recommending Her

Majesty to affirm the decision of the Court below. We would not have troubled the learned Counsel for the respondents, but that we were anxious the case should be fully investigated, as it relates to property of a very large amount. On a full consideration, we feel no difficulty in assenting to the propriety of the decree of the Sudder Court on all points.

The appellant claims the zemindary of pergunnah Haveelee Purneah, situate in the province of Bengal. He claims to be entitled as the cousin on the mother's side, and claims against the defendant below, the father of the respondents, who is related in the sixth degree on the father's side. It is admitted that, if the law on which the learned Judge Mr. Harrington proceeded, governs the succession, no valid objection can be taken to the decree of the Court below. That matter has been fully investigated; and although there was some doubt about it, the Counsel for the appellants do not feel strong enough to impeach the decree if it was rightly decided according to the law. Now, was it so decided? Let us look, in the first instance, to the point on which the parties put their case till they came to the Sudder Court. The plaintiff does not state by what law his descent is to be regulated, but he claims as the heir at law of the deceased Rajah. The answer of the defendants, whose representatives are the present respondents, distinctly puts it on the ground that the Shasters of Tirhoot regulate the succession. They state that the case ought to be decided "according to the Shasters of Tirhoot which are in usage in the country, and particularly among the Brahmins of Mithila who are ruled entirely thereby." Now when the plaintiff comes to his replication, it is equally clear that he puts his claim also on the Shasters of Tirhoot or the law of Mithila, and there is not a word said about any other law to regulate the succession between the parties.

Then we find that, in pursuing his appeal to the Sudder Dewanny Adawlut, it is said that one small portion ought to be adjudged according to the law of Bengal. Now is that right? Mr. Harrington, who considered the question, is of opinion that the rule of succession ought to be the Mithila law, according to which the parties have governed themselves, and he lays it down as a clear proposition of law that, in a case where a family migrates from one territory to another, if they preserve their ancient religious ceremonies, they also preserve the law of succession, and relies on the case of Rajender Narain Chowdry v. Goculchund Goh, proceeding on the opinions of the Pundits, and which was in evidence in the Sudder Dewanny Adawlut. It is very true that the precise point decided by the Court in that case does not go to the full length of Mr. Harrington's judgment, for the family there had abandoned part of the religious observances and adopted those of Bengal; and there it is said that the law of that country must decide. There is a want of clearness, probably in consequence of the defect of translation; but the effect is that, if they had preserved their ancient religion, the law of succession would be according to the country from whence they migrated. That opinion is clearly adopted by the Court, and there is a note well deserving of attention, which is not only the note of the reporter, but, as we learn from the preface to the book, especially valuable as coming from the pen of Mr. H. Colebrooke. Now the note upon this subject says, "If the family had been shown to have continued in the observance of the natural law and usages, viz., those of Mithila, the rule of inheritance as established in that province must have been followed." They treat that as a matter of clear law and not admitting of any doubt. The present case, therefore, must be considered, rather as an exception to that which is laid down as the law in that case, because there they had abandoned those usages and taken to those of Bengal. It appears highly reasonable in such circumstances that that should be the rule, for the law of succession of the Hindoos partakes greatly of their religious opinions, and is part of their system.

It appears to their Lordships that the opinion expressed by Mr. Harrington

is the law to govern this case ; and in respect to the application of that law to the state of this family, there appears no objection. Upon the whole view of the case, the law to decide, therefore, must be the Mithila law ; and according to that their Lordships cannot say that the case has been wrongly decided. It appears there was some little doubt as to the provision of the Mithila law. The note to which I have referred states that "the books of greatest authority in Mithila on the subject of inheritance, are silent in regard to the sister's son ; and the established opinion is that the male descendant of the remote ancestor shall inherit, and not a descendant through females of a near ancestor." But that does not appear to have been perfectly decided ; and, therefore, probably this suit was brought to have that point cleared up, upon which the opinions of so many Pundits have been taken. It appears that the Mithila law is against the claim of any relation on the mother's side till those on the father's side to the seventh degree have been exhausted. This being an appeal against the decision of the three Courts, it must of course be dismissed with costs.

The 7th December 1849 and 18th February 1850.

Present :

Lord Langdale, Lord Campbell, Mr. Baron Parke, Rt. Hon. T. P. Leigh, and Sir Edward Ryan.

Lakheraj—Regs. XIX of 1793 and XIV of 1825—Onus Probandi—Presumption—Resumption—Limitation—Regs. II of 1819 and III of 1828—Reg. II of 1805 s. 2 cl. 2.

On Appeal from the Court of Special Commission appointed under Reg. III of 1828.

Maharajah Dehraj Mahtab Chund

versus

The Government of Bengal.

The general presumption is in favor of the liability to assessment of land ; and by Regs. XIX of 1793 and XIV of 1825 the *onus probandi* lies on a claimant to lakheraj to establish his title to exemption, not by inferences, but by positive proof of a grant made by some one to hold in lakheraj and by hereditary right prior to 12th August 1765, and that possession was *bond fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at and since that time.

The right of Government to institute proceedings, under Regs. II of 1819 and III of 1828, for resumption of lands, is barred by limitation under cl. 2 s. 2 Reg. II of 1805.

Baron Parke.—This case was argued before their Lordships at the sittings in December last. The importance of the question, both to the East India Government as well as to the appellant, has called upon us to give it the fullest consideration ; and the result of that consideration is, that their Lordships think that the decisions of the Collector and Special Commissioner, before whom the claim of the appellant was litigated in India, are right (subject to a point which I shall afterwards observe upon, arising for the first time in the argument before us upon the Regulations of Limitations), and that their Lordships ought to advise Her Majesty to affirm those decisions by which it was declared that the property of the appellant was liable to assessment.

The claim of the appellant, the Rajah of Burdwan, was to the exemption of the turuf of Tajpoor, consisting of eighteen villages, of large annual value, in his zemindary, from assessment to the Government revenue, as being lakheraj lands. The case depends mainly upon the principle which we ought to adopt in deciding whether this species of property is liable to assessment or not. If we were at liberty to decide this case upon the same principle of long and quiet enjoyment,

on which we should act if a claim for some similar right or exemption were before us, in an English Court of Justice, without express statutory regulations for the conduct of the enquiry, we are not prepared to say that there is not evidence on which a jury might and ought to presume in its favor, in the absence of proof on the part of the Government, that any revenue was received from this particular district for seventy years and upwards. There is, in the first place, the omission (if unexplained) of all mention of the District on the occasion of the Decennial and Permanent Settlements, as being liable to pay revenue. Secondly, the withdrawal of the Collectors from the zemindary, including the District described in the Order, as "Mahoteran," in the year 1795. And, thirdly, the Registry, though imperfect, of this District, as "Mahoteran," in the year 1802, which indicates a formal claim to exemption at that time.

But that is not our duty in the present case, but to decide according to the express provisions of the Regulations of the East India Government, which are as obligatory for the purpose as the Statute law of the land ; and the question, therefore, is, whether such proofs of exemption, or right to exemption, as these Regulations require, have been given.

The material Regulations are XIX of 1793 and XIV of 1825. The preamble of the first fully explains the nature of the right of the Government, and the frauds committed upon it, not only by the zemindars, but by Officers of Government themselves procuring grants to be made under the pretext that the produce of the lands was to be applied to religious or charitable purposes, such grants being generally made with a view to the clandestine appropriation of the produce to the use of the grantor. It proceeds to state that the Government was induced by its lenity to adopt as a principle, that grants of this description, made previous to the date of the Dewanny, 12th August 1765, (provided the grantee had obtained possession,) should be allowed to the extent of the intentions of the grantor, so far as they were ascertainable from the terms of the writings, or from their nature and denomination of the lands. It recites that zemindars were in the habit of making grants to their dependents for their own use, antedating the deeds. It states the intention of the Governor General to recover the public dues thus alienated, and the purposed omission from the Decennial Settlement of all lakheraj lands, whether exempted from the public revenues, with or without authority, in order that the Governor General might impose such assessment as he might deem equitable on all lands then alienated and paying no public revenue, which should be proved to be held under illegal and invalid titles. At the same time it states the Governor General's wish, that persons claiming under valid titles should be secured in the enjoyment of their property. The Regulation then proceeds to enact rules with a view to facilitate the recovery of dues from lands held under invalid grants, &c. The first of these rules is, that all grants previous to the 12th August 1765, by whatever authority, and whether by a writing or without, shall be deemed valid, provided the grantee actually and *bonâ fide* obtained possession of the land granted, previously to that date, and the land shall not have been subsequently made liable by the Officers of Government. But if it shall be proved to the satisfaction of the Courts, that the owner did not get possession, or that the lands had been since subjected to the payment of revenue, the grant is to be deemed invalid. It was also provided, that the heirs of the grantee should not be entitled, under a grant, unless named therein, or the grant should be from its nature, or according to the usage, hereditary.

Under this Regulation, it is obvious that the exclusion or omission from the Decennial and Permanent Settlements, of lands, as lakheraj, is of no weight as evidence of title to that exemption. The effect of such exclusion is simply to reserve such case for inquiry, according to the directions of the Regulations, whether there is a lawful exemption or not.

The other important Regulation, XIV of 1825, was made for the purpose

of further defining the principles to be followed in determining the force and validity of grants made previous to the Dewanny. It enacts and declares that the power of granting and confirming grants, except by a regular judgment, belongs to the Supreme Government, and all confirmations are invalid, except such as are made by the Governor General or some Officer expressly authorised to grant or confirm by some competent Court of Judicature or Revenue Board acting in a judicial capacity, after full investigation in the manner described in the Regulations. Rules are then laid down for the investigation of all claims; one of them is, that lakheraj tenures, of which uninterrupted possession shall have been held exempt from assessment, at and subsequently to the 12th August 1765, shall be considered to be valid without evidence of any formal grant or confirmation of the same, and shall be continued to heirs in cases in which it may be clearly shown that the right is hereditary, from the nature of the grant or from ancient usage. The proof of possession, and in case of persons not the original grantees, of the hereditary nature of the tenure, is on the parties claiming to hold the lakheraj property, the general principle being, that the ruling power is interested in a certain proportion of the produce of every beegah, except so far as it shall have transferred, relinquished, or compounded its right thereto, and all persons claiming the benefit of such exemptions being bound to establish their respective claims and titles. The result of this is, that the general presumption is to be in favor of the liability, and the claimant of lakheraj is to establish his claim, not by inferences and presumptions, but by the positive proof required by the Regulations. It may appear to be harsh to disregard the presumptions arising from length of time and general conduct, but we have nothing to do with that question; we are bound to act on the principles laid down in these two Regulations, according to that which we deem the true construction.

By them proof is required from the claimant, of a grant made by some one, of lands, to hold in lakheraj, and by hereditary right, prior to the 12th August 1765, and that possession was *bonâ fide* taken under it, or an enjoyment of lands as such, and descendible to heirs at and since that time.

Upon the evidence in this case, neither of these claims is made out to our satisfaction: as to the actual grant, there is some proof of one, because though the original, which ought to be in the custody of the claimant (for the title-deeds were returned to the claimant in 1795), is not produced, it does appear that it was exhibited before Mr. Brook in November 1792, and a copy is produced from the records of the Court. The defective register of this, wanting the name of the grantor, and wrong in the name of the grantee, throws some suspicion as to its being a genuine deed; but admitting it to be such, the title founded upon the deed is defective on three grounds. First, because the grantee in lakheraj, Baboo Beejee Chund, is not proved ever to have been *bonâ fide* in possession after the grant. Secondly, Rajah Tilok Chund, the grantor, afterwards, and before the 12th August 1765, is admitted to have got back the property (whether by purchase or not, or for a full consideration, does not appear), and was sued for the arrears of a charge upon it made by him to the said Baboo Beejee Chund, in 1762, which became subsequently the subject of a suit, in 1792, by his heir against the heir of Raja Tilok Chund; so the heirs of the grantor, and not of the grantee, remained in possession. Thirdly, the grant is stated by the appellant's vakeel to have been made to Manik Chund, who was the managing Dewan, in the name of Baboo Beejee Chund, and such a grant bears with it the strongest suspicion of being a fraudulent contrivance to deprive the ruling power of its lawful share of the revenue, and to be exactly such a transaction as it was the avowed object of the Regulation to defeat.

We think, therefore, that the claimant's title by the deed is not made out: if the deed had been made *bonâ fide*, the grantee proved to have been in possession, and the grantor proved to have *bonâ fide* purchased afterwards from him the

property for a valuable consideration, and so acquired all its rights, the heirs might have been entitled. But there was no such evidence.

The next ground on which the claim is rested, is that of enjoyment, at and from the 12th August 1765, as lakheraj, which would be a good title, irrespective of the deeds. .

Now by the terms of the Regulations, the claimant is to prove this, and the reason he is called upon to give such proof, is, there being a strong presumption against the validity of such titles (as appears by the recitals in the Regulations themselves), and in order to guard the Government against the frauds of its own Officers. It is not enough then for a claimant to say, "You, the Government, could prove the payment of the revenue, if any was paid, and I rely on the absence of your evidence to make out my title, and show that it was not paid." He must show his own title to exemption, and prove by some evidence on his part that no revenue was collected, and must carry back that evidence to 1765. We should suppose that, in the Collector's Cutcherry for that District, evidence might be found of the receipt of the revenue as far back, which might afford an inference of the non-payment for this property. It is clear, however, that the Regulations require the claimant to prove his possession, and it is presumed that the Government would not require a proof which could not reasonably be given, if the exemption was a just and fair one.

Our law affords an analogy to this, in the case of all ancient customs and exemptions, which must have existed from time immemorial; in order to be valid, proof of the customs or exemption for some years back, even twenty, there being no proof to the contrary, would warrant the jury, indeed call upon them to presume their immemorial existence. But under Lord Tenterden's prescription Act, requiring usage for twenty, forty, or sixty years, evidence is always required of the usage, as far back as the commencement of those periods, though it need not be proved for each year.

There is, in this case, no proof of such possession as is required to be shown on the claimant's part, and the only material evidence to raise the inference of exemption, is the release of the title-deeds, and the giving up the estate in the year 1795 by the Collector. But that does not carry back the evidence of claim for exemption far enough, and it is not clear that the estate was given up by the Collector because it was lakheraj. Further, if the case is to rest on possession, there must be evidence that it was an hereditary possession, or possession of exemption, descendible to heirs according to Reg. XIV of the year 1825, and there is no such evidence, independently of the deed itself, upon which, on account of the suspicions attaching to it, no reliance can be placed.

Their Lordships are of opinion, therefore, that the claimant's title is not made out; not on the deed, because the possession of the grantee is not proved, and because there is good ground to believe that the deed was fraudulent; and they think it was not made out independently of the deed, for want of sufficient evidence of the enjoyment of the exemption; certainly for want of sufficient evidence that it was of an hereditary nature; the mere enjoyment in succession, supposing that to be inferred from the evidence, is, by the express terms of the Regulations, not enough.

If the claim cannot be supported, on either of these grounds, it certainly cannot on the ground that it has been ratified and confirmed by the Government. The transactions in 1795, clearly, do not fall within the terms of the Regulation, which does not give the power of confirmation to be exercised in that manner; and we cannot help thinking, that it would be a strange thing to hold that this order, which, in truth, is the only evidence of enjoyment offered on the claimant's part, and which, by the Regulation, has no direct effect in establishing the exemption, should yet be sufficient evidence for the claimant of every thing necessary to give him a title.

Another objection taken on the part of the respondent was, that the register was defective. Their Lordships think it possible that the parties gave the best account of the deeds they could ; and, therefore, do not think the claim ought to be rejected on that ground.

There remains only to be considered a question which was raised for the first time, on the argument here, upon the Regulation of Limitation : we have looked through the different Regulations, and have given information to the Counsel upon the different Regulations bearing upon this point, the result of which appears to be, that there is no Regulation of Limitation to a proceeding before the Collector ; possibly, (though that matter is very obscure,) there was one as to the proceeding in the Adawlut Courts. The learned Counsel will have the goodness to look into that, and if they think anything can be said upon that subject to mention it again. In the meantime our report will be suspended.

The case was afterwards directed to be argued by one Counsel on each side, upon the point reserved by the judgment, namely, whether the right of the Government to assess the villages in question was barred by the cl. 2 s. 2 Reg. II of 1805, by reason of sixty years having elapsed since the right of Government to assess the lands had accrued.

The judgment of their Lordships on the point reserved was delivered as follows on the 18th February 1850 by—

The Right Hon. T. P. Leigh.—This is an appeal from a decision of the Special Revenue Commission of Bengal, on the subject of the assessment of certain estates of the appellant to the public revenue.

Various grounds of objection were taken to that decision, all of which were disposed of by their Lordships, at a former sitting, but one question was reserved, which appeared to arise incidentally in the course of the discussion, namely, that the claim of the Government of Bengal was barred, by, what we should call, the Statute of Limitations, by the lapse of the period of sixty years. It appears to their Lordships, that the claim would be barred by the lapse of that period, in this case, unless the case can be taken out of the operation of the Regulation of Limitation upon either of the two grounds stated in the argument, on the part of the Bengal Government.

It was said first, that the limitation which is contained in the Regulation of 1805 does not apply, because it refers to Courts of Civil Justice : that is very true, but it is quite clear that the principle of that Regulation would be rendered wholly nugatory, unless it were extended to the case which is now before their Lordships, in which the Collector's Court must be considered for this purpose a Court of Civil Justice. It is the only mode in which the question could arise. Their Lordships are, therefore, of opinion, that there is nothing in that ground of exception.

The more important matter was, that the point does not appear to have been raised in the Courts below, and is not distinctly stated in the printed cases here. It was suggested that there may be circumstances which are not known to us, which may prevent the application of a law which apparently is distinctly applicable to the case.

Now, in the first place, the proceedings in the case were not proceedings in a regular suit. There were no pleadings, and, therefore, it would be rather hard to bind the parties by an objection of so technical a nature, especially if on investigation it is found to have a valid ground of defence. But since this case was heard, we have had produced to us a copy of a judgment pronounced a twelvemonth after the decision of this case in the Court below (a), in which it

(a) After the case had been argued upon this reserved point, and before final judgment was delivered, the appellant's Counsel handed in to their Lordships a copy of a case, No. 405, Appeal, lakheraj, heard before the Special Commissioner, at Moorshedabad, on the 31st December 1838. This case was extracted from the Calcutta Monthly Journal, Vol. V. Pt. I. (1839), p. 61 : the material part,

was held that the Regulation did apply to a case similar to that now before this Court.

Upon the whole, therefore, their Lordships are of opinion, that upon these grounds they must reverse the judgment which has been pronounced by the Special Commissioner, but under all the circumstances they think there should be no costs given either in this Court or in the Court below.

The 18th July 1854.

Present:

Lord Justice Knight Bruce, Sir Edward Ryan, Lord Justice Turner, and
Sir John Patterson.

*Joint Hindoo Family—Separate Property—Benamsee Purchase—Presumption of
Hindoo Law—Onus Probandi.*

On Appeal from the Supreme Court at Calcutta.

Gopeekristo Gossain

versus

Gungapersaud Gossain.

The presumption of Hindoo law, as to a joint undivided family, is that the whole family property is joint, and the *onus probandi* is on any party claiming any part of such property as separate property.

Where a purchase of real property is made by a Hindoo in the name of one of his sons, the presumption of Hindoo law is that it is a *benamsee* purchase, and the *onus* is on the party in whose name it was purchased to prove his sole title to the legal and beneficial interest in such property.

The purchase of a talook in Bengal by a Hindoo in his eldest son's name, though the conveyance was in the English form of lease and release, was held to be *benamsee*; the son being declared a trustee for the father, and the talook part of the father's estate.

Knight Bruce, L. J.—In this appeal two questions of importance arise, one of fact, material only to the particular parties to this litigation; the other of law, interesting, not only to them, but to society at large among the natives of India, at least among the natives of Bengal. The questions arise in this way: a wealthy native of the name of Rogoram Gossain, employed as a Banian, at Calcutta, and having also mercantile concerns of his own, made at different periods of his life

relating to the operation of Reg. II of 1805 s. 2, as a bar to the claim of Government, was as follows:—

"The appellants have filed a deed under seal of the Khalsa or Dewanee, and the signature of the President of the Committee of Revenue, H. Cotterell, proving possession of their lakheraj land, dated 5th July 1775, and which had been duly registered and countersigned by H. Vansittart, Persian translator of that Office. The period limited by the Regulation now in force for prosecution, in such cases, on the part of the Government, ended, and the right to institute a suit to assess the land, lapsed on 5th July 1835. Whereas this prosecution was not commenced till 16th September 1836, or fourteen months and eleven days after the expiration of the limitation fixed by Reg. II of 1805. The Government pleader wished to make the institution of the suit date from 1st May 1793, that is to say, from the institution of Reg. XIX; but this cannot be admitted. Reg. XIX of 1793 was not the commencement of a suit to be 'heard,' tried, and determined; but the enactment of trying the validity of claims, and declaring what should be valid and what invalid; and that Regulation, moreover, contained a section (twelve) especially providing that no period of limitation shall bar the claim of Government; but this section has been repealed by Reg. II of 1819 s. 2 cl. 2, and since which it is no longer 'in force,' as required by cl. 2 s. 2 Reg. II of 1805; from the time of which enactment, the limitation of sixty years by the latter Regulation for Government claims comes into force generally instead of it, takes its place, and cannot be set aside for the benefit of the revenue, any more than the bar of twelve years could be set aside for the benefit of a private individual.

"Now the cause of action in this case, is the non-payment of revenue. This bar existed more than sixty years at the time the first notice, in this case, was served; the limitation fixed has been passed, and the claim has lapsed. I, therefore, reverse the Collector's decision.

purchases of immoveable property in other names than his own; some of these purchases being made in the names of his sons, and some in the name of his son-in-law and of his brother. It is very much the habit in India to make purchases in the names of others, and, from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as "*Benamée* transactions"; they are noticed, at least, as early as the year 1778, in Mr. Justice Hyde's notes, where, in a case that came before him in that year, *Doe dem., Tilluck Seal v. Gour Hurry Day* (Morton's, December, 249), the practice is thus mentioned: "In mere personal demands, such as Bengal bonds, the Courts have upon consideration determined that the action may be brought in the name of the person whose name is on the instrument, though it should be proved that he had no real interest in it. And the Court has so far complied with the very general practice in this country of using the names of other persons in mere personal demands, that in many cases the plaintiff had recovered on notes not in his own name, but in some other name, giving evidence that the transaction was really his; such, for instance, that the money lent was his, and that he took the bond in the name of another." Then he speaks thus in reference to real estate: "But it cannot be allowed to be both ways; in the case of a dispute of land, without directly contradicting those former decisions of the Court."

In a much more recent case, which occurred in Sir Edward Ryan's time, *Maha Raneé Bussunt Comaree, v. Bullobdeb* and others, reported in *Fulton*, 383, which report Sir Edward Ryan informs us is substantially accurate, it is said: "As far as the evidence goes, for there was no proof of the deed, the transaction is a simply *benamée* one, in the name of the complainant, but in truth for the benefit of Rajah Tez Chunder. It may be for religious purposes, but the question raised, whether the Court will recognise a *benamée* trusteeship, or a trust upon a trust, does not arise. It being once established, then, that the transaction is '*benamée*,' the circumstance of the receipts being in the name of the complainant proves nothing, that being in accordance with *benamée* usages. The complainant, therefore, has no title to call for the account, and the bill must be dismissed."

Other cases were mentioned in the course of the argument, which came before the Sudder and other Courts, to the same effect. The law upon this subject was recognised by the Judicial Committee, in 1843, in the case of *Dhurm Das Pandey v. Mussamut Shama Soondri Dibiah* (a) (3 Moore's Ind. App. Cases, 229), where Lord Campbell, in delivering the opinion of the Court at page 240, says: "We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan (whose most valuable assistance we have in this case, and it gives me a confidence that I should not otherwise have felt), that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore, I think that so far on this part of the case no difficulty can be entertained, and that the whole of the property must be considered as joint property."

It is clear, and their Lordships are confirmed by the opinion of Sir Edward Ryan, that the knowledge and assent of the person in whose name the purchase is made is immaterial: to repeat the language of Lord Campbell, the criterion is, the quarter from which the money comes, and in the greater number of instances of *benamée* purchases they are made in the names of persons ignorant at the time of their being so made. In the present instance there is no question but that all the money was provided by Rogoram Gossain; that is indisputable. I do not allude now to whether the money was the joint property of Rogoram Gossain and his brother. It is clear it was not the money of the individual in whose name the purchase was effected. If then the person in whose name the purchase was

effected had been a stranger in blood, or only a distant relative, no question could have arisen ; he would have been *primâ facie* a trustee, and if he desired to contend that the *primâ facie* character of the transaction was not its real character, the burthen would have rested on him ; but the individual in whose name the present purchase was effected was the son, and at that time the only son, of the person who made the purchase, and whose money it was, and it has been contended that that circumstance changes the presumption, and that what would be presumption in the case of a stranger does not exist between father and son ; that the presumption is advancement, and that, therefore, the burthen of proof is shifted. Now, on this, as far as their Lordships can learn, there is no authority in Indian law, no distinct case, or *dictum*, establishing or recognising such a principle, or such a rule. It is clear that in the case of a stranger the presumption is in favor of its being a *benamée* transaction, that is a trust ; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different ; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris*. Probable as it may be, that a man may wish to provide for his son to a certain extent, and though it may be his duty to do so, yet there are other considerations belonging to the subject ; among others, a man may object to making his child independent of him in his lifetime, placing him in such a position as to enable him to leave his father's house and to die, leaving infant heirs, thus putting the property out of the control of the father. Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances ; but in India there is what would make it particularly objectionable, namely, the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one ; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequences would follow as where several sons were in being. The note on this subject is clearly stated in W. H. Macnaghten's "Principles of Hindoo Law," which we learn from Sir Edward Ryan is cited as an authority in the Courts of Bengal. In the first volume, p. 2, he says : "The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle, that is, by the death of the owner (natural or civil), or his voluntary abandonment. In ancestral real property the right is always limited, and the sons, grandsons, and great grandsons, of the occupant, supposing them to be free from those defects, mental or corporal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself ; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another. With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility. The property of the father being thus restricted in respect of ancestral real

property, and wills and testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be set aside, where they are at variance with the law ; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime. A will is nothing more or less than the legal declaration of a man's intentions, which he wills to be performed after his death ; but willing to do that which the law has prohibited, cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a will in the sense in which it is understood in the English law, is wholly unknown to the Hindoo system ; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may be done *inter vivos* may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another, without sufficient cause. This has been declared in the Dayabhaga to be a precept, not a positive law ; and it is therein laid down, that a gift or transfer under such circumstances is not null ; for a fact cannot be altered by a hundred texts. There is nothing inconsistent in this, as the doctrine is rather confirmatory of the text, which declares the absolute nature of the father's power over such property ; but it has been held to extend to the legalising of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or in other words, to signify that an act may be legally right though morally objectionable."

It is their Lordships' opinion, therefore, that notwithstanding the respondent was the only son of Rogoram Gossain when the purchase was made, the objection in point of morality and of religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed ; it forms an objection against importing into the Hindoo law that rule of positive law which exists in England. I have omitted to observe that *benamee* purchases in the names of children, without any intention of advancement, are frequent in India ; that is recognised in many cases, and, among others, in that of Amaree Tewaree v. Rai Rugahoo Bun Suhai (3 Ben. Sud. Dew. Rep., 366), where may be found this statement : "The present case does not appear to be at all of a nature with those *benamee* transactions which are prohibited by the Regulations, as Sheo Suhai, in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply."

Their Lordships are, therefore, satisfied that according to the law by which this case must be governed, the presumption in favor of its being a *benamee* transaction is different from that which would have existed by the law of England. It is, therefore, upon this point of view that their Lordships must look at the evidence, and to this test it must be submitted. In this case it is on the respondent to prove whether what was *prima facie* the nature of the transaction, was really not so. It might, of course be a very different thing if the burthen of proof were the other way, and the appellant had to show the opposite state of the case. Now, the Supreme Court, without saying it, has held that the presumption was not against the respondent, and has certainly not held that it was in favor of the

appellant, and this is a position of law on which their Lordships find themselves compelled to differ from the able judgment under review. This relieves the case from the difficulty pressed, that the case ought to be very strong before, on a mere question of fact, a Court, constituted as this is, should dissent from the Court in India, before which the witnesses were examined, and which possessed such peculiar means for arriving at a correct conclusion. We have, as I have said, to look at the evidence from a different point, and to submit it to a different test. Now, on this evidence their Lordships are not sure it would be right to dissent from the expressions on the subject in the very able judgment delivered by Mr. Justice Colville, in the name of the whole Court ; one is that in which he speaks of the evidence as unsatisfactory at best, and the other is this : " Now, although several witnesses have been examined, and a large mass of documentary evidence has been put in on both sides, we cannot say that the evidence, on the one side or on the other, is conclusive upon the question of intention." If that is a correct view of the evidence, as it is likely to be, the result is favorable to the appellant and not to the respondent, because the burthen is on the respondent, and the evidence being assumed to be correctly viewed in the passages I have just stated, he does not discharge himself of the burthen. To enter into the evidence a little more in detail, the grounds on which the respondent relies, are the age of the respondent at the time of the purchase, the English form of conveyance, the accounts kept by the father in his books, including particularly the debit of Rs. 64,000 in the name of the respondent, the different mode in which this purchase with the purchase of Chattra were treated in the books of the father from purchases made in the names of other persons ; a document submitted to him as a case in another cause, containing a statement of his title, though this is claimed on each side ; certain letters relating to the property ; certain memorials addressed, one to Mr. Thompson, the Deputy Collector of Hooghly, and another to the Deputy Governor of Bengal, relating to the tenure of the property, and parol evidence as to conversations ; to which may be added the evidence of the conduct of the respondent and appellant after their father's death, which happened in 1842, the benefit of which is claimed on each side.

With regard to the age of the respondent, their Lordships are of opinion, that no weight is to be attributed to it : they believe it to be as usual to buy in the names of minor children as of others, and in this particular family another purchase, the Buttollah house, was made in the name of this very child, the respondent, when not much older than he was when the purchase in question was made. The form of the conveyance was insisted on to show that the father wished the English law to apply in this case ; but their Lordships are of opinion, that though the observation was a fair one to make, it would not be right to give weight to a deduction which, if I may say so, seemed to be too far fetched. As to the books, it seems impossible to extract from them anything favorable to either side, for their Lordships are not satisfied that they are not kept irregularly. As to the price of Rs. 64,000 debited to the respondent, it does not appear until some years after the purchase—a singular mode of keeping the accounts in any event ; but considering the other entries in the books, the conclusion to which their Lordships would come, if obliged to come to any, would be, that it was on account of a transaction in the name of a person rather than an account with a person. As to these talooks being treated after a certain time in a different way to the other purchases, this might give rise to some observations, but when the question arises whether an estate *prima facie* belonging to one shall be taken from him on account of entries in ill kept books, which may be accounted for in many ways, and he whose books they were had gone to his grave, it appears too unsafe to give this particular explanation to a circumstance which is possibly unsusceptible of any explanation, and which the father, if living, would probably have not been able to explain. With regard to the evidence of Carter and Storm,

property, and wills and testaments being wholly unknown to the Hindoo law, it follows, for the sake of consistency, that they must be set aside, where they are at variance with the law ; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime. A will is nothing more or less than the legal declaration of a man's intentions, which he wills to be performed after his death ; but willing to do that which the law has prohibited, cannot be held to be a legal declaration of a man's intentions. There may be a gift in contemplation of death, but a will in the sense in which it is understood in the English law, is wholly unknown to the Hindoo system ; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may be done *inter vivos* may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another, without sufficient cause. This has been declared in the *Dayabhaga* to be a precept, not a positive law ; and it is therein laid down, that a gift or transfer under such circumstances is not null ; for a fact cannot be altered by a hundred texts. There is nothing inconsistent in this, as the doctrine is rather confirmatory of the text, which declares the absolute nature of the father's power over such property ; but it has been held to extend to the legalising of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or in other words, to signify that an act may be legally right though morally objectionable."

It is their Lordships' opinion, therefore, that notwithstanding the respondent was the only son of Rogoram Gossain when the purchase was made, the objection in point of morality and of religion was a circumstance of conduct so strong, according to Hindoo principles, that it is not lightly to be assumed ; it forms an objection against importing into the Hindoo law that rule of positive law which exists in England. I have omitted to observe that *benamee* purchases in the names of children, without any intention of advancement, are frequent in India ; that is recognised in many cases, and, among others, in that of *Amaree Tewaree v. Rai Rughoo Bun Suhai* (3 Ben. Sud. Dew. Rep., 366), where may be found this statement : "The present case does not appear to be at all of a nature with those *benamee* transactions which are prohibited by the Regulations, as Sheo Suhai, in making the purchase in the name of his eldest son, acted only in conformity to the general usage and custom of the country, against which the prohibitory enactment was never intended to apply."

Their Lordships are, therefore, satisfied that according to the law by which this case must be governed, the presumption in favor of its being a *benamee* transaction is different from that which would have existed by the law of England. It is, therefore, upon this point of view that their Lordships must look at the evidence, and to this test it must be submitted. In this case it is on the respondent to prove whether what was *prima facie* the nature of the transaction, was really not so. It might, of course be a very different thing if the burthen of proof were the other way, and the appellant had to show the opposite state of the case. Now, the Supreme Court, without saying it, has held that the presumption was not against the respondent, and has certainly not held that it was in favor of the

appellant, and this is a position of law on which their Lordships find themselves compelled to differ from the able judgment under review. This relieves the case from the difficulty pressed, that the case ought to be very strong before, on a mere question of fact, a Court, constituted as this is, should dissent from the Court in India, before which the witnesses were examined, and which possessed such peculiar means for arriving at a correct conclusion. We have, as I have said, to look at the evidence from a different point, and to submit it to a different test. Now, on this evidence their Lordships are not sure it would be right to dissent from the expressions on the subject in the very able judgment delivered by Mr. Justice Colvile, in the name of the whole Court; one is that in which he speaks of the evidence as unsatisfactory at best, and the other is this: "Now, although several witnesses have been examined, and a large mass of documentary evidence has been put in on both sides, we cannot say that the evidence, on the one side or on the other, is conclusive upon the question of intention." If that is a correct view of the evidence, as it is likely to be, the result is favorable to the appellant and not to the respondent, because the burthen is on the respondent, and the evidence being assumed to be correctly viewed in the passages I have just stated, he does not discharge himself of the burthen. To enter into the evidence a little more in detail, the grounds on which the respondent relies, are the age of the respondent at the time of the purchase, the English form of conveyance, the accounts kept by the father in his books, including particularly the debit of Rs. 64,000 in the name of the respondent, the different mode in which this purchase with the purchase of Chattra were treated in the books of the father from purchases made in the names of other persons; a document submitted to him as a case in another cause, containing a statement of his title, though this is claimed on each side; certain letters relating to the property; certain memorials addressed, one to Mr. Thompson, the Deputy Collector of Hooghly, and another to the Deputy Governor of Bengal, relating to the tenure of the property, and parol evidence as to conversations; to which may be added the evidence of the conduct of the respondent and appellant after their father's death, which happened in 1842, the benefit of which is claimed on each side.

With regard to the age of the respondent, their Lordships are of opinion, that no weight is to be attributed to it: they believe it to be as usual to buy in the names of minor children as of others, and in this particular family another purchase, the Buttollah house, was made in the name of this very child, the respondent, when not much older than he was when the purchase in question was made. The form of the conveyance was insisted on to show that the father wished the English law to apply in this case; but their Lordships are of opinion, that though the observation was a fair one to make, it would not be right to give weight to a deduction which, if I may say so, seemed to be too far fetched. As to the books, it seems impossible to extract from them anything favorable to either side, for their Lordships are not satisfied that they are not kept irregularly. As to the price of Rs. 64,000 debited to the respondent, it does not appear until some years after the purchase—a singular mode of keeping the accounts in any event; but considering the other entries in the books, the conclusion to which their Lordships would come, if obliged to come to any, would be, that it was on account of a transaction in the name of a person rather than an account with a person. As to these talooks being treated after a certain time in a different way to the other purchases, this might give rise to some observations, but when the question arises whether an estate *prima facie* belonging to one shall be taken from him on account of entries in ill kept books, which may be accounted for in many ways, and he whose books they were had gone to his grave, it appears too unsafe to give this particular explanation to a circumstance which is possibly unsusceptible of any explanation, and which the father, if living, would probably have not been able to explain. With regard to the evidence of Carter and Storm,

and the letter to Storm, and the memorials to Mr. Thompson and Colonel Morison, their Lordships think they are explained by the legal nature of the title. In one case before Sir Edward Ryan, which I mentioned just now, the mode of giving receipts for rent and management was held to pass no legal ownership, and their Lordships think these documents are to be explained on that theory. Parol evidence is given of conversations during the life of the father, who died in 1842, but at this distance of time their Lordships think it would be unsafe to allow the title at law to be affected by them. Their Lordships having to consider the evidence from a different point of view to the Supreme Court, are of opinion, that if this were a time close on the death of the father, their view of the evidence would be rather unfavorable, than favorable, to the respondent ; but it is sufficient that the evidence prove neither one thing nor the other. This, perhaps, would be a just estimate of it ; but if not, the conclusions which I have before given would be.

We then come to the conduct of the brothers after the father's death—conduct to which much weight cannot be attributed either way ; it would seem that parts of their mode of dealing with the property are in favor of respondent, and parts in favor of the appellant, but no part of their conduct can be considered as wholly belonging to or supporting the theory of either party ; they continued a considerable time after the death of the father, and after the respondent came of age, to receive jointly the proceeds of the talook in question, and this conduct of the respondent is rendered remarkable by the evidence of Ruggobanchunder Lahoree, the brother-in law of the respondent. His evidence is in these terms :—“ I am the son-in-law of the late Rogoram Gossain. I married his daughter in 1836, and have lived ever since in his family house at Serampore, and live there still. The title deeds of the family property were kept in a room adjoining one which Rogoram used as his office, in his family house ; all the family documents were kept in that room ; some papers may have been lying about in another room, but, generally speaking, all deeds and papers were kept in the room I speak of. I know the two talooks, Gheritty and Chattra. There were title deeds belonging to both of them ; and in the lifetime of Rogoram, these deeds were kept in separate tin boxes, in the room I have spoken of, next to Rogoram's office, and of which Rogoram himself kept the key up to the time of his illness. He then handed the key to me, and I retained it up to the time of his (Rogoram's) death ; and I then gave it to Gungapersaud Gossain, Rogoram's eldest son. I gave him the key about six or eight months after Rogoram's death, and it may have remained with him ever since. Rogoram died in 1842 ; and his son, Gungapersaud, is about twenty years old, and Gopeekrist a year or two younger.” On his cross-examination he says : “ I gave up the key to Gungapersaud after his father's death. Rogoram gave me the key when he became ill, and told me to give it to Gungapersaud.”

We must then remember the whole course of conduct on the part of the respondent and the appellant, who were in joint receipt of the rents, having possession of the title deeds, and who, therefore, knew what the title was. Stress has been laid on the accounts kept of Mr. Rattray's loan, by which it was said to appear that a sum of money which the appellant refused to lend, was carried to the respondent's account as for Gheritty. Their Lordships are of opinion that it would be unsafe to give such a character to the transaction ; they think that it probably was, that the sum was to be debited in some way to the respondent rather than to the appellant, and that it was not intended to affix any particular character to the account in which it might be found. Their Lordships, however, think that the views which the sons may have taken of the matter, are of very little importance ; they may have mistaken their rights, and their conduct can only be material as being that of persons knowing what the father's intention was, and as, therefore, proving that intention ; but it appears that they had no means of knowledge beyond what the Court at Calcutta and the Court here have,

for there is no trace of any communication having passed between their father and them, and, therefore, their conduct since the father's death does not afford any valid ground for changing the view of the case which would have prevailed at the death of the father if it had just occurred.

On the whole it is not necessary to express any dissent, or, at least, to any great extent, from the view taken by the Supreme Court of the evidence. The Court thought it was not conclusive, their Lordships may say the same; the presumption, however, remains in favor of the appellant; but if the evidence is to be taken as of any value, their Lordships' view of it is rather in favor of the appellant than of the respondent. Another point arises, but the case seems hardly touched by the pleadings. It appears that Rogoram Gossain and his brother formed a joint family, their property was joint, and there is no proof that the Rs. 64,000 were not part of the joint property; if they were, and perhaps the true inference may be that it was joint property, both families would have been interested in these purchases; but the family of the father's brother are bought off: this would leave the property part of the joint family property of Rogoram Gossain, in which case it would belong to the two sons. If this view is open on the pleadings, which we do not say, the appellant would on this ground be entitled. On the whole, then, their Lordships feel bound respectfully to dissent from the judgment of the Supreme Court. The dismissal of the Bill cannot, therefore, stand; there are no costs to be dealt with, the Bill having been dismissed without costs. Their Lordships will declare that the purchase was a *benamee* purchase, and will also declare the party in whose name it was made was a trustee for the father, and that the property in question was part of the father's estate at the time of his death.

Mr. Dickens suggested that the declaration should extend to Chattra, to avoid chances of further litigation between the parties, which was agreed to by the appellant's Counsel and the Court.

Their Lordships made the following report, which was confirmed by Her Majesty's Order in Council :—

Declare that the purchases by the late Rogoram Gossain, in the pleadings mentioned, of, amongst others, the talooks, Gheritty and Chattra, with their appurtenances, severally comprised in the indenture of lease and release, dated the 12th and 13th days of July 1825, and the indenture of lease and release dated the 29th and 30th days of January 1832, in the name of the Appellant and respondent respectively, as in the pleadings mentioned, were and are *benamee* transactions, and that the appellant and respondent thereby severally became, and thenceforth continued, and were, up to and at the time of the death of their father, Rogoram Gossain, trustees respectively for him, as the absolute and beneficial owner of each of the two talooks respectively, with their appurtenances aforesaid. And that it ought to be further declared that talooks, Gheritty and Chattra, respectively, with their appurtenances aforesaid, were, at the time of the death of Rogoram Gossain, integral parts of the estate and property of him, Rogoram Gossain, and that execution upon the judgment (if any) in the action of ejectment in the pleadings mentioned, and all proceedings in the action, ought to be stayed, and that in case the possession shall have been changed under any execution issued upon the judgment, such possession ought to be restored as the same stood before such execution was issued; and their Lordships are further of opinion that the cause ought to be remitted back to the Supreme Court, with directions to the Supreme Court to give effect to this report and to Her Majesty's Order made thereupon; and their Lordships not thinking fit to deal with the costs incurred as aforesaid, do recommend the Supreme Court to deal with the costs of the parties incurred and to be incurred in the Court below, as to the Supreme Court, having regard to the declarations and directions aforesaid, shall seem just.

The 22nd June 1855.

Present :

The Right Hon. T. P. Leigh, Lord Justice Knight Bruce, Sir E. Ryan,
Lord Justice Turner, and Sir John Patteson.

Hindoo Law—Succession—Raj—Family Usage—Tirhoot Zemindary.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Baboo Gunesh Dutt Singh

versus

Maharajah Moheshur Singh and others.

By the general law prevailing in Tirhoot, and indeed generally under the Hindoo law, estates are divisible amongst the sons when there are more than one son ; they do not descend to the eldest son, but are divisible amongst all, except as to a Raj or Principality, which, in its very nature, excludes the idea of division.

The general law with respect to inheritance, as well as other matters, may, in the case of great families where it is shown that usage has prevailed for a very long series of years (for at least two centuries in this case), be controlled, unless there be positive law to the contrary.

Upon a consideration of the circumstances of the case, the zemindary of Tirhoot was held to be a Raj, and the usage to prevail there, whereby the reigning Rajah has the power of abdicating, and by deed assigning the Raj in favor of his eldest son or next immediate male heir.

Right Hon. T. P. Leigh.—In this case their Lordships do not think it necessary to trouble the Counsel for the respondents. We had very little doubt at the termination of the argument for the appellant what judgment it would be our duty to recommend Her Majesty to pronounce ; but we were extremely unwilling to intimate any opinion upon that subject until we had an opportunity, by a careful examination of the whole proceedings, of ascertaining whether there was anything to be found in them which would either alter or confirm that impression. We have had an opportunity of making that examination, and the result of that is to remove all doubt from our minds as to the utter absence of any ground for the present appeal.

Before adverting to the circumstances of the case, either of fact or of law, which are in controversy, it may be convenient to state those as to which either there is no dispute, or as to which, in the opinion of their Lordships, all possibility of their being successfully disputed is removed by the evidence.

In the month of July 1775, Madhoo Singh succeeded to the zemindary of Tirhoot. He succeeded to the zemindary on the death of his brother Pertab Singh, who had previously been in sole possession of it, Madhoo Singh during the lifetime of his brother being in possession of a pergunnah called Dhurumpoor, as a Baboo allowance, which is a provision for younger sons, as an appanage of the estate. Madhoo Singh had five sons ; Kishen Singh his eldest son, died without issue in his father's lifetime, and a younger son called Ramapat Singh was adopted into another family, and ceased therefore to be a son of Madhoo Singh. There remained, therefore, three sons of Madhoo Singh, namely, Chuttur Singh his eldest son, Keerut Singh his second son, and Gobind Singh his third son.

On the 18th June 1807, Madhoo Singh, thinking himself at the point of death, and being, in truth, extremely ill, abdicated the zemindary, and retired to Benares, or to the banks of the Ganges, for the purpose of dying there, and on that day he made a deed, upon which, in a great measure, the merits of this case turn.

By that deed, after reciting that he was unwell, and was retiring from the world to die upon the Ganges, he transferred the Raj as he called it, or the zemindary in question, to his eldest son, Chuttur Singh ; and by the same deed he declared that he had already given one pergunnah, Jeedee, to his second son, Keerut Singh,

by way of provision as a Baboo, and another pergunnah, Burkarpoor Ragho, to his son Gobind Singh as a similar provision for him as a younger son. He made a similar disposition of certain villages as a provision for his daughter. This deed was executed on the 18th day of June. On the 27th of that month he presented a petition to the Judge of the Zillah Court of Tirhoot, stating the terms of this deed, and praying that it might be carried into effect. On the 4th July 1807, he presented a similar petition to the Collector, praying that in his department this instrument might be carried into effect by entering the estates in the names to which the deed transferred them. On the 12th August 1807, an order was made by the Collector accordingly, directing those transfers to be entered; and on the same day the Collector issued an order to the tenants, ordering them to pay their rents and assessments according to the terms of this deed; and on the 14th of the same month, the Zillah Judge of Tirhoot sent a message or note to Chuttur Singh, stating that he had received communication of this instrument, and that Chuttur Singh should be put in possession, and remain in quiet possession according to the terms of that deed.

With respect, therefore, to this instrument, and to the fact of its having been made, of its being considered valid, and carried into execution, at least adopted by all the authorities of the country, there can be no doubt.

But all this takes place during the time that Madhoo Singh was alive; he continues to live till the month of November 1807; no doubt is ever intimated by him, no suspicion suggested by him of any fraud having been practised upon him, or of there being any invalidity in this instrument, and upon this deed the possession in all respects, both with respect to the Raj, if it be a Raj, and with respect to the pergunnahs given to those younger sons as Baboo allowances, is taken and confirmed according to the terms of the deed.

Thus matters continued till the month of May 1811, when Keerut Singh, the second son, who was in possession of the pergunnah Jeedee, institutes a suit against his brother, Chuttur Singh, for the purpose of obtaining one-third of the zemindary. In the plaint in that suit he states the facts which I have alluded to, namely, the situation of the family, and the possession of the Raj by Chuttur Singh. He then alleges that the pergunnah which he held was given to him by his father upon his investiture with the Brahminical thread, and that he was not by the acceptance of the pergunnah deprived of his general rights in the zemindary; and then he alleged that the zemindary was divisible amongst all the sons, and that he, therefore, as one of the three sons, was entitled to a third share. He stated that his brother Gobind Singh was then a minor, but that when Gobind Singh came of age, Gobind Singh would claim his third, or might claim his third of the zemindary.

On the 7th May 1812, Chuttur Singh put in his answer in that suit, and he there distinctly alleged that the possession of the pergunnah held by Keerut Singh was under the terms of this deed; he denied the fact of any grant having been made upon the investiture, and insisted upon the validity of the deed, under which he was in possession, and of his right as sole heir to this zemindary.

On the 22nd June 1814, the suit of Keerut Singh was dismissed, and it was dismissed upon this ground, that totally independent of all family usage whatever, or of what the law might be if no such deed as that of 1807 had been assented to by the sons, Keerut Singh had taken possession of pergunnah Jeedee, and was then in possession under the terms of that deed; that he had, therefore, assented to the deed, and was bound by the whole effect of it.

That judgment was pronounced on the 22nd June 1814. Keerut Singh appealed against that judgment, and in the month of July 1816, he abandoned that appeal, and by a deed of compromise and adjustment distinctly recognised the title of his brother to the possession of this zemindary, of this Raj, as it is there termed, as his undivided inheritance. On the 4th September 1816, it appears

that there was a deed executed by Chuttur Singh, which it was said was connected with the deed of July 1816. Their Lordships can find no connection between those two deeds ; there is nothing in the suit which had been instituted by Keerut Singh, in which the claim which Chuttur Singh abandoned by the deed of the 4th September 1816 is raised or insisted upon by him. It never can be considered, in the opinion of their Lordships, as in the slightest degree affecting the validity or the effect, whatever it may be, of that abandonment of the appeal, that this deed was executed by Chuttur Singh. The effect of Chuttur Singh's deed was simply this: that Keerut Singh was to be put in possession of thirty-three villages, a comparatively small quantity of land, which had been given to him, not by a direct ancestor of the family, but by the Maharanee, the wife of one of those former Rajahs, or at least a member of the family. Chuttur Singh, it seems, had claimed that, not in this suit, but had claimed it, or set up some right to it, as a part of the zemindary, and, upon this deed of the 4th September, he abandoned it. The claim involved in this instrument of the 4th September 1816, is thirty-three villages, whereas the right involved in the suit by Keerut Singh is one-third of fifteen hundred villages, a large principality. There is no sort of connection between those two instruments that we can perceive, and if there were it would be idle to represent that the one could be considered as a consideration for abandoning the claim to the other.

Now, observe this takes place in 1816. Gobind Singh had been in possession (as far as a minor can be in possession during his minority) of the pergunnah which had been allotted to him, but in 1815 or 1816 he came of age. Keerut Singh, in his suit, had adverted to his claim. I rather think he was guardian of Gobind Singh ; but Gobind Singh, on coming of age, must have known, and could not have avoided knowing, the question which had been raised in this suit by his brother, Keerut Singh, and that if the possession of the pergunnah which had been held by his brother was under that deed, he could have no claim, according to the decision of the Zillah Court, to any portion of the zemindary. Now, in this state of things, what does he do ? Having full knowledge of this claim, being called upon by the circumstances of the case, if he could distinguish his case from Keerut Singh's, to point out that distinction, and assert that claim in a suit of his own, he lives for seven or eight years afterwards, he acquiesces entirely in the possession of the pergunnah ; he raises no claim to the smallest portion of the zemindary, and he dies in the month of June 1822, leaving the present appellant, his son, a minor.

Now, at the death of Gobind Singh, the present appellant was about a year and a half old. His father had remained, at all events after he came of age, for seven or eight years in the possession of this pergunnah under that title, whatever it was, by which at that time it was held. In 1837, I think, the present appellant would come of age. It is not material, but on the death of Gobind Singh, the appellant was made a ward of the Court of Wards, and during his minority the income of this pergunnah was applied to his use.

In 1839 Chuttur Singh, who had thus remained during the whole of his life in the individual possession of this zemindary, made a gift to his son, Roodur Singh, according to the family custom, as it is alleged, by which he abdicated the zemindary in favor of his son, and he soon afterwards died, and Roodur Singh took possession as sole zemindar.

On the 29th July 1839, the present appellant instituted his suit. Now, it must be observed, that he had full notice of the ground upon which Keerut Singh's suit had been decided, and the points which he had to make out, therefore, were these : that the zemindary in its nature was divisible ; that there was no deed, or no valid deed, executed which could destroy that divisibility, and that he never had assented, whatever Keerut Singh might have done, to the deed of 1807, by which what they call a partition of this family property was made.

Accordingly, in his suit, he distinctly alleges, and it is the necessary foundation of his suit, that his possession of that pergunnah had not been under the deed of 1807, but that grants had been made to each of the sons, and among them to Keerut Singh, upon their investiture with the Brahminical thread by their father; that, upon the occasion of that investiture, a grant had been made to each son, of a pergunnah, as a free gift by the father. He then disputed, as had been done in the former suit, the validity of the deed of 1807 upon other grounds, and he claimed one-half of this zemindary.

The answer put in by Roodur Singh insisted that the possession had been under the deed of 1807, and under the family usage, warranting the execution of that deed. In that answer he distinctly stated what was very important, that with respect to Keerut Singh there was not a pretence for saying that it had been made upon the investiture with the Brahminical thread. It appeared, upon the documents to which he referred, that there had been a gift made to him upon his birth by his father, as the eldest son, and that the documents in the Collector's office, and the Magistrate's office, distinctly proved that. Now, on the 31st August 1841, the replication was filed by the appellant, still persisting in his statement of this grant having been made to all the sons upon the investiture with the Brahminical thread, and then for the first time he sets up a deed which he states is dated the 14th March 1806, by which he alleges that that grant to him was made.

Now, it appears that Roodur Singh had a brother named Basdeo Singh, and when this claim was set up by the present appellant, insisting that the zemindary was divisible, and that he was entitled to one-half of it, as coming from Madhoo Singh, it occurred naturally enough to Basdeo Singh, that if that were so he was entitled to one-half of that which belonged to Chuttur Singh, and, accordingly, on the 20th September 1841, he instituted a suit, and the effect of the success of those two suits would have been this: in the first place, one-half of the zemindary must have gone to the present appellant, and one-half of the remainder must have gone to Basdeo Singh.

Now, there was this difference, and this difference only, in the questions which were raised in those two suits. In both, the validity of the deed of 1807 and the existence of the family custom were equally in controversy. In the suit of the appellant alone, could any point be raised as to the deed of 1807 becoming valid by acquiescence of the parties. In the appellant's suit, therefore, both the family usage and the validity of the deed of 1807 were raised, and also the point whether the present appellant was or was not bound by the acquiescence of his father in the deed of 1807. These two suits involving in a great degree the same points, an order was made by which they were referred to the same judge; they were heard at the same time, and there appears to have been a reference made to the evidence in both suits. The evidence taken in one was referred to in the other. On the 31st December 1844, both these suits were dismissed. The first suit, the appellant's, was dismissed in this manner: it was said by the Court that he raised there two points, first the acquiescence, which, as they held to be decisively against him, it was unnecessary to enter into the question of family usage in that case, because that was fully done in Basdeo Singh's suit, in which equally with this it was an essential part of the case. In the two suits together, therefore, they decide that this is a Raj; that family usage exists for which the deed of 1870 was executed; that the deed of 1807 was a deed to which Gobind Singh assented, and by which the appellant, his son, is bound.

On the 10th March 1845 there was an appeal in both suits to the Sudder Court, and on the 27th February 1846 both appeals were dismissed. In August 1846 there was leave given to appeal to England. In 1850 Roodur Singh, the then Rajah, following the usage which had prevailed in this family, or was represented to have prevailed in this family, for at least two centuries, abdicated in

favor of his eldest son, the present respondent, and by an order made by the Sudder Court the respondent was substituted for him in the appeal.

Now, the questions which have been raised at their Lordships' bar, and argued with that ability which we always find in the arguments of the Counsel who have been employed in the appeal, are these : The first question is as to the validity of the deed of Madhoo Singh, and that independent of any acquiescence by Gobind Singh. Now, questions of general law of great importance have been raised, but which it appears to their Lordships do not really arise in the present case. We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in this district, and indeed generally under the Hindoo law, estates are divisible amongst the sons, when there are more than one son ; they do not descend to the eldest son, but are divisible among all. With respect to a Raj as a Principality, the general rule is otherwise, and must be so. It is a Sovereignty, a Principality,—a subordinate Sovereignty and Principality no doubt, but still a limited Sovereignty and Principality, which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families, where it is shown that usage has prevailed for a very long series of years, be controlled, unless there be positive law to the contrary. Now, it is said in this case that there is no positive law which excludes the divisibility of this inheritance, unless it be clearly proved to be an ancient Raj, which it is denied that it is. But Reg. XI of 1793 really has no bearing upon the case, for the Regulation of 1793 is confined to cases in which there is no deed and no will executed. While there is a deed, or where there is a will, it does not give a validity to that deed or that will, which the deed or will would not otherwise possess, but it leaves it precisely where it stood before ; therefore, the Regulation of 1793, and Reg. X of 1800, and the authorities upon this point which have been referred to, do not appear to their Lordships to be at all involved in the consideration of the present case.

The question, therefore, is, first, was this a real and true Raj ? Now, upon looking into the evidence upon that point, one can hardly avoid expressing some surprise that even the strong necessity of the case could induce a doubt to be raised upon that point at the bar ; because, what is the evidence ? In the first place, it is not disputed that a considerable time before this country fell under the dominion of the East India Company, this was a Raj, with all the circumstances attending a Raj ; that it was treated as such by the supreme authorities ; that it was treated as such by the vassals or tenants of the Raj ; and that from that time to the present no question as to its being a Raj has existed.

But the evidence goes a great deal further, and it is some satisfaction to their Lordships in this case to find that there is at length one case (I think I may almost say it is the first I have ever seen in my experience in this Court), in which the parol evidence given in the case upon the part of the respondents is really worthy of the utmost attention. It is given by persons not liable to any imputation whatever, either in respect of their position, or in respect of the form and mode in which they gave their testimony.

Now, the evidence which was given in this case is produced from nineteen witnesses, fourteen or fifteen of them, if not more, being zemindars or talookdars, persons of station holding property paying a large revenue to the Government, some Rs. 3,000, some Rs. 5,000, some Rs. 6,000, some Rs. 8,000 ; all well acquainted with the country, whose ancestors, as it appears in many instances, for twelve generations, in some for longer, and in others for a less period, have held lands in this district, who were interested therefore in knowing what the nature of this property was ; and what is the account which they give ? Why, the account which they give is this that this was a Raj. Independent of this, however, there

is the evidence of three Canoongoes or record-keepers, persons in this part of India especially, as it appears from reports which we have had occasion to look into for another purpose, entitled to great credit, and who tell us that that which is stated in the parol testimony, as a tradition from their ancestors by other witnesses, is consistent with their knowledge collected from the records which have been in their possession. The account, therefore, which they give upon that point is this : that before the time of Mohesh Thakoor, above 200 years ago, before the original founder of this family, Mohesh Thakoor, came into possession of it, it was a Principality, that it was granted by the Emperor to this first founder of the family, and that ever since it has continued in this family, one and indivisible ; but to that I will advert presently. Now, what do they tell us ? They are asked how they know this ; why, they say, we know it for this reason, that the whole of this Sircar Tirhoot was originally included in it. The whole of that great property was included in the possession of this family ; they were the only rulers whom we knew ; and we knew they were the rulers, and we knew who they were, for this reason, that we and our ancestors held our lands from them, and until the East India Company assumed the dominion over this territory, we paid our rents as vassals or as holders to the lords of the zemindary, who were the rulers of the country, we knowing nothing of the Emperor from whom the grant to this founder of the family was made, and we find the seal with the fish, which is not in its own expression very intelligible, is stated to be an emblem of sovereignty or of high nobility granted by the Emperor to great families ; and if it were further necessary to enquire into the antiquity of this zemindary before the possession of the East India Company, there is evidence which admits, in the opinion of their Lordships, of no doubt whatever that this was a Raj ; was a Principality indeed, the remnant of it, as it appears, extending even at the present time to about 1,500 villages.

Well, then, in the next place, is there usage ? Is the family usage proved ? Now, the witnesses to whom I have already referred, one and all, speak of its being not only a Raj, but without divisibility. They state further that, according to their knowledge, it has always been treated as indivisible, and that there is no instance to be found anywhere in which there are two Rajahs to be found upon the records of the Supreme Government as coparceners of this zemindary. Now, is that consistent with the evidence on the other side ? Why, evidence on the other side there is none. The case has been examined with the greatest ability and ingenuity, and in different parts of the case circumstances have been pointed out as to which it is said, " Why, it is difficult to reconcile that with the statement." Why, we are dealing with usage continued for 200 years, and when you have no other knowledge than that which can be collected, after a great lapse of time, with the ignorance of those circumstances which might explain difficulties, it is impossible but that there should be difficulties ; but I must say that this is a case in which there are as few difficulties, at least in my judgment, as I have ever seen.

Now, let us see what the evidence is. The pedigree put in by the respondent describes the original founder of the family and many of his successors, not as " Rajahs " or " Maharajahs," but as " Thakoors : " why, really, that is a circumstance which is utterly unimportant. The question is not, What was the title or designation of the owner ? but, What was the nature of the property which the person held ? The term " Rajah," as it is well said, has been and may be usurped by almost anybody who is in a situation which would in any degree give countenance to it, as we find commonly enough in this country with respect to other titles. But we all know that in feudal times the greatest barons and princes in the feudal empire, in France especially at all events, held their estates without titles ; one of them, I think De Courcy, boasting that he was neither King, nor Count, but Seigneur De Courcy. It may be just the same with this

family. They may be called "Thakoors," they may be called "Rajahs," but that makes no difference. Nay, these very Baboos themselves, the younger sons of the family, are in this very case termed Maharajah Baboo So-and-so.

But then it is said (and it is the circumstance which alone appears to their Lordships to have any weight in this case), But we give you evidence that, with respect to one of those parties, Ram Singh, there was a joint possessor of this zemindary, and we prove it in this way:—Nurinder Singh was in possession as Rajah, and during the time that he was in possession as Rajah, from about 1745 down to 1752, we find several grants made by Ram Singh of property within the limits of this great zemindary, most of them made for religious uses; but whether or not so made, it appears that one or two of those grants were subsequently confirmed by the Supreme Court. In the first place, it is quite consistent with possibility, and I should say with probability, that this Baboo would have, as the sons of the family always appear to have had, a Baboo's allowance, and that those grants were made out of that property which he held as Baboo, or out of other property which belonged to him in his individual character, and which was the subject of his own acquisition. But there is further evidence, that some of these grants were confirmed by Maharajah Nurinder; and with respect to others which were not confirmed, it is perfectly notorious to everybody acquainted with Bengal usage, that there is a very great reluctance on the part of the great proprietors to interfere with property so appropriated, whether with or without law; it is considered a sort of sacrilege so to do.

I am not aware that there are any other circumstances established in the evidence in this case which are in the smallest degree inconsistent with that usage which is proved by the witnesses to have prevailed for this great length of time, or anything which can throw doubt upon the truth of that statement.

But there is this, which really removes, as it appears to their Lordships, all doubt upon the case. This property was acquired about two hundred years ago; according to the case which the appellant is compelled to insist upon, not only was it not subject to division, but it was left to descend without disposition; it was not capable of being made the subject of disposition so as to exclude divisibility. Now, is it possible that in a period of two hundred years there should have been no division of this estate, or at least no such division as finally to divide and separate one portion of it from another? It is absolutely impossible; and can anything more strongly illustrate that impossibility than this, that if the question he raises, whether the general Hindoo law prevails or not, be decided in his favor, this zemindary would naturally be split into portions; the appellant would take one portion, Basdeo Singh would take another half of the remaining half, and the Rajah would be left with only one-fourth?

Their Lordships, therefore, are quite unable to entertain any doubt, either as to the fact of its being a Raj, or as to the fact of the usage prevailing that the reigning Rajah has the power of abdicating, and by deed assigning the Raj in favor of his eldest son or next immediate male heir; and we think that such usage is proved beyond all controversy to have prevailed in this country, and to have been acted upon in this instance.

If that be so, it is not very important to enter into the consideration of sunnuds which were commented upon by the appellant's Counsel, the different grants which are represented to have been made, beginning with that by Maheeneth Singh in the year 1690, and continuing down to the present time. Their Lordships are unable to find any reason to doubt the validity of these instruments, except with respect to one. With respect to that one, it is said, that that deed purports to bear date on the 12th June, and that the Rajah is proved to have died on the 9th of that month, and that, therefore, it could not be a genuine instrument. Well, the force of that argument depends, of course, entirely upon the accuracy with which these dates are given. Yet assuming that that instru-

ment could not be genuine, upon which their Lordships, in their present state of knowledge upon the subject, are not able to pronounce any decided opinion, and striking that instrument out of the case, all the others would remain unimpeached, and that which is the most important of all would so remain.

Then, if there were no deed, the Raj would descend indivisible ; but when we look at what has been done within the last one hundred years, there really seems to be scarcely room for the suggestion of a doubt that each of those different Rajahs has actually adopted the custom contended for, whether reasonable or unreasonable ; and, with respect to the deed in question, it would be unnecessary if that custom prevailed : and it may be observed, that though undoubtedly before the Regulation of 1793 such a deed was useful only if the zemindar abdicated in his lifetime ; yet, if he chose to retain the Raj, the deed was unnecessary as regards the Regulation of 1793 ; though it might possibly be important for other purposes.

If, therefore, the case stood only upon this, that the appellant has totally failed in making out the divisibility of this inheritance, and the invalidity of the deed of 1807, their Lordships would be clearly of opinion that he had failed altogether in the case ; but as the property is of very great value, and as we have taken the somewhat unusual course of stopping the respondent's Counsel, it may be proper for us to advert to another point, namely, whether this deed of 1807 was assented to by Gobind Singh, so as to bind his son, the present appellant ? Now, that depends entirely upon this. That Gobind Singh held possession of this pergunnah admits of no doubt ; that he took possession and held it, or that it was held for him, during his minority, and that he held it for himself during his lifetime, and that after his death it was held for his son during his minority, and is held by him up to this very hour, as it appears by the appellant's statement, are facts which admit of no doubt. The appellant says, That is very true, but I do not claim that pergunnah under the deed of 1807 ; if I do, no doubt I am out of Court : for the deed of 1807 allots it to me expressly as a Baboo allowance ; but I claim it not as a Baboo allowance, but as a distinct and absolute grant made to me upon my investiture with the Brahminical thread ; similar grants on other occasions having been made by Madhoo Singh in favor of his other sons, and I produce this deed, late it is true, in the course of these proceedings, many years after the contest had arisen—a deed, the like of which it never occurred to Keerut Singh to suggest or produce. It is in his replication, for the first time, he mentions a deed dated in the year 1806, which purports to make this grant to Gobind Singh on the occasion, as the appellant alleges, of his investiture with the Brahminical thread.

Let us see what the evidence is upon this point. He produces several witnesses to state that they saw this deed ; some of them cannot read ; some of them do not know the language ; but they say that they saw the deed on the occasion of the investiture ; that Madhoo Singh came out and declared that he had made that gift to his son, Gobind Singh. In the first place, these very witnesses swear, at least several of them do, that a similar grant was made in favor of Keerut Singh ; and after the attention of the appellant had been called to the fact that the grant to Keerut Singh was of a totally different character, in his replication he persists in that statement, and it is upon that issue that the parties go to evidence.

Now, what is the evidence ? The appellant's Counsel most candidly, as well as judiciously, withdrew that from the consideration of their Lordships by stating, "We must admit that it was a mistake." A mistake ! Why, it is a mistake which must have been within the knowledge of the parties at the time they made this allegation, for in the answer they were referred to the documents ; and what are the documents ? Why, among the documents is a grant of the pergunnah of Dhurumpoor, a portion of this estate, but such a portion that it pays eighteen lacs

of rupees a-year for revenue to Government. This grant was made to Kishen Singh upon his birth. Whether any deed was executed upon the occasion does not appear. I rather think there was not; but upon Kishen Singh coming of age in the year 1802, Madhoo Singh presented him to the Collector, stating the fact of his having made the grant eighteen years before, and stating the fact that his son had now come of age, and praying that the estate might be transferred out of his own name into the name of Kishen Singh; and that is done by the Collector. And what is the effect of that? Why, the effect is: to separate the property from the zemindary; to make Kishen Singh at once hold from the Government, to make Kishen Singh liable to pay the revenue assessed upon it, and not to the Rajah, but to the Government.

Then what is the case with respect to the other grants? They are quite different. Where an estate is granted to a younger son as a Baboo allowance, he continues to pay the rent and assessment to the Rajah; the property is never separated from the zemindary at all. The cases, therefore, of absolute grants, and of grants by way of Baboo allowance, are essentially different in their nature.

Let us see, then, in what way the pergunnahs thus given are entered in the Collector's books. If they were entirely transferred under a deed of grant, they would be transferred as such into the names of those persons to whom they were given. If they are made as Baboo allowances, they will be described as Baboo allowances, and the owners of those Baboo allowances will have to pay the revenue, not to the Government, but to the Rajah in whose Principality the property is situate. Upon that there is no question at all. We find with respect to each of those pergunnahs, the mode in which they were entered in the Collector's books, and that they are especially entered as Baboo allowances, and entered immediately in these terms:—"Jumma Wassilbakee, or revenue account for the whole year, of the pergunnah Jeedee, in the Sircar of Tirhoot, the property of Maharajah Koonwur Baboo Keerut Singh, for his support as a Baboo." "Jumma Wassilbakee, or revenue account for the whole year, of the pergunnah of Burhahpoor Ragho, in the Sircar of Tirhoot, the property of Maharajah Koonwur Baboo Gobind Singh, for his support as a Baboo." Is it possible to raise a doubt upon this? You have these entries made upon the petition of the Rajah stating that he has made the grants for the Baboo allowances; you have those grants recognised by Keerut Singh and Gobind Singh, who held them, and they settle accounts distinctly upon the footing that they are Baboo allowances; they settle accounts upon a totally different principle from that upon which they would have been settled if they had been distinct grants like that to Kishen Singh.

It is useless to make further observation upon a case which, as to this part of it, at least, is so perfectly plain. But with respect to the deed of 1806 thus sworn to by witnesses who clearly are unworthy of credit, it may be remembered that every one of those respectable landowners whose evidence is given on behalf of the first respondent distinctly state that there is no usage to grant land upon the occasion of these investitures, though there is a usage to make presents of jewels and of money, and, I think, three, or perhaps more, of those witnesses, were present at this very investiture of Gobind Singh himself, and not one of them was asked by the appellant, "Was there such a deed made?" "Did not you see that deed?" Or, "Did not you hear of this deed which is sworn to by the appellant's witnesses?"

Upon the whole of this case, therefore, their Lordships, neither upon the one point nor upon the other, are able to entertain any doubt.

They were much struck by an observation made by the appellant's Counsel upon the judgment which had been pronounced in this case; and they certainly had been led from their statement, which was a perfectly fair one, but from a misapprehension they had entertained of the nature of the two suits, to suppose that the case had been decided against Gobind Singh upon the ground of acqui-

escence, because it had been previously decided against Keerut Singh upon that ground. Now, it is quite obvious that Keerut Singh might acquiesce and that Gobind Singh might not, but the case of acquiescence as against Gobind Singh is precisely the same as, only much stronger than, that against Keerut Singh; for with respect to Gobind Singh, he never during his life at any time, either by himself or by others on his behalf during his minority, made the slightest representation of his possession of this pergunnah being otherwise than under the deed of 1807, and according to the entries made upon the Collector's books.

Their Lordships have looked through the report, which was cited by the appellant, of the case of Maharajah Koonwur Basdeo Singh v. Maharajah Roodur Singh Bahadoor, 7 S. D. A. R. 228; and it is quite clear from that report that there was other evidence, probably a good deal of important evidence, which we have not before us upon the present occasion, but which it is wholly unnecessary we should have; and we advert to that now only for this purpose, that, in dismissing the two suits at the same time, the Court below do not say, we exclude the consideration of the family custom in the appellant's suit, and we exclude the consideration of the validity of the deed of 1807, independent of acquiescence; but, having these same points raised in both suits, both being for this purpose consolidated, we will pronounce our opinion upon that point in the other suit, and upon the acquiescence in this.

Upon all these points, therefore, though the case is one of much complication, and has been argued with great ability, which might have thrown some doubt, if it had been possible that any doubt could be entertained with respect to it, their Lordships must come to the conclusion of humbly advising Her Majesty that this appeal should be dismissed, and with costs.

The 26th July 1856.

Present :

Lord Justice Knight Bruce, Sir Edward Ryan, Lord Justice Turner, Sir John Patteson, and Sir Lawrence Peel.

Mortgage—Ancestral Estate—Charge by Manager—Onus Probandi—Presumption—Trial of Issues—Construction (of Native Deeds and Contracts).

On Appeal from the Sudder Court at Agra.

Hunooman Pershad Pandey

versus

Mussamut Babooee Mundraj Koonweree.

Principles upon which the Courts in India are to decide issues depending before them.

Native deeds and contracts ought to be construed liberally, regard being had to the real meaning of the parties, rather than to the form of expression.

Under the Hindoo law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge in lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title.

The question as to the *onus* of proof in such cases is one not capable of a general and inflexible answer; but the presumption proper to be made will vary with circumstances. Thus, a mortgagee, who is setting up a charge in his favor made by one whose title to alienate he knew to be limited, must prove the facts which embody the representations made to him of the alleged deeds of the estate and the motives influencing his immediate loan; but such proof must not be required from one not an original party, after a lapse of time and enjoyment and apparent acquiescence. Where also a charge is created by the substitution of a new security for an older one, and the consideration for the older one

was an old precedent debt of an ancestor not previously questioned, the presumption will arise in favor of a consideration that binds the estate.

Under the Hindoo law, the power of a manager for an infant heir to charge an ancestral estate is a limited and qualified one to be exercised in a case of need, or for the benefit of the estate. Where the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The lender is bound to enquire into the necessities for the loan, and to satisfy himself that the manager is acting for the benefit of the estate. But if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and he is not bound to see to the application of the money. The mere creation of a charge by a manager, securing a proper debt, cannot be viewed as improvident management; and a *bond fide* creditor should not suffer when he has acted honestly and with due caution, but is himself deceived.

Mode of taking accounts when the defendant is mortgagee in possession.

Knight Bruce, L. J.—The complainant in the original suit was Lal Inderdown Singh, described in the plaint as proprietor of the Raj of Pergunnah Munsoor Nuggur Bustee. The suit was against the present appellant, the chief defendant, the mother of the complainant. The complainant sought by his plaint the possession of certain immoveable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage-bond, bearing date Assar Sooud Poornumashee 1246 Fuslee, set up by the appellant; to oust the appellant as mortgagee in the Collector's records, and to recover mesne profits.

To this suit the defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer; but the defendant alleged his title as mortgagee (except as to some *birt* lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer). The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

It is unnecessary to enter in detail into the pleadings or proceedings in the suit. It is sufficient to state that, in the result, the Sudder Ameen decided in favor of the security, dismissed the claim generally; but that on appeal from that decision, the Sudder Court decided against the security, and in substance granted the relief asked by the plaintiff, except in so far as it was abandoned.

The reasons for the decision of the Appellate Court are contained in their judgment. The Court says:—"The question with which the Court have first to deal, respects the right of the Ranee to execute the instrument before them." They then remark "that the bond itself assigns to the Ranee a proprietary character, and that it was not amongst the defendant's pleas that the Ranee acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The plaintiff, on the other hand, has throughout argued for the avoidance of the bond, by denying the Ranee's proprietary title in any way; and such being the issue joined between the parties, the Court looking to the fact that the estates in dispute unquestionably devolved on the plaintiff, to the exclusion of the Ranee, on the death of the plaintiff's father, Rajah Sheobuksh Singh, have no hesitation in declaring that even on the assumption that the Ranee voluntarily executed the bond, and received full consideration for it, the bond is not binding on the plaintiff, and that neither he nor his ancestral property can be made liable in satisfaction of it. It is needless for the Court, their enquiries being thus stopped *in limine*, to enter on the real merits of the transaction as between the Ranee and Hunooman Pershad Pandey."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the Ranee's act of assumption of proprietorship, to the further consideration whether the appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge, in

whole or in part, as a charge effected by a *de facto* manager, or proprietor, whether by right or by wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of so much weight.

This judgment may be considered under the following points of view :—

First.—Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts?

Secondly.—Did it take a right view of the relation in which the Ranee intended to stand to her son's estate? and

Thirdly.—Did it consider the point, whether the rights of these parties could wholly depend upon the question whether that relation was duly or unduly constituted?

On the first point their Lordships think it right to observe that it is of the utmost importance to the right administration of justice in these Courts that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for the decision of the real points in issue.

But their Lordships think that, if the wording of the issues be carefully considered, it will be found that the issue in substance is, whether the charge under the instrument bound the lands. The words in which the Principal Sudder Ameen states the issue on the point are: "whether it (the mortgage-bond) ought to have effect against the mortgaged villages." It was not an issue limited to the particular description or character in which this act was done, and a mis-description or error in that respect would not have been fatal to the charge. Consequently, their Lordships cannot agree with the Sudder Dewanny Adawlut, upon the first point, that the real question in dispute between these parties, namely, whether the charge bound the lands in the hands of the heir, was not substantially included in the issues which were evidently intended to raise it. Neither can their Lordships adopt the reasoning on the conclusion of the Sudder Dewanny Adawlut upon the second point as to the relation in which the Ranee meant to stand, and substantially stood, to the estate of her son.

Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. Now, what is meant by the assumption of proprietorship on the part of the Ranee which the judgment ascribes to her? It is not suggested that she ever claimed any beneficial interest in the estate as proprietor; had she done so, it would have been, *pro tanto*, a claim adverse to her son; and it is conceded by the respondent's Counsel that she did not claim adversely to her son. The terms of "proprietor" and of "heir," when they occur, whether in deeds or pleadings, or documentary proofs, may, indeed, by a mere adherence to the letter, be construed to raise the conclusion of an assumption of ownership, in the sense of beneficial enjoyment derogatory to the rights of the heir; but they ought not to be so construed unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her; that she must be viewed as a manager, inaccurately and erroneously described as "proprietor" or "heir;" and it is to be observed that the Collector takes this view; for whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as "*surburakar*."

If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient, in their Lordships' judgment, to show the real character of her proprietorship.

Upon the third point, it is to be observed that, under the Hindoo law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. Therefore, had the Ranee intruded into the estate wrongfully, and even practised a deception upon the Court of Wards, or the Collector exercising the powers of a Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, which is the case that Mr. Wigram supposed, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the Ranee's assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently even had the view which the Sudder Dewanny Adawlut took of the character of the Ranee's act, as not having been done by her as guardian, been correct, their decision against the charge without further enquiry would not have been well-founded. It would not have been accordant with the principles of the Hindoo law, as declared in *Coleb. Dig.* vol. 1, p. 302, and in the case of *Gopce Churn Burrall v. Mussamut Ishwurce Lukhee Debia* (3 S. D. A. Rep. 93), and as illustrated by the case cited for the appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say that they see any ground of probability for the assertion that the Ranee really meant to deceive the Court of Wards, or the Collector exercising its authority, by any consciously false description of herself. The title to this Raj cannot readily be supposed to have been unknown in the Collector's office, nor is it probable that the Ranee could have deceived the office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship; the plaint itself says she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the Sudder Dewanny Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence disclose, as it is contended for the respondents that it does disclose, no *primâ facie* case of charge at all on this ancestral estate, then as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which lies on the mortgagee, the complainant's title to the estate, to the mesne profits, and to the other relief is made out; but if, on the other hand, the evidence discloses even a *primâ facie* case of charge, some enquiry at least ought, as it seems to their Lordships, to have been directed.

The question then next to be considered is whether a *primâ facie* case of a subsisting charge is made out by the appellant. This question involves the consideration of two points: first, the actual *factum* of the deed; and, next, the consideration for it. First as to the *factum*. The execution of the bond by the Ranee is stated by several of the attesting witnesses. It was argued, however, on

behalf of the respondent, that the Court ought not to act on their evidence. Some discrepancies, such, however, as are not unfrequently found in honest cases in native testimony, were dwelt upon. The Sudder Ameen who decided this case originally has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the bond is the deed of the Ranee. The decision by a Native Judge, possessing the intelligence which this judgment of the Sudder Ameen evinces, on a question of fact in issue before him, is, in the opinion of their Lordships, entitled to respect; he must necessarily possess superior knowledge of the habits and course of dealing of natives, and that knowledge would be likely to lead him to a right conclusion upon a question of disputed fact. The Sudder Ameen observes, in substance, that possession went along with this bond, and that the mortgagee was inscribed in that character as proprietor on the records of the Collector. He was therefore put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further that his receipt of the rents and profits of the lands included in this conveyance would diminish, *pro tanto*, the annual income of the estate, which would come to be administered by the Ranee, and that this state of things continued for several years after the execution of the bond. The Ranee's ignorance, then, of such title, possession, receipt, and diminution, is, as the Sudder Ameen justly observes, not a probable supposition. It could be rationally accounted for only on one supposition—that the Ranee was a mere cypher, and entirely ignorant of that which was done in her name. This, however, does not appear to have been the case: she herself denied it on a subsequent contest as to the managership; and the act of the Collector in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character, as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's office, nor is it reasonable to suppose that the management would have been confided to her had such been her character. It was argued, indeed, that she may have become by that time capable; but it is to be observed that a long course of neglect and mismanagement which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the Ranee's allegations of her own competency, that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate by an officer interested in its right administration.

Their Lordships cannot but concur with the Sudder Ameen in thinking that these circumstances do materially confirm the story of the attesting witnesses as to the Ranee's execution of the deed. The story of her non-execution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is, in the opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the respondent give as to the *factum* of the instrument. The story told by the witnesses, Heera Lal and Gyapershad Patuk, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the respondent, this bond was fraudulently executed in the name of the Ranee without her sanction or knowledge, in order to fix a false charge of Rs. 15,000 in the defendant's favor, on the property of the infant Rajah. The defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses who give nearly *verbatim* the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as

true ; yet such is at once the impatience and the folly of these conspiring parties that every one of the witnesses, each of whom is described as dropping in by chance as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy, and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the concealment are both without motive according to the account which is given us. And the story of this utterly needless commission of his crime is told of a man used to business, intelligent and described by the respondents as the habitual accomplice of crafty and designing men, the *karindas*, in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the Sudder Ameen as to it.

Next, as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point ; for, according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is, *primâ facie*, to support the charge, and the *onus* of disproving it rests on the heir. For this position a decision, or rather a *dictum* of the Sudder Dewanny Adawlut at Agra, in the case of Oomed Rai v. Heera Lall (6 Sudder Dewanny, N. W. P., 218), was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate ; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger ; consequently this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the *onus* of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favor made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir ; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the

time of Sir Edward Hyde East, reported in his Decisions in the 2nd vol. of Morley's "Digest," seems the foundation of this practice. (See also the case of *Brown v. Ram Kunnee Dutt*, 11 S. D. A. Rep., 791.)

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time and enjoyment, and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, when the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable. The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances; it is a consolidating security; and as to part, at least, namely, the ancestral debt, there is, in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the appellant's favor of a consideration that binds the estate. It is unnecessary to the decision to pursue the enquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least *primâ facie* proved as against the estate. And, as to the whole charge, there is also at least *primâ facie* evidence in the admission of the plaintiff, proved by several witnesses, uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being ancestral, could not, according to the law current in the N. W. P., be charged in the hands of the heir for an ancestor's debt. But it is to be observed as to the change of security that there was a reduction of interest; it is therefore a transaction, *primâ facie*, for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th vol. of the Decisions of the Sudder Dewanny Adawlut, North-Western Provinces, incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a *primâ facie* case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to determine, for how much, if for anything, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether in taking the account between these parties, the defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the *pottah*. It is said for the appellant that the Sudder Dewanny Adawlut did not set aside the *pottah*. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage-bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage-money. Mr. Palmer contended that a stipulation, such as this *pottah* evidences, may stand in India between mortgagor and mortgagee, and that the regulations as to interest do not touch such a case. The regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage-security, and forfeiting the claim of the mortgagee to his principal and interest; but Mr. Palmer contends that, where there is no such evasion, and a *bonâ fide* and fair rent is fixed upon as representing, *communibus annis*, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct the taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that, by reason of the provision that the rent shall be a fixed one, notwithstanding losses

and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis ; but, notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and it is in accordance with the true nature of the security and the spirit of the Regulations.

In the case of *Roy Juswunt Lall v. Sree Kishen Lall*, reported in the Decisions of the Sudder Dewanny Adawlut in 1852, vol. 14, p. 577, the Court seems to have thought that, where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken ; but it appears from that case that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipts of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage-debt, and must be restored when the debt, interest, and costs, are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the cause must be sent back for further enquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management ; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Their Lordships will, therefore, humbly report to Her Majesty in the following terms :—

“ Their Lordships are of opinion that the Ranee ought to be deemed to have executed the mortgage-bond dated *Assar Soodee Poornumashee*, in the pleadings

mentioned, as and in the character of guardian of the infant Lal Inderdowun Singh.

"And their Lordships are of opinion that the validity, force, and effect of the bond, as to all and each of the sums, of which the sum of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the appellant, were respectively so advanced by him, regard being had also, in so far as may be just, to the circumstances under which the same were respectively borrowed.

"And their Lordships are also of opinion that, assuming the bond to be invalid and ineffectual, the appellant would, nevertheless, be entitled to the benefit of any prior mortgage or mortgages paid off by him affecting the property comprised in the bond, if and in so far as such prior mortgage or mortgages was or were valid and effectual.

"And their Lordships, therefore, are of opinion that the decrees of the Zillah and Sudder Courts, respectively, ought to be reversed, and the cause remitted to the Sudder Court, with directions that enquiry be made into the several matters aforesaid, and that all such accounts be taken, and such other enquiries made as, having regard to such matters and to the circumstances of the case, may be found to be necessary and proper, with directions also that the Sudder Court do proceed therein as may be just, both with respect to the said mortgage-bond and the several instruments of even date therewith; and that the costs of the appeal be costs in the cause, to be dealt with by the Sudder Court."

The 2nd December 1859.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Sir E. Ryan,
Lord Justice Turner, and Sir L. Peel.

Hindoo Law—Will—Hindoo Widow—Maintenance—Gift to Idol—Construction—Accumulations.

On Appeal from the Supreme Court at Calcutta.

Sonatun Bysack

versus

Sreemutty Juggutsoondree Dossee.

The extent of a Hindoo's testamentary power of disposition must be regulated by the Hindoo law and cannot interfere with a widow's right to maintenance.

According to the true construction of the will in this case, it was held that, although the will purported to begin with an absolute gift in favor of an idol, the property granted to the idol was effectually granted for the benefit of the testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies, and festivals, and to the provisions for maintenance contained in the will; and that the surplus income was in like manner given for the benefit of the four sons and their offspring in the male line as a joint family.

The testator in this case, Ramdoss Bysack, died leaving four sons, one of whom died intestate, leaving three sons, Sonatun Bysack the appellant, Hurrymohun Bysack, and Kistodoss Bysack. Hurrymohun Bysack, the second grandson of the testator, died intestate and childless, leaving the respondent his widow.

Turner, L. J.—The question in this case ultimately resolves itself, as their Lordships think, into a question of the construction to be put upon a Hindoo will; and it may not be improper to observe, with reference to the testamentary

power of disposition by Hindoos, that the extent of this power must be regulated by the Hindoo law.

The first point which arises on the construction of this will is, whether, according to the true intent of the will, the idol for whom the property is granted was intended to take absolutely.

Now, a reference to the second, third, and fifth clauses of the will lead us to the conclusion that, although the will purports to begin with an absolute gift in favor of the idol, it is plain that the testator contemplated that there was to be some distribution of the property according as events might turn out; and that he did not intend to give this property absolutely to the idol seems to their Lordships to be clear from the directions which are contained in the third clause, that after the expenses of the idol are paid, the surplus shall be accumulated; and still more so from the fifth clause, by which the testator has provided for whatever surplus should remain out of the interest of the property, the expenses of the idol being first deducted. It is plain that the testator, looking at the expenses of the idol, was not contemplating an absolute and entire gift in favor of the idol.

The rights, therefore, of the idol being thus disposed of, the question then arises, what was to become of the property, subject to the payments which were to be made for the expenses of the idol? And here we have two divisions of the will. The testator evidently contemplated two events; one, in which the family was to continue joint and undivided, and the other, in the event of the family becoming divided. Now, with reference to the second branch of this will, the event of the family becoming divided, that state of circumstances does not appear to have arisen. There has been no division at all of this family unless the division of the income during the few years which followed upon the death of the testator up to a short period after the death of Hurrymohun Bysack constituted a division of the family, and their Lordships are very clearly of opinion that the mere division of income, for the convenience probably of the different members of the family, did not amount to the division of the family.

In considering the case, therefore, we may for the present (whatever questions may hereafter arise upon it) consider this family as an undivided family; and the point for determination is, what are the rights of these parties in the property, considering the family as a joint and undivided family? Now, in that case, it is plain that the testator contemplated that the property was to go in the male line. He says that he has four sons, that his property shall never be divided and partitioned amongst them, and that the sons and their offspring, that is to say, their "sons and grandsons, heirs in succession," shall not have the power of alienating any of the property by deed or gift, nor shall the property be liable to sequestration for their debts. The testator, then, having intended that the property should pass from the four sons to their sons and to their grandsons, the event which has happened is this: one of the sons died leaving three sons, who accordingly came into his share, and one of those three sons afterwards died leaving no male issue.

Now, what is the consequence of that? There are directions in the will that the property is to go in the male line to the sons and their descendants, but one of them dies leaving no issue in the male line, and the will is silent as to what the disposition of the property is to be in that event. It is a share of the property of the joint family, descendible, therefore, to the heir to whom that property would go in the absence of any provision made by the will. The consequence, therefore, as it appears to their Lordships, must be, that upon the death of Hurrymohun, this property must have descended, and that the one-third of one-fourth passed to Hurrymohun's heir, his widow, so far as she is entitled to her widow's estate.

What their Lordships propose to do is, to declare that, according to the true construction of the will, the property granted to the idol is effectually granted for

the benefit of the testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies, and festivals, and to the provisions for maintenance in the will contained, and that the surplus income, after answering the performance of such provisions, is in like manner well and effectually given for the benefit of the four sons and their offspring in the male line, as a joint family. It appearing that Krishnomungle, one of the sons, died leaving three sons, and that Hurrymohun died leaving no male offspring, the family continuing joint up to the death of Hurrymohun; their Lordships also propose to declare, that upon the death of Hurrymohun, his share of the joint estate, subject as aforesaid, passed to the respondent, his widow and heir, and she is entitled to one-third of one-fourth as widow and heir. Their Lordships think that, under the circumstances of this case, it would be better not to direct the accounts to be taken in the mode in which the Court has done, but simply to give liberty to apply, in order that the parties may, as they probably will do if they are well advised, come to some arrangement upon the subject of the amount. There will be liberty to apply as to the amount, or otherwise as the parties may be advised. And it appearing that there has already been an order made for the maintenance of this lady of Rs. 100 a month, that order must be continued, and she will account for what she has received under that order as against what may be coming to her upon the account to be taken. The better course would be, to discharge the order which has been made by the Court below, and simply to make the declarations which I have suggested with a limit and a direction to continue the maintenance, and that she shall account for what she may have received under it.

Their Lordships think that the costs of the appeal may very properly be given out of the estate.

The 26th February 1866.

Present:

Lord Chelmsford, Sir James W. Colvile, Sir E. V. Williams,
and Sir Lawrence Peel.

*Guardian and Minor—Debtor and Creditor—Fraudulent Contract by Guardian
—Onus Probandi—Purdah Women.*

On Appeal from the Sudder Court at Agra.

Lalla Bunseedhur

versus

Koonwur Bindesseree Dutt Singh.

He who sets up a charge upon a minor's estate, created in his favor by the guardian, is bound to show, at least, that, when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

Where the negotiation out of which such a transaction sprang was between a *purdah* woman acting as the guardian and manager of an infant's estate, and a keen man of business at that time a debtor to the estate, and she was induced to sign an instrument which transformed the debtor into a creditor and heavily burdened her ward's property without consideration, except the merely colorable one of the abandonment of an appeal and the promises of future advances for the purposes of litigation of which a part at least was neither necessary nor prudent, whether she was herself defrauded or acted in collusion with the debtor, the transaction was held, in either case, to have been a fraud upon the minor.

Sir James W. Colvile.—The first and principal question that arises upon this case is whether the *ikrar* of the 17th February 1850, which was executed by his guardian during his minority, is binding upon the respondent.

In dealing with this question we have no difficulty about the *ratio decidendi*, since it is admitted that the principles which govern it have been authoritatively laid down in the case of Hunooman Pershad Pandey v. Mussamut Babooee Munraj Koonweree * (6 Moore's I. A. Cas. 423). It is there said: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." And again, p. 424: "The lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate." It follows from the passages above cited, and from the rest of this judgment, that he who sets up a charge upon a minor's estate, created in his favor by the guardian, is bound to show, at least, that, when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

The learned Counsel for the appellant have not ventured to contend that the stipulations of the instrument, to which these principles have now to be applied, were, upon the face of them, beneficial to the respondent's estate. Their arguments have been directed to show that the whole transaction might be justified by a consideration of the circumstances in which the parties stood, and of the nature of the litigation in which Sheodutt Singh had in his lifetime been engaged. It becomes necessary, therefore, to review, as briefly as may be, the very tedious and intricate history of that litigation.

In 1828 Seetaram Singh, the father of the appellant, had lent, or agreed to lend, Rs. 29,500 to Sheodutt Singh, on a mortgage of the ancestral talook now in dispute. The talook consisted of twenty-nine villages, and the mortgage was to be a usufructuary mortgage by way of a lease for ten years of the whole talook. Before this arrangement was completed, it appeared that the two other persons, named Baijnauth and Bishun Dayal, claimed to be prior mortgagees of part of the talook.

It was at first settled between Sheodutt Singh and his mortgagees, that Seetaram Singh should apply part of the Rs. 29,500 in paying off Baijnauth and Bishun Dayal; but it was ultimately arranged between those two persons and Seetaram, that the three should be jointly interested in the mortgage; the share of Seetaram being taken to be Rs. 17,700, and that of the other two Rs. 11,800. The instrument of the 27th May 1828, by which this so-called partnership was effected, provided, that if it should be deemed advisable thereafter to disclose the partnership, the property should be divided and held separately in the proportions above specified.

They entered into possession of the mortgaged property in June 1828, and in 1831 dissolved their so-called partnership; thereupon Bishun Dayal and Baijnauth became mortgagees in possession of twelve, and Seetaram became, or ought to have become, mortgagee in possession of the remaining seventeen villages of the talook.

We say "or ought to have become," because it appears, from the subsequent proceedings, that he never was in possession of five of these villages; they having been transferred by Sheodutt Singh prior to the mortgage to his wives and two other persons.

Seetaram carried on his general business in partnership with one Sheosuhai; and on the dissolution of their partnership, and a consequent division of its assets, this mortgage fell to the share of Sheosuhai. He was never, however, recognised as mortgagee by Sheodutt Singh, nor was his name recorded as mortgagee until after June 1838, when the period of ten years, during which the possession of

* See also 18 W. R. 81 (*foot-note*), and p. 29 *ante*.

the mortgagee was to continue, expired. Sheosuhai and the other parties then in possession of the mortgaged premises, retained possession after June 1838 ; they allowed the Government revenue to fall into arrear, in consequence of which the estate was attached, and let in farm, for six years, to one Ilahee Buksh, whose security, Torab Ali, acquired by assignment the whole of the interest, as mortgagee (if any) of Sheosuhai, and also the mortgage rights of Baijnauth. Those of Bishun Dayal became vested in some other parties.

Torab Ali instituted proceedings on the mortgage securities against Sheodutt Singh, claiming the balance alleged to be due on them ; but these proceedings, though successful in the Court of first instance, were ultimately dismissed by the Sudder Court, apparently on the ground that the mortgage debt had been satisfied by the reception of rents during the possession under the ten years' lease.

In this state of things, and on the 17th June 1842, Sheodutt Singh brought the first suit of which we have any mention against the appellant and his brother, since deceased, as the sons and representatives of Seetaram Singh, and against all the other persons who in the course of the transactions lastly above stated had become interested in the mortgage securities or had been in possession of the mortgaged premises. The object of the suit was to recover possession of the property, on the double ground that the principal and interest of the mortgage debt had been liquidated by the collections, and that the period for which the property had been mortgaged had expired ; and it also claimed a large sum for the mesne profits of the four years during which it was alleged possession had been wrongfully retained.

It is unnecessary to consider very minutely the merits of this suit, because a final decree had been made in it before February 1850, when the widow of Sheodutt executed to Bunseedhur the Ikrarnamah in question. It is sufficient to state that, although the plaint expressly stated that the principal and interest of the mortgage debt had been liquidated by the collections, the appellant did not dispute that fact. His defence was simply that, by reason of the assignments to Sheosuhai by his father Seetaram, he had ceased to have either interest or liability in the matter.

The course of the suit was as follows :—On the 26th June 1843, the Principal Sudder Ameen decreed in favor of the plaintiffs for redemption and possession of the estate after the expiration of the farm, but nonsuited the claim for mesne profits and damages. On a remand from the Sudder Court, the same officer, by a decree, dated the 28th November 1843, made the appellant and his brother, as co-heirs of Seetaram, liable jointly with Sheosuhai in the sum of Rs. 16,570 7a. 9p., as mesne profits for the year 1246, but dismissed the claim for damages for the years 1247, 1248, and 1249 B. S. It should also be mentioned that he expressly found in his judgment that the mortgage debt had been discharged. There was an appeal from this second decision, and the Sudder Court by its original decree on that appeal held, that the appellant, as the then sole heir and representative of Seetaram (his brother having died), was solely liable to the plaintiffs for the mesne profits and damages due to him ; and that the sum awarded by the Principal Sudder Ameen ought to be increased by the mesne profits for the years 1247, 1248, and 1249. Their decree seems to have proceeded on the ground that Seetaram and his estate were primarily liable to the mortgagor for the non-delivery of the possession when it ought to have been re-delivered ; and were accountable for the mesne profits of the whole estate, notwithstanding the transfer to Baijnauth, Bishun Dayal, Sheosuhai, and others.

The appellant applied for and obtained a review of this decree on the grounds that he was improperly charged with the mesne profits of the twelve villages held in possession by Baijnauth and Bishun Dayal ; that he was improperly charged with the profits of the five villages of which, by reason of their assign-

ment to Sheodutt's wives and others, Seetaram was never in possession ; and that he was improperly charged with a certain amount under the head of Sayer. And he again raised the question that the effect of the transfer to Sheosuhai was to determine the liability of Seetaram for the profits of any part of the estate. The majority of the Court decided against the appellant on the last point, and in his favor on the three others ; and the final decree was against him for the sum of Rs. 14,865 10a., being the amount of the profits claimed in respect of the twelve villages of which Seetaram was unquestionably in possession after the dissolution of the so-called partnership between him and Baijnauth and Bishun Dayal. This final decree was dated the 1st March 1846. The appellant satisfied this judgment by payments into the Court to the amount of Rs. 26,211 12a. 9p. ; and these moneys were afterwards paid out through the Mookhtar of Sheodutt Singh, and are those or some of those which in the third clause of the Ikrarnamah are alleged to have found their way into the hands of Mohun Lall.

The appellant, having thus satisfied this decree, instituted in the year 1847 a suit against Sheodutt Singh. His claim was founded on the wrong done to Seetaram by reason of his not getting possession of the five villages assigned to the wives of Sheodutt Singh, and was for the profits of those villages during the ten years of the mortgage lease. The gross amount claimed was Rs. 27,129 6a. 6p. principal, and an equal sum for interest. The proceedings in this suit are not amongst the documents in the Appendix, and for the facts we are referred to the short report of the case in the fourth volume of the Sudder decisions for the North-Western Provinces (1849), p. 60.

From that, it appears that the Principal Sudder Ameen, on the 31st December 1847, decreed in favor of the appellant upon the ground, certainly erroneous, that he had been made to pay the profits of these villages ; but he awarded him only so much of the profits as fell within the period of twelve years prior to the institution of the suit ; treating the rest of the claim as barred by the Regulation of Limitation. The Sudder Court on appeal reversed this decree, and by its decree of the 26th March 1849, dismissed the appellant's suit altogether. The reasons for the judgment are not very clearly expressed ; but the Court seems to have been of opinion, that if Seetaram had any claim for damages in respect of the failure to give him possession of these villages, he should have sued during the currency of the lease ; and that at all events his representative (the appellant) could not then maintain that action. The appellant obtained leave to appeal to Her Majesty in Council against this decree ; and his appeal was pending in 1850 when the Ikrarnamah was signed.

In the meantime, and in 1848, Sheodutt Singh had brought his suit against the appellant for the profits of the talook during the years of the farming lease which were not covered by the former suit, and had obtained a judgment for the sum of Rs. 7,480 4a. 9p., which is the subject of the fourth clause of the Ikrarnamah. He had also commenced a third suit against the appellant in the name of his son, the respondent, in respect of property derived by the respondent from his mother. That suit was undecided on the 3rd July 1849, when Sheodutt Singh died.

Hence at the date of the Ikrarnamah the position of the appellant and respondent's guardian with reference to the antecedent litigation was this. The appellant had been decreed to pay and had paid Rs. 26,211 12a. 9p. in respect of the final decree of 1846. By the decree of 1848 he had been found liable to pay, but had not paid, Rs. 7,480 4a. 9p., with (probably) interest and costs. Another suit was pending against him, but had not been decided. On the other hand, he had brought a suit to enforce a claim for upwards of Rs. 50,000 against the estate of Sheodutt Singh. But this claim had been only partially decreed in his favor by the Zillah Court, had been wholly dismissed by the Sudder Court, and was the subject of an appeal to England.

This being the position of the parties, what were the provisions of the Ikrar-namah which the guardian was induced to sign? The first clause, after stating that the appellant had been unjustly made to suffer the losses which he had sustained, by reason of Sheodutt Singh's first suit, partly in order to compensate him for such losses, and partly in order to induce him to abandon the appeal in his own suit, made the estate liable to pay him Rs. 27,000, without interest. This clause was obviously against the minor's interest, in so far as it re-opened the questions closed by the final decree of the 1st March 1846; admitted the injustice of the claim on which it was founded; and gave compensation to the appellant for the loss which it had inflicted upon him. It is contended, however, that the success of the appeal was so probable, and the consequences of that success were so serious, that the guardian was justified in spending Rs. 27,000 to avert that danger from the estate. This is the point which has been most labored at the Bar, but their Lordships can find in the facts before them no reasonable grounds for such a conclusion. In the course of their ingenious argument, the learned Counsel for the appellant were almost constrained to admit that the particular action was misconceived, inasmuch as it was brought to recover the mesne profits of certain villages of which *ex concessis* the defendant had not been in possession. They were further obliged to admit that under Reg. XXXIV of 1803, the interest of the holder of a usufructuary mortgage in the property would cease on the liquidation by the usufruct of the principal and interest of his debt; and consequently that in any action founded on the breach of the agreement, express or implied, to give possession of the five villages, it was essential to allege and prove that, by reason of the non-delivery of such possession, something still remained due on the mortgage.

Their Lordships have extreme difficulty in seeing how such a suit could have been maintained by the appellant; since in the first suit of Sheodutt Singh against him it had been alleged and proved as a fact that the mortgage debt had been fully discharged; and he, instead of taking issue on that allegation, had sought to escape liability by showing that, by reason of Seetaram's assignment to Sheosubhai, he had no interest whatever in the mortgage. But assuming that he might have maintained such a suit, they have to observe that it would have been founded on a cause of action different from that on which the suit actually brought proceeded; and that it is not to be supposed that, if the appeal had come here, this Committee would have taken the unprecedented course, suggested by Mr. Pontifex, of reversing a decree that had dismissed a suit improperly conceived, and of remanding the cause in order that it might be moulded into a suit of an entirely different character. To their Lordships it appears that the appeal occasioned no such danger to the minor's estate; and that there are no grounds for saying that the stipulations of the first clause, so favorable to the appellant, were for the benefit of the minor, or could have been reasonably supposed to be so.

The third clause appears to their Lordships to be of the same character. No plausible reasons have been assigned why the guardian should embark in an expensive litigation in order to recover back from Mohun Lall sums for which he would necessarily have to account in the general account then open and unsettled between him and the estate; or why, in consideration of advances for the purposes of that litigation, she should agree to divide with the appellant moneys which, if recovered, would belong to the minor's estate. The latter objection affects also the seventh clause.

There is a conflict of evidence concerning the alleged payment of the sum of Rs. 7,480 1a. 9p. mentioned in the fourth clause. The oral evidence to negative the payment is undoubtedly very loose and unsatisfactory, and the Gomastah of the appellant has given some evidence of the fact of payment, which he corroborated by the production of an entry in the appellant's books. On the other hand, it is remarkable that the appellant, though examined as a witness on other points,

did not depose to this payment; and the circumstance that the claim in respect of which this sum had been decreed was of precisely the same character with those which the first clause of the document had pronounced to be unjust tends to justify the conclusion of the Courts below, that this clause was under color of an admission of a payment that was never made—the release of a judgment debt to the prejudice of a minor's estate. Their Lordships do not think it is necessary to decide the question whether this payment was really made. If it was not made, the clause, no doubt, affords another strong argument against the validity of the Ikrar; but if it was made, it would not in any degree cure the other defects of that instrument, which would have to be considered as if this clause were not inserted in it. The fifth clause seems to imply the abandonment of the suit pending at the date of Sheodutt Singh's death. It was, therefore, also to the prejudice of the estate.

If the above-stated view of the particular clauses of the Ikrar be correct, the only ground on which the instrument can be supported is that the transaction, as a whole, was for the benefit of the estate, because the necessity for obtaining the pecuniary assistance of the appellant was so urgent that the guardian was justified in submitting to the extraordinary and usurious terms on which it was to be given. There is no proof of such a necessity; and it might be sufficient for the purposes of this appeal to say that, in their Lordships' judgment, the appellant has wholly failed to relieve himself of the burden which the law casts upon him of showing that he had good grounds for supposing that this transaction was for the benefit of the estate.

Their Lordships, however, are disposed to go further, and to say that the Courts below were warranted in imputing the character of fraudulent contrivance to this transaction.

The negotiation out of which it sprang was one between a purdah woman acting as the guardian and manager of an infant's estate, and a keen man of business, at that time a debtor to the estate. She is induced to sign an instrument which transforms the debtor into a creditor, and heavily burdens her ward's property without consideration, except the merely colorable one of the abandonment of the appeal, and the promise of future advances for the purposes of litigation, of which a portion, at least, was neither necessary nor prudent; of litigation which, if unsuccessful, would be ruinous to the estate, and, if successful, was to result in a division of spoils absolutely incompatible with her duty as guardian. It is not shown that, in coming to this agreement, she had the assistance of proper or independent advisers. On the other hand, it is not shown affirmatively by what practice (if any) upon her ignorance or her fears she may have been induced to execute the document. She may or she may not have been fully informed as to what she was doing. But whether she was herself defrauded, or whether she acted in collusion with the appellant, the transaction was in either case a fraud upon the respondent.

It has, however, been strongly urged that this finding of the invalidity of the Ikrar is not fatal to the title of the appellant as purchaser at the execution sale. It has been contended that his rights are identical with those which a stranger purchasing at the same sale would have had; that the execution was good, at least, to the extent of the Rs. 26,987 advanced to save the property from sale at the suit of Mohun Lall; and that the rights of the respondent against the appellant, taking them at their highest, are limited to the recovery of the difference between the last-mentioned sum and the price bid at the execution sale. Another argument in favor of this conclusion was that the respondent had not really been injured by the sale of his ancestral property under this execution, because he would equally have lost it if it had been sold at the suit of Mohun Lall.

As to the latter argument, it seems sufficient to observe that we have to deal with the rights of the parties in the events that have happened, not in

those that might have happened; that the salvation of the property by other means from the sale at Mohun Lall's suit was not absolutely impossible; and that, in any case, an execution for Rs. 26,987 is less formidable than one for upwards of Rs. 70,000. Again, it is to be observed that, if the respondent has been wronged by the sale of his property at the suit of the appellant, the relief suggested falls very far short of an adequate remedy for that wrong. The property of which he has been deprived was ancestral; and the feeling on the subject of ancestral property is so strong in those provinces, that the policy of allowing it to be taken in execution and sold under judicial sales has been seriously questioned. And even if no account is to be taken of that feeling, it is notorious that landed property when sold under an execution, rarely, if ever, realizes its full value. It follows, therefore, that to restore the property to the respondent on the terms of paying to the appellant what may be justly due to him is far more equitable than the proposed limitation of his remedy to the surplus proceeds of the sale; and the only question is whether the sale has interposed an effectual bar to the application of the more appropriate equity.

Their Lordships concur with the learned Judges of the Sudder Court in dissenting from the authority of the case which is stated to have been decided in 1847 by two out of three of the then Judges of the Sudder Court of the North Western Provinces. The proposition that no difference is to be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale seems to them to be wholly untenable. The question is, in the former case, which of two innocent parties shall suffer; in the latter, whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrongdoing? A Court exercising equitable jurisdiction may withhold its hand in the one case, and yet set aside the sale with or without terms in the other.

In the present case, the judgment by cognovit, the execution, and the sale are all tainted with the fraud which entered into the original transaction, the execution of the Ikrar. All are parts of the contrivance by which the respondent has been deprived of his property, and the appellant has acquired it. Their Lordships, therefore, are of opinion that both the Courts below were right in decreeing that possession of the property should be restored to the respondent. In considering on what terms this should be done, their Lordships concur with the Sudder Court in thinking that the only principal sum for which the appellant was entitled to receive credit was the Rs. 26,987. That he had no title to the Rs. 27,000 follows obviously from what has been already said. Nor has he, in their Lordships' opinion, shown any better title to the Rs. 1,354. That sum had been advanced for costs for the litigation in which he involved the guardian under the third clause of the Ikrar. Of that litigation, if it had been successful, he would have had half the fruits. It was unsuccessful. He cannot be allowed to carry on this kind of speculation at the risk and cost of an infant's estate.

The only remaining point—and it is one on which their Lordships have felt some difficulty—is the rate of interest to be allowed on the Rs. 26,987. The Attorney-General has insisted that it was a favor to the appellant, in the circumstances, to give him any interest at all on that sum; that the rate was in the discretion of the Court below; and that their Lordships should not interfere with that discretion. On the other side, it has been argued that the rate ought to be 12 per cent., such being the current rate of interest, and that which the judgment debt of Mohun Lall would naturally have carried. The contention below on the hearing of the application for a review was that the rate should be 6 per cent., or the contract rate, as shown by the confession of judgment. Their Lordships have come to the conclusion that the third course is that which should be adopted. If interest was to be allowed at all—and they think the Court below was right in allowing it—the rate should be fixed according to some principle, not according to the arbitrary discretion of the Judges. On the other hand, the appellant has no

right to complain if he receives interest at the rate for which he stipulated when he made the advance. It may be true that he would not have advanced his money on terms so favorable to the estate if he had not had in view the corrupt advantages for which he had stipulated in the Ikrar. But there is no reason why the Court, because it will not let him reap the benefit of those improper stipulations, should make a new contract for him in respect of this particular advance.

On the whole, then, their Lordships will humbly recommend to Her Majesty that the decree of the Sudder Court be modified by the allowance of interest on the Rs. 26,987, at the rate of 6 per cent., instead of that of 5 per cent. per annum, but that in all other respects that decree be affirmed with costs. They do not think that so slight a modification ought to deprive the respondents of the costs of this appeal.

The 7th November 1866.

Present :

Lord Westbury, Sir James Colville, Sir Edward Vaughan Williams, and
Sir Lawrence Peel.

Practice—Judgment—Disclaimer—Breach of Faith with Court.

On Appeal from the High Court at Madras.

Sreemuthoo Raghoonadha Perya Oodya Taver,

versus

Kattama Nauchear.

A suit was brought by *A* to recover property in which, on appeal to the Privy Council, two questions arose, viz., whether the property was to pass as divided or undivided property, and whether such property was conveyed away to *A*'s father by a deed of testamentary disposition? The Lower Court had decided only the latter point, and the Privy Council remanded the case for determination of the former point. On a second appeal to the Privy Council, that Committee were about to enter upon the question as to the validity of the testamentary paper, when *A* gave up the point that the paper was in any sense testamentary in its character, and disclaimed having any title under it as a testamentary devise, and the Privy Council therefore did not decide that question.

HELD that a subsequent suit by *A*, in which he sought to recover the property by setting up the paper as a valid will and testament, was a suit instituted without *bona fides*, and could not be allowed to proceed, because, *first*, the nature of the paper was in issue in the former suit, and what was in issue must be taken to have been decided by the judgment; and *secondly*, because *A* having used the document and abandoned all right to it as a will, he could not again use it for a different purpose.

The facts of this case have been lucidly presented to us, and the case has been argued very ably by the learned Counsel for the appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in, and decided by, the judgment of the Privy Council in the year 1863,* and what passed before this tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the zemindar, the original proprietor, questions arose whether he was undivided in estate with his brother, and whether this property was to pass as undivided or divided estate. A document was produced in which the zemindar made a testamentary gift of the estate to the appellant's father, in the event of the child of one of his widows, who was *enciente*, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844,† the exact issue whether the family was undivided or divided had not been so raised as to become necessarily the subject of judicial determination.

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

† 6 W. R. P. C. 50; 1 Suth. P. C. R. 155.

The issue, however, of the alleged testamentary paper had to be raised, and the decision of the Sudder Court was against it.

When the case came before the Privy Council in 1844, having regard to the law touching undivided property, their Lordships were of opinion that there must be a judicial determination upon the point whether the family was divided or undivided, before the question of the validity of any devise could arise. No opinion, therefore, was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined whether there was division or no division. It is plain that when the issue was raised whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of the deceased proprietor, would immediately have been enabled to set up the will as constituting his title. But it has been contended before us to-day that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question whatever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any such construction. The same point was raised and insisted upon before the Judicial Committee in 1863; for it was then contended, on behalf of the present appellant, or those who preceded him in title, that the suits which had been instituted and were brought by way of appeal were suits that transgressed the limits imposed by the order of the Privy Council in 1844 (being, in effect, the same argument that we have heard to-day); but that contention was over-ruled, and it was held that the order of the Privy Council in 1844 did not at all interfere with or preclude the parties from bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the decrees in which were the subject of the appeal to the Privy Council in 1863.

We take as an example of these suits the form of the suit No. 10 of 1856. One of the present respondents filed her plaint in that suit for the recovery of the zemindary, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in that plaint. By the answer to it, the present appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that that question of division or no division was after all immaterial, because they found it clear that the zemindary in question was self-acquired property; that is, that the deceased proprietor had been the first purchaser of it; and they accordingly held, that even if the brothers were undivided, yet that the estate being self-acquired was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable, therefore, of being devised. Immediately, it became most material in the mind of the Judicial Committee of 1863 to determine the question with regard to the testamentary paper; but they were wholly relieved from the necessity of doing so, because the present appellant then appearing by most able Counsel, as respondent at the Bar, deliberately told their Lordships that, although the paper in question had been familiarly called a will, the name had been introduced only as a short denomination of the instrument, which in reality was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the respondent did not claim any title under it as a testamentary devise, but used it only as conclusive evidence of what the opinion of the last proprietor was, viz.,

that this zemindary was in reality undivided property. It is quite plain why the learned Counsel for the then respondent adopted that course. In their minds it was thought safest to rest their case upon the question of division or non-division. They appear to have reasoned thus :—" If we set up this as a will, then it is a conclusive declaration by the alleged testator that the property was divisible; and if divisible, that it was not undivided. We will, therefore, abstain from treating that instrument as an instrument of title. We will abstain from insisting upon it as a devise, and we deliberately tell the Judicial Committee, that it is not to be regarded as being in any sense testamentary." The result, therefore, was that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its judgment the fact that the respondents' Counsel, the present appellants' Counsel, had deliberately elected to disclaim any title under that instrument as a will, and that, therefore, its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this character to the instrument,—a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, *first*, have insisted that it was an undivided property, and that, therefore, the plaintiff in those suits had no interest therein; and *secondly*, he might have pleaded—" But if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favor." When a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will; but instead of doing so, when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed.

On every ground, therefore,—*first*, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; *secondly*, upon the personal ground that the appellant, having used this document and abandoned all right to it as a will, cannot now use it for a different purpose,—we are of opinion that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present appeal is brought, as a suit instituted without *bona fides*, and directly contrary to what the appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the decree, and to direct that this appeal be dismissed with costs.

Sir Roundell Palmer.—If it would not be taking too great a liberty, it may be a satisfaction to your Lordships to know that what Sir Hugh Cairns did at the Bar was a mere repetition of what had been done in the printed answer to the appeal by the respondent in India, and your Lordships will find it at page 218, paragraph 39 of the Record of 1863. If I may be permitted to read it, it runs thus :—" In opposition to paragraph 64 of appeal petition, respondent submits that the correspondence which passed at the time shows that the Government authorities did acknowledge the *prima facie* right of the respondent's grandfather, and that the Civil Court was correct in terming the will a mere declaration of right. It is only necessary to refer to Regulation V of 1829 to perceive that it could not

possibly be more, and that in quoting it the Government officers could only have viewed it in that light, and not as a bequest."

Lord Westbury.—I am very glad that you have stated that, because it removes from the case any possibility of its being supposed that Sir Hugh Cairns either mistook or exceeded his instructions.

Sir Roundell Palmer.—That was my motive for presuming to mention it.

The 1st February 1867.

Present :

Sir James W. Colville, Sir Edward Vaughan Williams, Lord Justice Cairns,
Sir Richard T. Kindersley, and Sir Lawrence Peel.

Gift—Evidence—Hindoo Widow—Streedhun—Mitacschara.

On Appeal from the late Sudder Court at Agra.

Mussamut Thakoor Dayhee,

versus

Rai Balack Ram and others.

In establishing the validity of a deed of gift taken from a woman stricken with a mortal disease and in expectation of death, proof at least of equal strictness as is required to prove a testamentary disposition must be given, and the proof to support such a transaction ought to be sufficient to establish that she knew what she was about, and intended to make such disposition of her property.

According to the Mitacschara a Hindoo widow may dispose of moveable property inherited from her husband, a power she does not possess under the law of Bengal, but by both laws she is restricted from alienating any immoveable property, whether ancestral or acquired, so inherited. On her death the immoveable, and the undisposed of moveable, property pass to the next heirs of her husband.

The devolution of *streedhun* from a childless widow is regulated under the Mitacschara by the nature of her marriage, and if the marriage was according to the four approved forms, the *streedhun* goes to the collateral heirs of her husband.

The question on this appeal is the right of succession to certain property of which one Choteh Bebee, a Hindoo widow died possessed. She was the widow of one Ramjee, who died in 1824 without issue ; and he was the only son and heir of Bence Ram, one of the five sons of Rai Suhuj Ram. The respondents are all descended from the last-named ancestor through one or other of his four other sons, and are admitted to be the collateral male heirs of Ramjee living at the date of his widow's death. The appellant is the niece of Choteh Bebee, her brother's daughter. She is said to have been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular and not in its technical sense. It is not now contended that the adoption was of that kind which, according to Hindoo law, would create between Choteh Bebee and the appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether the property in dispute on the death of Choteh Bebee descended to the respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been executed by her shortly before her death, to the appellant. That property is partly moveable, and partly immoveable. The latter is situated in the districts of Tirhoot, Behar, Shahabad, and Benares, and the deceased was domiciled at Benares. Therefore, the law by which the succession to the whole is governed is that of the Western Schools.

The issues recorded in the cause were, whether Mussamut Choteh Bebee was competent to bestow the property in gift or not ; and if she was, whether the deed of gift relied upon by the defendant (now the appellant) is valid or not. Between

the date, however, at which the issues were recorded and that of the trial a change took place in the constitution of the Court of the Principal Sudder Ameen of Benares, in which the cause was pending ; and Mr. Smith, by whom it was tried, in his judgment, says :—"The disposal of the case rests on two important issues—1st, Whether the property, which was the subject of the gift to the defendant, was joint ancestral or not? 2nd, Whether the alleged deed of gift is or is not a *bona fide* instrument?" The first of these questions, as will hereafter be shown, is by no means identical with the first recorded issue. Mr. Smith, however, having decided it in favor of the appellant, appears to have considered that the necessary consequence from his finding was, that Choteh Bebee was legally competent to alienate the property ; and he further found that she had duly executed the deed of gift. He, therefore, dismissed the respondents' suit with costs. There was an appeal to the Sudder Court of Agra, and that Court, confining its attention to the second of the recorded issue, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a decree in favor of the respondents. The present appeal is against that decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause can be taken to have established that the alleged deed of gift was duly executed by Choteh Bebee. The case set up by the appellant is the following. In 1858, Choteh Bebee undertook a pilgrimage to Juggurnath. She was accompanied by the appellant, the appellant's brother Balkishen, Nathoo Ram, a priest, and Bunsee, a menial servant. On her return homewards from the shrine, and a few days before she reached Midnapore, she was attacked with dysentery, and arrived at Midnapore very ill and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by Hurry Doss, a pleader in the Judge's Court of Midnapore, and by his nephew and clerk, Deenbundhoo Muttye. It was written in Bengalee, a language foreign to the person by whom it purported to be executed, a language which it is admitted she did not understand. It was executed at the door of the Cutcherry of the Registrar of Deeds, to which place both Choteh Bebee and the appellant were taken in separate palanquins, and there registered. The appellant says : "After the registry was effected we returned home and left the station." Balkishen says that Choteh Bebee remained at Midnapore about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed at a place called Gobind Chuttee, distant about seven days' march from Midnapore, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely ; and first it may be well to see what evidence there really is that the person who put her hand to the instrument was Choteh Bebee.

The subscribing witnesses to it are Balkishen, Nathoo Ram, Bunsee, and four Bengalees, viz., Tarachund Muduk, Modhoo, a Chowkeedar, Sree Chedum Surma or Sirdar, and Deenbundhoo, who was concerned in the preparation of the deed. The first three of the Bengalee witnesses may be at once disposed of. Neither their subscriptions nor the testimony of such as have been examined can add anything to the credibility of the transaction. Tarachund almost admits that he was called out of the crowd about the door of the Cutcherry to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says that Chedum Surma, elsewhere called Chedum Sirdar, and Modhoo the watchman, were unable to write, and he does not know who signed for them ; whilst Balkishen says, "Those witnesses who could write, signed for themselves, and those who could not, Deenbundhoo signed for them." Chedum Sirdar does not seem to have been examined, and Modhoo was probably a witness of the same class with Tara-

chund ; for his statement that he, a village watchman, had been admitted into the presence of Choteh Bebee, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing witnesses, we have that of Hurry Doss and Shamachund Ghose, who took upon themselves to identify Choteh Bebee to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company, or from the person spoken of as the Chowbey. He was the only resident in Midnapore, who it is pretended had ever seen or known Choteh Bebee before this transaction. He was a Pundah, a sort of priest, who had migrated to Midnapore from the upper provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the Chowbey-Hulway, an appellation which expresses both his *status* as Brahmin and his occupation as confectioner. What was the extent of his previous acquaintance with Choteh Bebee does not appear. Balkishen says :—"She knew a Chowbey of Muttra at Midnapore. On going to Juggernath she saw the Chowbey, who kept a shop, but did not halt at Midnapore ; she halted further on." But whatever was the extent of his acquaintance, the Chowbey neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the Sudder Court, he had disappeared from Midnapore and could not be traced. There is, therefore, no evidence of the identity of the person who signed the deed with Choteh Bebee except that of the appellant, her brother, their dependent the priest, and a servant. This might have been corroborated by satisfactory evidence of the handwriting ; but from the evidence on that point and a comparison of the Nagree signature on the deed with the admitted signature of Choteh Bebee upon other documents, the Sudder Court has come to the conclusion that the former is a forgery. The testimony too of the Kobiraj or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He could at least have proved that he was called in to attend a woman dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons above mentioned, of the time and place of Choteh Bebee's death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died. But that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems clear that Hurry Doss, the pleader, was called in on the night of the arrival of the party at Midnapore. He is the person called Sreedhur Moonsee by the Hindustani witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says that Balkishen and Nathoo Ram called on him, and said he had been recommended to them by the Chowbey. Shamchunder Doss, who seems to have been hanging about the house where the pilgrims put up, professes to have directed them to Hurry Doss. Bunsee says : "The Chowbey sent for Sreedhur Moonsee." Nathoo Ram's evidence is to the same effect ; and Balkishen says that "he and the Chowbey went to Sreedhur Moonsee, who sent for the writer" (Deenbundhoo). These discrepancies, however, are not of much importance. It is clear that Hurry Doss went to the house where the woman alleged to be Choteh Bebee was, on the night of her arrival ; and, though the evidence is not altogether consistent on that point, that he took Deenbundhoo with him.

Hurry Doss being the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect :—"I found Choteh Bebee lying down. She said, 'Are you a vakeel?' I said, 'I am.' She said, 'All my property I wish to make over in gift to Thakoor Deyhee, my niece'—who was then sitting by her. I asked, 'What estate (talooqua), and what property, that

a rough copy might be prepared.' She said, 'To-night I am not at all well, but to-morrow morning I will have it all written out.' I then returned that night to my house. The next morning I sent Deenbundhoo to take a list, and ascertain what she wanted to have written. He went, and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp paper. I then drew out a deed of gift in the Bengalee language, and I sent Deenbundhoo with it to Choteh Bebee to be read to her, and ascertain whether it was what she wanted. Deenbundhoo returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp paper, and brought it to the Cutcherry. Choteh Bebee and Thakoor Deyhee also came in palkees to the Court, and I then read out to Choteh Bebee the contents of the *hibbanamah*, and she signed it with her own hand. Choteh Bebee was then taken in a palkee before the Registrar, the door of the palkee was opened, and the Nazir questioned her by the Principal Sudder Ameen's orders, and she admitted that she had executed the deed. I received back the *hibbanamah* after registry, and the next day took it to Thakoor Deyhee through Balkishen."

From this statement it is to be inferred that on the first evening nothing was expressed but a general intention to make a gift of the whole property; that on the following morning the pleader obtained more particular instructions through Deenbundhoo; that he then, in his own house and with his own hand, drew up the draft deed, and sent it by Deenbundhoo to be explained to the woman; that on the following day he had the engrossment made on stamp paper in his own house, and took it thence to the Court-house, where he met the two women in their palkees; that he read over the fair copy to the woman said to be Choteh Bebee outside the Court, who executed it there; that she was then taken in her palkee before the Registrar, and to him or his Nazir acknowledged her signature. One would have expected that this account would have been confirmed, at least by the clerk Deenbundhoo, in all its material particulars. This, however, is not the case. His statement is that on the night when, according to Hurry Doss, Choteh Bebee was too ill to give full instructions, he remained behind and took down from her dictation what he calls a list containing the names of her husband and her father; that the rough copy of the deed was drawn out the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that Hurry Doss prepared the rough copy of the deed in her house; that Choteh Bebee explained to him what she wanted done, and that he (the witness) at Choteh Bebee's request, wrote the copy out clearly on paper. (This probably means the copy on stamp paper.) He says that on the same day (being the day after the evening on which Hurry Doss was first called in), the two women came to the Cutcherry, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindustani witnesses, on the whole, tends to confirm the statement of Deenbundhoo rather than that of Hurry Doss. Both Nathoo Ram and Balkishen say that both the draft and the fair copy of the deed were written and explained by Deenbundhoo at Choteh Bebee's house. They do not speak to the fair copy having been explained to her by Hurry Doss at the Cutcherry when it was executed. They say that the deed was written and executed on the same day, viz., that following the evening of Choteh Bebee's arrival at Midnapore. Bunsee, however, states that the fair copy on stamp paper was written at the Cutcherry and that the deed was written after remaining three days at Midnapore.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecti* from a woman stricken with a mortal disease and in expectation of death; that woman being one of a class which the law regards as in need of special protection. Whatever strictness is required in the proof of a testamentary disposition, is, at least, equally required here. The document is written in a character and language which, if in the fullest possession of her faculties, she could neither

read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent and unsatisfactory. If it were even established that the person who put her hand to the paper were Choteh Bebee, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and almost dying woman is said to have been carried down on the afternoon of an August day, and deposited at the door of the Cutcherry. Whilst lying there she has the instrument explained to her, for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place ; several, and that is far more credible, that an additional copy for registration was then made. After all this ceremony is gone through, she is carried into Court and questioned by the Nazir.

Now, she might certainly have executed the deed in the privacy of her own house. Nor does she seem to have been bound, by the Acts and Regulations touching registration, to appear personally before the Registrar in order to have it registered. She might have sent it for that purpose by a duly authorized representative, with one or more of the witnesses who could speak to her execution of it.

Appearance in a public Court, even under the protection of a palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of Choteh Bebee's position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a color to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue, which she was bound to prove.

If the appellant were suing to recover possession of the property from the respondents by virtue of the deed of gift, the conclusion to which their Lordships have come, would, of course, determine the cause. That, however, is not the nature of the suit ; and the respondents, being the plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immoveable property which are therein specified ; to recover certain moveable property which seems to have been under attachment ; to have the deed of gift cancelled and set aside ; and to avoid the title which the appellant was then understood to claim by virtue of adoption. The first things to be determined are the *status* of the family and the nature of the property.

The respondents alleged in their plaint that the family of the common ancestor Suhuj Ram, including Benee Ram and Ramjee, had continued to be undivided. But the evidence, and above all the indisputable fact that Choteh Bebee was in possession of the greater part of the property in dispute as heiress of her husband for upwards of thirty years, seem to their Lordships to support the finding of the Principal Sudder Ameen—that Ramjee was not a member of an undivided family, of which the respondents, whatever be their *status inter se*, are or represent the other co-parceners ; Benee Ram having separated from his co-heirs, and taken as his share of the ancestral estate the villages in Tirhoot, which form the first parcel

of the immoveable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned Counsel for the appellant of the acquisition of the other parcels of immoveable property.

The state of the family and the nature of the property having been thus ascertained, the only question is, whether the respondents became entitled to the possession of it on the death of Choteh Bebee as the next heirs of her husband. The appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments which have been addressed to their Lordships in support of Choteh Bebee's power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned Counsel for the appellant—whilst they admitted that, by the law as it prevails in Lower Bengal, the estate of inheritance which a Hindoo widow takes in the property of her husband, dying without male issue, is limited in its enjoyment; that she cannot alien such property, whether moveable or immoveable, except for certain defined purposes and subject to certain restrictions; and that it passes on her death to those who are then the next heirs of her husband—have nevertheless contended that this is not the law of the Western schools, and have attempted to show that at Benares and in the other Provinces governed by the Mitacshara the widow's estate in her husband's property is absolute; that she has full power to dispose of it; and that, if she fails to do so, it is after her death subject to a different course of succession from that which obtains in Bengal.

The opinion of the Pundit taken by the Sudder Court does not support this contention in its integrity. He admits the right of the widow to alien moveable property, whether ancestral or not, and the immoveable property acquired by her husband or herself with the proceeds of the former's share in the ancestral estate; but he denies her right to dispose of her husband's share in immoveable ancestral property, and states that on her death it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned Counsel for the appellant relied mainly on arguments drawn from the 1st and the 11th sections of the 2nd chapter of the Mitacshara, and on the supposed confirmation of them by Sir Thomas Strange. The first of these sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject,—some favorable, others adverse to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th article, viz., "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms the widow's right of succession, with a qualification unknown to the law of Bengal, viz., that her husband was not at the time of his death a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on these points is to be found in the rest of that portion of the Mitacshara which has been translated by Mr. Colebrooke, and published under the title of "The Law of Inheritance from the Mitacshara." It is not, however, a necessary consequence from these circumstances that the Benares school recognises in the widow an absolute power of disposition over the estate which she has inherited from her husband, or her absolute interest therein. We have not the whole Mitacshara. Mr. Colebrooke, in his preface, page 4, states that his work includes only an extract from that celebrated treatise, comprising

so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that upon other subjects the Mitacshara cites with approbation Menu, Catayana, Nareda, and others, upon whose *dicta* the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends ; and that these authorities are received by the Western schools as well as by that of Bengal. Accordingly Sir Thomas Strange (vol. i., p. 1246) states clearly that such limitations are, with some slight variations, common to all the schools.

A more plausible argument in favor of the appellant's contention may be derived from the 11th Section of the 2nd Chapter of the Mitacshara, if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this section, are taken (as they are taken by Sir Thomas Strange and others) to include property inherited from a husband ; for it may be said that there can be no distinction between different portions of a woman's *streedhun*, or separate property. If she can dispose of part of it, she may dispose of the whole ; and further, that the whole must pass on her death according to the law which regulates the succession to *streedhun*. Sir William Macnaghten, however, in his "Principles and Precedents of Hindoo Law," vol. i., page 38, lays down broadly that there is such a distinction. He says :—"In the Mitacshara, whatever a woman may have acquired, whether by inheritance, purchase, partition, or finding, is denominated woman's property, but it does not constitute her *peculium*." And he then proceeds to show what is that *peculium*, or *streedhun* proper, according to Menu.

Certain it is that whilst no decided case has been cited in support of the appellant's contention, there are many to show that according to the Benares and other Western schools, the power of a widow over property inherited from her husband is limited, and that on her death it passes to his heirs. The case of Keerut Singh v. Koolahul Singh* (2 Moore's Indian Appeals, page 331), where the property in dispute was situate in the district of Benares, is directly in point. To the same effect are the cases at pages 32 and 189 of the second volume of Macnaghten's "Principles and Precedents." Several of the cases set forth in the Appendix to the 10th Chapter of Sir Thomas Strange's work, with the remarks of Mr. Colebrooke and others thereon, also support this view. (See 2 Strange, pages 402, 407, 408, and 439.) The "Vivada Chintamani," which has been recently translated by Baboo Prosunno Coomar Tagore, and is of high authority in the Mithila school and in the district of Tirhoot, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immoveable property of her husband, and that his heirs take it on her death. (See pages 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases, like that of the Collector of Masulipatam v. Cavalry Vencata Narainapah† (8 Moore, 528). The result of the authorities seems to be, that although, according to the law of the Western schools, the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from aliening any immoveable property which she has so inherited ; and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heir of her husband. There is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of *streedhun*, and passed as such, the respondents would seem to have a

* See 5 W. R. P. C. 131 ; 1 Suth. P. C. R. 96.

† See 2 W. R. P. C. 61 ; 1 Suth. P. C. R. 476.

better title to it than the appellant. The devolution of *streedhun* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that Choteh Bebee was not married according to one of the four approved forms. In that case her *streedhun* would, according to the Mitacshara (chap. ii. s. 11 art. 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 Strange, pages 411 and 412, and the comments of Mr. Colebrooke and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband Ramjee or the fruit of its accumulations.

Their Lordships, then, are of opinion that Choteh Bebee had no power of disposition over the immoveable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his moveable property, it is unnecessary to determine, since it has been found that no valid disposition of either kind of property has, in fact, been made. And this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of Choteh Bebee, passed to, and became vested in, the respondents.

The decree impeached is therefore substantially right. Whether it is altogether right in point of form may be doubted. It contains an order that the respondents should recover from the appellant the possession of the immoveable property with mesne profits from the date of the institution of the suit; whereas the plaint seems to admit that the whole or a large portion of such property was at that date in the respondents' possession, and made no demand for mesne profits. The error (if error there be) appears only in the formal decree—not in the judgment upon which it is founded. The recommendation which their Lordships will humbly make to Her Majesty is, that the decree of the Sudder Court be varied, and that it be thereby decreed that the respondents (the plaintiffs) be confirmed in the possession of so much of the immoveable property in the plaint mentioned as was in their possession at the date of the institution of the suit, and be declared entitled to the moveable property; and that they do recover from the defendant (the appellant) so much (if any) of the said immoveable property as was in her possession at the date of the institution of the suit, with the mesne profits of such last-mentioned property from the said date, together with the costs of suit in both Courts. Their Lordships, however, are of opinion that notwithstanding the variation of this decree, the appellant must pay the costs of this appeal.

The 25th February 1867.

Present :

Sir William Erle, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, and Sir Lawrence Peel.

Practice (of Privy Council)—Findings of Lower Courts on evidence—Wife.

On Appeal from the late Sudder Court at Agra.

Mussamut Jariut-ool Butool

versus

Mussamut Hosseinee Begum.

In a suit by *A* for possession of property which belonged to her uncle *B*, the defendants *C* and *D* each alleged herself to be the wife of *B*, and each said that the other was his concubine. *C* also set up a will in her favor by *B*. *C* admitted that she had once been *B*'s concubine, but alleged that she had been subsequently married to *B*. The evidence was conflicting, and the Courts below pronounced against both the marriages and also against the will. *C* alone appealed to the Privy Council, who held that lapse

of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, are not sufficient to raise the presumption that A was a lawful wife; and there was wanting in this case that clear indication of error in the finding which was necessary to take the case out of the rule laid down by the Privy Council, in the case cited, that the Judicial Committee would not interfere with the decision of the Courts in India, when they have concurred in opinion, merely on the effect of evidence or the credit due to witnesses.

This is an appeal from the decision of the Sudder Dewanny Adawlut of the North-Western Provinces of India, which affirmed a decision of the local Court of Jounpore in favor of the respondent, the plaintiff in the suit. The plaintiff sought to recover certain moveable and immoveable property specified in her plaint "by right of inheritance to Mirza Abdoolla Beg, her uncle and ancestor, and also to Mirza Jumud Beg, her husband." The plaint contained a detailed description of the property sought to be recovered. The principal defendants were Mussamut Hossein Buksh, Mussamut Ruzzee-ool-nissa *alias* Rugbee Khanum, and Mussamut Uzeez-ool-nissa *alias* Mussamut Emamun.

The first and second named female defendants claimed each to be a widow of the deceased Abdoolla, but each denied that the other was ever married to Abdoolla, each alleging the other to have been his mistress and not his wife. The third female defendant claimed to be the legitimate daughter of Abdoolla by his alleged wife, her mother, the second female defendant. The first female defendant, the present appellant, also set up a will alleged to have been made in her favor by Abdoolla the day before his death, by which he bequeathed to her by the description of "my married wife Mussamut Jariut-ool Butool *alias* Bedee Hossein Buksh," all his moveable and immoveable property, subject to certain provisions in favor of the plaintiff, to which it is not necessary to allude further. The validity of this will was disputed both by the plaintiff and by the second and third defendants. The Civil Court decided against the will, and also against both the alleged marriages, and the alleged title of the third female defendant. On appeal to the Sudder Dewanny Adawlut the decision was affirmed. The first female defendant alone has appealed to Her Majesty from the decision of the Sudder Dewanny Adawlut. The second and third defendants have not appealed, and therefore their interests are put out of the case entirely.

In the case of *Naragunty Lutchmeedavamah v. Vengamah Naidoo** (9 Moore's Indian Appeals, page 87), their Lordships said: "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence, or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the appellants, are of opinion that there is wanting in this case that clear indication of error in finding against the marriage and the will, which would be necessary to take this appeal out of the operation of the above salutary rule.

The Sudder Court thought the evidence as to the marriage of the appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the will untrustworthy. They say: "We concur with the Judge in discrediting the evidence in support of the will. We consider the attendant circumstances as altogether improbable and unworthy of belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, on oral testimony, a heavy charge on the estate of the deceased person to the amount of Rs. 50,000, and the will is one made *in articulo mortis*.

* See 1 W. R. P. C. 30; 1 Suth. P. C. R. 460.

Some of their Lordships can judge by their experience of precedent cases before this Committee, of the dangers likely to ensue if the Courts of justice in India did not require cogent proof in such cases.

If it were once conceded that a woman, once a concubine, could be converted by judicial presumption into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption rise? The ordinary legal presumption is, that things remain in their original state. Were, then, the Courts below well founded in treating the original connexion by the appellant with the deceased Abdoolla as an illicit connexion? The evidence was conflicting. She herself admits that she was once a prostitute. It is true that she alleged penitence and a change of life, and some of her witnesses say that she had relinquished the life of a prostitute before her intercourse with Abdoolla began; and one witness says that she had discontinued it five years before she came to live with Abdoolla. But no evidence is adduced to prove what was her intermediate employment, or what were her means of maintaining herself in the *interim*. She declares the deceased to have been a man entertaining one mistress whilst his wife was living. The Court had to determine, amidst conflicting evidence, whether it was more likely that he should make a woman of that class his wife and settle on her a very large dower, or that he should induce her to live with him as his mistress, displacing the former favorite. The evidence was conflicting, and the finding cannot be viewed as a decision against the weight of evidence. If, then, the Courts below were justified in finding that the original connexion was illicit, where is the evidence of any change in its character? If length of time be invoked as a reason for considering the previous connexion as lawful, the appellant herself is found placing no reliance on mere length of intercourse with respect to the second defendant's claim to be regarded as a wife: and if the subsequent removal to a different house of that lady be insisted on as an argument that she was not a wife, the answer seems to be that the mere removal into, and maintenance in, a separate house is not at all inconsistent with the *status* of a regularly married wife, superseded either by wife or concubine, but undivorced. The appellant, indeed, is not content to rely on any presumption from length of time: she alleges or calls witnesses to prove an actual marriage ceremony, accompanied with some degree of publicity, the presence of witnesses, and the oral assignment of a large sum of dower.

The witness Imam Buksh, the physician, deposes to this effect, that only one year before the death of Abdoolla, the latter assured him that the appellant was his wife; that the witness asked the question in consequence of the appellant referring him to the deceased for information on the point, asserting that she was a wife and that the second defendant was not, and that the Mirza would so inform him. Now this witness describes himself as having attended both on the Mirza and on the appellant, not as a mere stranger in the house. But what origin can reasonably be ascribed to this inquiry as to her *status*, unless some ambiguity existed in relation to it; and how is this ambiguity consistent with a marriage celebrated from the first before witnesses, with an outspoken assignment of a large dower in the husband's house? Can any ignorance or uncertainty about such a *status* exist at all in the house of the husband with such an introduction of a new wife, and such an open celebration of a marriage? The evidence, therefore, does not cohere, and the Court might well distrust it; nor could their distrust be reasonably found fault with in a case where each alleged wife brought forward the same kind of evidence of an open celebration, and each treated as undeserving of credit the allegations and evidence of the other.

With respect to the will, the improbabilities against it are strong, and the evidence in its favor weak. It is deposed that the second female defendant was present during the time that the will was being dictated, rough copied, and clean

copied ; that a provision was made in the will for her expenses in case she proceeded on a pilgrimage to Mecca ; and that this was done on her request. She is therefore described as cognizant of the will, and assenting to it in some degree by accepting a contingent benefit under it. Yet she was united with her daughter and son-in-law in interest, and throughout acted in conjunction with them. She claimed to be a wife and sought to establish her daughter as an heir. Her assent to the will is therefore most improbable, and the supposition is rendered more so by this, viz., that at this very time her son-in-law Usghur was making a public protest by way of petition addressed to a public officer, claiming his interference and presence at the house of Abdoolla to prevent a will being executed in the name, as he alleges, of Abdoolla, then a senseless and dying man. Is the second alleged wife to be supposed acting at variance with herself without adequate motive, and in so short a period of time to return to opposition ? It appears that she had two years before protested against a description of herself as "prostitute" on a public assessment, and had been described as wife on her own application on more than one public document. She was therefore claiming to be a wife. The reason for describing her as present and acquiescent at the time of the preparation of the will is obvious. That a Mahomedan of high position and wealth, a man of business besides, should, with a view to prevent disputes in his family, make such a will, as likely to foment as to quell them, and omit to make that disposition which would, had her story been true, secure to the appellant her dowry of 50,000 rupees and her share as widow, is not a probable occurrence in itself. One would expect him to act with the advice and aid of his usual mookhtar, and not defer the settlement of disputes in the confused state of his family connections until his last hours, and then to put himself in the hands of people not previously employed by him ; on the other hand, if a will, whether from fraudulent or merely mistaken prudential motives, was to be put forth, though without his concurrence, as his, the preparation and execution would be delayed until his end was so near, his strength so reduced, and his mind so inert, that he would probably be found incapable of opposition to a proposition pressed upon him. Between these conflicting views of the subject, the Courts below were called on to decide, and their conclusion does not appear to their Lordships unreasonable or against the weight of evidence.

Their Lordships think, therefore, on a careful view of the evidence, that the case is not taken out of the operation of the rule laid down in 9 Moore, which has been frequently asserted and constantly acted on. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

The 4th July 1867.

Present :

Sir James W. Colville, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Mahomedan Law—Onus probandi—Suit by Mahomedan wife against husband (for recovery of property)—Bonâ fide purchaser—Benamée transactions (presumptions against)—Omission to sue—S. 7 Act VIII of 1859—Construction—Suit for conjugal rights (by Mahomedan husband)—S. 15 Reg. IV of 1793—S. 200 Act VIII of 1859.

On Appeal from the High Court at Calcutta.

Moonshee Buzloor Ruheem

versus

Shumsoonnissa Begum ;

and

Judoonath Bose

versus

Shumsoonnissa Begum.

In a suit by a Mahomedan wife, who had left her husband's protection on account of ill-usage, for recovery, among other property, of certain securities belonging to her which had got into the husband's possession, and the detention of which he justified on the ground that he had purchased them from her and on their endorsement and delivery to him had paid the full value for them, the correct principle as to the *onus* of proof is that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her; and where it was proved that the wife had the securities while under her husband's protection and some had passed from her to him, and others to his creditors, and that the wife left her husband's house in destitution, the proof adduced by the husband as to the sale for full consideration to him must be full and clear, and such as to satisfy a Court of Justice that the transactions were conducted fairly and properly, and with a due regard to the rights and interests of the wife.

Where it was in proof that a portion of the immoveable property of the wife had passed to a *bonâ fide* purchaser under conveyances executed by the wife to her husband or to such purchaser, the burden of proof in a suit by her to recover the property is upon her, as she seeks to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her.

The habit of holding land benamee, though inveterate in India, does not justify the Courts in making every presumption against apparent ownership.

The words "if a plaintiff relinquish *or omit to sue* for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained" in s. 7 Act VIII of 1859 plainly include *accidental* or involuntary omission, as well as acts of deliberate relinquishment. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it.

The correct test when a second suit is brought for something omitted to be sued for in a previous suit is, whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit.

A Mahomedan husband may institute a suit in the Civil Courts of India to enforce his marital rights by compelling his wife against her will to return to co-habitation with him, and such suit must, under the imperative words of s. 15 Reg. IV of 1793, and the nature of the thing, be determined according to the principles of Mahomedan law. If the wife raise a defence of cruelty, she must prove violence of such a character as to endanger, or a reasonable apprehension of danger to her personal health or safety. The *ratio decidendi* in such a case considered and laid down.

Quære.—Whether under the present procedure the disobedience of a wife to obey the orders of the Court to return to her husband, can be enforced by giving her over bodily into her husband's hands. Such disobedience would seem to fall within s. 200 of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

The appellant, in three of the four appeals of which their Lordships have now to dispose, is Moonshee Buzloor Ruheem, a Bengal zemindar. The respondent, in all four appeals, is his wife, Shumsoonnissa Begum. Her father, Moonshee Hossain Ali, died in the year 1837, possessed of considerable wealth. His co-heirs, according to Mahomedan law, were his three widows Ashruffnissa, Oomdatunnissa, and the respondent's mother, Komerunnissa; two daughters, viz., the respondent and a posthumous child, named Nujmunnissa, and his nephew Boo Ali. His estate was divisible amongst these persons in twenty-fourth parts or shares, of which the respondent and her sister each took eight. The settlement of his affairs, however, occasioned a good deal of litigation, and the respondent did not obtain full possession of her share until November 1847.

She had previously, and in the month of April or May of that year, being then a widow with five children by her first husband, become the wife of the appellant the Moonshee. By him she has had one daughter. In July 1853, in consequence of the death of her sister Nujmunnissa, which took place in August

1849, and of the compromise of a suit with that lady's husband, she received a large accession of fortune. Her co-habitation with the Moonshee continued until the 28th December 1855, when on a complaint by her of ill-usage on his part, she was allowed by the Magistrate of the 24 Pergunnahs to leave his house. They have since lived separately, and the present litigation dates from that time.

On the 8th April 1856, she instituted against her husband a suit for the recovery of her property, which, she alleged, he had detained or made away with. On the same day he commenced against her and one of her sons-in-law a suit, of which the object was, to enforce his marital rights, by compelling her return to his house and control. These suits, in the argument before us, were called respectively the "property suit" and the "restitution suit"—a nomenclature which it may be convenient to adopt.

The "property suit" was originally brought against the husband alone. By his answer it appeared that certain portions of the landed property claimed by her had got into the possession of two persons, named Judoonath Bose and Mirtonjoy Bose. They were accordingly brought before the Court by supplemental plaint, on an allegation that they were the dependents of the principal defendant the Moonshee, and held benamsee for him. The suit was tried before the Civil Judge of the 24 Pergunnahs. His decree, which bore date the 25th July 1859, awarded to the respondent company's papers to the amount of Rs. 234,800 and cash to the amount of Rs. 20,511, dismissing the suit as to the other moveable property claimed by her. It also decreed the restitution to her of the immoveable property held by Judoonath Bose, with mesne profits to be paid by the Moonshee, but dismissed the suit as against Mirtonjoy Bose without costs. All the defendants appealed against this decree, the appeal of Mirtonjoy being for his costs. The High Court of Calcutta, by its decree dated the 29th November 1862, confirmed, with some slight variations, the decree as to the company's papers, directing the Moonshee to restore the papers to the amount of Rs. 82,000 which remained in his hands, and to replace the others by the purchase of company's papers to an amount equal to that of the missing papers; but reversed the Judge's decree as to the Rs. 20,511 cash. It confirmed, however, the decree as to the property held by the appellant Judoonath Bose, making him also responsible for the mesne profits. And it further decreed the reconveyance to the respondent by Mirtonjoy, of the immoveable property held by him. Against this decree the appellants Moonshee Buzloor Ruheem and Judoonath Bose have severally appealed to Her Majesty. No appeal has been preferred by Mirtonjoy Bose.

The restitution suit was tried by the Principal Sudder Ameen of the 24 Pergunnahs, who, by his decree dated the 28th December 1860, dismissed it with costs. On appeal the High Court of Calcutta confirmed that decision by its decree of the 25th July 1863. The Moonshee has appealed against both of these decrees.

His remaining appeal is against a decree of the High Court, made on the 13th February 1863, in another suit instituted against him by his wife. The object of that suit was to recover from him a company's paper for Rs. 10,000, for which, as she alleged, she had inadvertently omitted to sue in the property suit. Objections, which will be hereafter considered, were taken to the maintenance of this fresh suit, and were allowed by the Zillah Judge. But the High Court reversed his decision and remanded the cause for trial on the merits.

Having thus stated the general history and scope of this unfortunate and complex litigation, their Lordships will proceed to deal first with the appeals in the property suit. The respondent having preferred no appeal against the decree of the High Court, her claims, in respect of the moveable property, must be taken to be now reduced to one for the Government securities to the amount of Rs. 234,800, which the Moonshee has been ordered to restore or replace.

And their Lordships will begin by considering whether the decrees under appeal can be supported against him in that respect.

That all these securities came to her hands whilst she was an inmate of his zenana; that they all passed from her to him; that some of them remain in his possession; and that others have been traced to his creditors,—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between husband and wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the wife. Her case is that the securities were intrusted to him for a particular purpose, viz., that of receiving the interest on them for her; and that, though they may have been indorsed, she never meant to transfer the property in them. His case is that he purchased them from her on several occasions, and that on their indorsement and delivery, he paid her the full value of them. The principle of the judgments of the Courts below seems to be that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bona fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion that this is a sound principle, and in accordance with the long-established practice of the Courts in India. Mr. Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindoo woman; nay, that in all that concerns her power over her property, the former is by law more independent than an Englishwoman of her husband. It is no doubt true that the Mussulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition. But the Hindoo law is equally indulgent in that respect to the Hindoo wife. It may also be granted that, in other respects, the Mahomedan law is more favorable than the Hindoo law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India, the Mussulman woman of rank, like the Hindoo, is shut up in the zenana, and has no communication, except from behind the purdah or screen, with any male persons, save a few privileged relatives or dependents; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must therefore hold that this lady is entitled to the protection which, according to the authorities, the law gives to a purdah nusheen, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him. They will proceed to consider whether the Courts below were right in holding that he has failed to prove his case.

The transactions are five in number, three of them being in the year 1848. On the 20th May in that year, she is said to have sold to her husband the two papers for Rs. 9,500 and Rs. 7,000, which she received on a compromise of a suit with her step-mother, Ashruffnissa. On the 27th of the same month, she is said to have sold to him all the papers specified at the foot of his answer, which make up the sum of Rs. 103,800, except a paper for Rs. 11,300, which is said to have been sold on the 12th of the following month. These exhaust all the papers

claimed, which formed part of her original share of her father's estate. The papers for Rs. 114,500 which she received in 1853 from the estate of her sister are said to have been sold on two occasions in 1855, viz., papers for Rs. 32,500 on the 2nd March, and papers for Rs. 82,000 on the 2nd July in that year.

These several transactions are sworn to by various witnesses, of whom most, if not all, are or have been dependents of the appellant. There may be slight discrepancies in their testimony, but its general effect is, that on each occasion money, being the full value of the papers purchased, passed in cash or notes from the appellant to the respondent. The appellant has himself deposed to the same effect, and has produced certain khatta books in corroboration of his testimony. The evidence, if believed, is sufficient to establish his case.

Both the Courts below have, however, disbelieved these witnesses, and have cast discredit on the books as being unlike those which were likely to be kept in order to record the transactions of a person in the appellant's position. The Zillah Judge, obviously a gentleman of experience and ability, appears to have tried the cause very carefully; and their Lordships cannot but feel the difficulty of holding against his judgment,—confirmed, as it is, by that of the High Court,—that either the witnesses or the books, considered by themselves, are trustworthy. In what degree, then, do the other facts and proceedings proved in the cause tend to confirm or to cast doubt upon their testimony?

The earliest in date are the applications for a certificate under Act XX of 1841. It appears that a difficulty had arisen in the way of drawing the interest on the two company's papers for Rs. 9,500 and Rs. 7,000, which stood in the name of Moonshee Hossein Ali, the respondent's father. The respondent applied for a certificate, which is in the nature of letters of administration, to his estate, on the 5th May 1848. Her application was refused, but the grounds of the refusal do not appear. The transfer of these papers to the appellant took place on the 20th May; and on the 2nd July, the appellant presented to the Sudder Dewanny Adawlut his petition, supported by a petition from the respondent, complaining of the Judge's order of the 5th May, and praying that a certificate might be granted to him in her stead. The only bearing of these documents upon the present suit is, that in his petition the appellant describes himself as the purchaser, and the respondent as the letter of these papers, and that the respondent in her petition says, "Owing to my having sold to Buzloor Ruheem, by an indorsement, the above-mentioned papers," &c. The importance of this as an admission is obviously very slight. We do not know—and this is an observation which applies to all the other evidence of this kind—how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts in these Courts. And taking the admission at its highest, it would show only that for some cause or another, possibly only in order to facilitate the receipt of interest, the apparent ownership of the notes had been transferred from her to her husband as upon a sale and purchase,—the only way, in truth, in which it could be done, since the Treasury in Calcutta takes no notice of trusts. This proceeding throws little (if any) light upon the nature of the actual transactions between the man and his wife.

The proceedings next in order of date that are relied upon are those in the execution suit, which began in September 1848, and was finally disposed of in May 1850. These relate more to part of the lands now held in the name of the appellant Judoonath, the title to which will be hereafter considered, than to the company's paper. It may, however, be well to state their nature here. Oomdatunnissa having, in the course of the protracted litigation of this family, a decree against the respondent for the small sum of Rs. 671-13-1, took out execution against her share in one parcel of the lands inherited from her father. The appellant, the Moonshee, intervened as objector (App. p. 48), stating that the lands seized, as well as the other lands belonging to the respondent, and

these company's papers, had been, before the execution, sold and transferred to him; and that the respondent, the judgment-debtor, had no interest therein. His objection was overruled by the Judge on the 12th January 1849 (App. p. 57). He brought a regular suit to impeach that decision, to set aside the execution, and recover the property sold under it. That suit was dismissed (App. p. 63) on the 21st May 1850, on the ground that the alleged transfer of the respondent's properties to the appellant was collusive, and in fraud of her judgment-creditor. The chief bearing which these proceedings have upon the title to the company's papers is that, in the answer filed by the respondent in the regular suit, she stated that, after her marriage with the appellant, fearing lest her properties should be wasted by her agents, she disposed of the same to her husband, and deposited the value thereof for the benefit of her children. Now, as that answer was filed long before any disagreement had arisen between the appellant and respondent, it can hardly be doubted that, if not actually prepared under his direction, it was at least filed with his concurrence. And it is to be observed that this statement is by no means consistent with the case now made by him of sales out and out to him, in order to raise money to meet the respondent's debts and other necessary expenses. It suggests a different motive for the sales, and treats the proceeds as remaining in the hands of somebody or another for the benefit of her family. The sales, too, having been found to be collusive and unreal transactions, are quite consistent with the supposition that the lady was persuaded into making them upon the suggestion that she would thereby defeat her creditor, and that they were merely colorable and made for that purpose. These proceedings tend more to discredit than to support the case now made by the appellant of absolute sales of these securities to him, and of the actual payment by him, out of his own funds, to the respondent of the purchase-money at the dates of the several purchases.

That case suggests the question so much insisted upon in the Courts below, viz., first, why should the appellant wish to purchase these large amounts of company's paper, and how was he able to pay for them? and, secondly, why should the respondent wish to sell her company's paper, and how has she disposed of the proceeds of it? What answer does the evidence give to these questions?

The appellant is no doubt shown to be a zemindar possessed of considerable estates. But the evidence tends to show that, at the time of his marriage, and at the date of the earlier, at least, of these transactions, he was, like many landed proprietors, an embarrassed man. He and his brother owed large sums to one Ramchand Mookerjee, and to Ashotosh and Promothonauth Day. These were secured by bond and by judgments confessed, probably on warrant of attorney, in the Supreme Court, of which one bore date the 27th March 1845 and was for Co's. Rs. 148,000, and the other, dated the 30th June 1846, was for Co's. Rs. 100,000. The precise amounts due on these judgment debts are not shown, but it is pretty clear that neither judgment at the time of the earlier transfers of the respondent's papers was satisfied. It is admitted by the appellant that most of the company's papers which, he says, he purchased on the 27th May and 12th June 1848, were, on the 6th July, transferred by him to Ashotosh Day, in payment of one of these debts. He and his brother were also, at this time, bound, under an order of the Supreme Court of the 12th April 1848, to pay into Court the sum of Rs. 62,000. It is not credible that a person under these liabilities should be purchasing Government securities, bearing a rate of interest considerably lower than that at which his debts were running on,—securities which, if the necessity for selling them existed, might have been sold through a broker in the market.

Again, the appellant's case is that the respondent, when she married him, was herself in debt; that she afterwards required large sums for the marriages of her children and other family ceremonies; that she sold her Government

securities in order to meet these necessities, and applied the proceeds in meeting them. He is driven to this allegation because, as it is clear that she carried nothing with her out of his house, it would be still more difficult to support a theory that the money remained with her in some other form of investment. It is to be observed, however, that some of his own witnesses assign a different motive for the sales. Some of them say that she sold in order to get rid of difficulties caused by the company's papers standing in the name of a purdanusheen. Others say, as she says herself in her answer in the execution suit, that she was afraid of being cheated by her agents. That the respondent, during her seven or eight years of co-habitation with the appellant, must have incurred considerable expenses in respect of her children by the first marriage, and for other family purposes, is pretty certain; but that she should have expended upwards of two lacs of rupees, the proceeds of these company's papers, over and above the other property, which, at one time, she unquestionably possessed, is not very credible. It is to be remembered also that, on the assumption of the Courts below, she had the interest of these company's papers wherewith to meet her necessary expenses. It is inconceivable that, if these very large sums had been expended in the payment of debts, and for the other purposes alleged, the appellant should not have been able to give better proof of the fact. It may suit his present purpose to profess that he had little personal connection with the management of her affairs; but the evidence, and in particular his petitions of the 27th October 1854 and the 4th December 1855 (App. pp. 88, 91), are strong to show that this was not the case. He there represents himself as active in the management of her property and interests.

The first of these documents is, in various particulars, strangely inconsistent with the case which the appellant now sets up. He is there defending himself from a charge, made before the Magistrate, of having confined his wife, and having refused to give up to her, not merely the company's papers derived from Nujmunissa, which according to his case would then be still in her possession, but also company's papers to the amount of Rs. 80,000 or Rs. 90,000, which, according to his present case, he had long before 1854 purchased from her; yet he does not say a word of this purchase. He covers the whole charge with the general answer, "The entire property of Shumsoonnissa being her own property, and my entire property being mine, what ground could there exist between her and me that I should confine her?"

We have hitherto considered the evidence with reference to the alleged sales of the Government securities generally. Some parts of it, however, suggest considerations, which apply exclusively to the alleged transactions of 1855 and the transfer of the papers for Rs. 114,300. It may be that the means of the appellant to make these alleged purchases had then been further diminished by the litigation in which he appears to have been engaged with his first wife, and by the decree which she obtained against him. On the other hand, he may have been in more prosperous circumstances than he was in 1848. But if he, so late as the months of March and July 1855, paid to the respondent the value of these papers, it is almost incredible that he should not be able to give some better explanation how she disbursed those large sums between those dates and the following December, when she left his house destitute. Again, his petition of June 1854 discloses a state of things which is far more consistent with the respondent's case, that she made over to him these company's papers in 1853, as soon as she received them, than with his, that they were not transferred to him until 1855. It shows that in June 1854 a petition had been presented to the Magistrate, complaining of his ill-treatment of his wife. He no doubt denied the charge, and treated it as emanating, not from his wife but from discharged servants, and the Magistrate then considered that the charge was unfounded. But when light is thrown upon this transaction by what subsequently happened, by his ill-usage of the respondent,

which is proved, and by her release from the house by the Magistrate, on the subsequent petition of 1855, it is difficult to resist the conclusion, that the quarrel between the husband and wife had begun in 1854 (the date to which her plaint assigns its commencement), or at all events, that in July 1855 there must have been a state of feeling between them, which would make a voluntary sale of her property to him a most improbable transaction. If he did, so shortly before their final separation, obtain a transfer of those securities to himself, the burden of showing that he did so righteously is assuredly made heavier.

Again, the evidence of ill-usage which has been given in this suit, seems to have a further bearing upon the issue between the parties which is now under consideration. We have not now to consider whether what he did was within or in excess of the marital powers of a Mussulman husband. It is sufficient to say that very harsh treatment, and a restraint from which the Magistrate saw fit to release her, are proved, and that she left the house in circumstances to which no native woman of her rank, who was not suffering under a sense of intolerable wrong, would have exposed herself. Now what was the cause of this grave quarrel? Her account of it is more probable than his, if indeed he has given any. It seems more likely that he should have attempted by harsh measures to frighten her out of a just demand, than that he should have met, in that way, one which was without foundation. Her conduct, too, if the quarrel had begun in 1854, has ever since been consistent; his, as has been shown above, has been inconsistent.

It would doubtless have been more satisfactory if the respondent had thought fit to support her claim by her own testimony. Her abstaining from so doing certainly affords an objection to her case deserving of serious consideration; and their Lordships do not think that it is altogether removed by the suggestion of the strong repugnance felt by native females in the respondent's position to taking such a step. But the objection, though it may weaken, does not destroy the case made by the respondent; and their Lordships are of opinion that, whatever weight may be due to it, it is quite insufficient to affect the conclusions in her favor to be drawn from the facts and circumstances of the case which have been already adverted to.

The admission of the tutor, a witness produced on the part of the respondent, to the effect that on the transfer to which he speaks he saw money pass, is also a circumstance in the appellant's favor. But if the witness has spoken the truth about the money, it is to be remembered that the transaction to which he speaks was that of the 27th May 1848, when it may have been desired to make a colorable sale for the purpose of defeating the execution in the manner shortly afterwards attempted.

Their Lordships, then, after carefully weighing the evidence and considering the able arguments addressed to them, have come to the conclusion that the burden of proving *bonâ fide* purchases of these company's papers was properly thrown on the appellant; that he has failed to do so; and that no ground has been shown for disturbing the concurrent judgments of both the Courts below on this part of the case.

The next question for consideration is that raised by the appeal of Judoonath Bose, as well as by that of the Moonshee, viz., whether that portion of the decree under appeal which directs the reconveyance to the respondent of the immoveable property held by Judoonath, and the payment to her of the mesne profits by both the appellants, can be supported.

The property in question consists of certain shares in two gardens, of which the entirety formed part of the estate of Moonshee Hossein Ali. They are known as the Dum-Dum garden and the Narain Mundul gardens, and, like the rest of the estate, were divided amongst the co-heirs in twenty-four shares. Of the first, the decree gives to the respondent sixteen shares, or two-thirds of the whole, comprising both her original share and the share which she inherited from her

sister. Of the other, it gives her only the eight shares inherited from her sister, her original share having passed, under an execution sale, into the hands of a stranger to the suit.

The history of the Dum-Dum garden, after the death of Moonshee Hossein Ali, and its division amongst his heirs, is this :—As early as 1843, Boalli sold his five shares, and Ashruffnissa Begum sold her one share to one Dilrus Begum for Rs. 3,000. These six shares were conveyed by one bill of sale dated the 29th Bysack 1250. On the 22nd May 1848, the respondent executed a bill of sale, by which she purported to convey her original eight shares of this garden to her husband, in consideration of Co's. Rs. 2,000. On the 15th August 1848, he, by an indenture in the English form, conveyed these eight shares to Dilrus Begum, in consideration of Co's Rs. 4,000. On the 20th July 1853, Dilrus Begum, by a bill of sale, conveyed both the six shares which she had acquired from Boalli and Ashruffnissa, and the eight shares which she had acquired from the appellant the Moonshee, to one Jegree Khanum, for Rs. 6,000. And on the 27th September 1853, Jegree Khanum conveyed all these fourteen shares to the appellant Judoonath, for Rs. 4,000. On the 9th January 1854, the respondent executed a bill of sale, purporting to convey the one-third part of this garden, which she had inherited from her sister, to Judoonath, for Rs. 2,000. The appellant Judoonath therefore holds twenty-two shares of this garden,—eight under a direct conveyance from the respondent ; eight under a title, founded on her conveyance to her husband, but strengthened by the mesne conveyances ; and six under a title, dating from 1843, and unimpeached, at least in this suit.

In May 1848, the respondent conveyed her original eight shares of the Narain Mundul gardens to her husband ; this property was the subject of the seizure which gave rise to the execution suit ; and the sale having been declared fraudulent as against the judgment-creditor, these shares were purchased by the judgment-creditor, and cannot now be followed.

On the 12th May 1855, the respondent executed a bill of sale, purporting to convey to the appellant Judoonath, in consideration of Rs. 1,500, the eight shares of this garden, which she had inherited from her sister. That transaction is impeached. He had previously acquired part of the share of Boalli in this garden, having inherited it from his brother Koylas, who, in 1850, purchased it at an execution sale. His title to this portion is not impeached.

The substantial issue on this part of the case is one between the respondent and Judoonath Bose. It is obvious, therefore, that the principle upon which, on the trial of the issue already considered, the burden of proof was shifted from the plaintiff to the defendant, is not necessarily applicable to the trial of this issue. The respondent comes into Court, seeking to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her ; and it lies upon her to establish her right to that relief. Has she done so ?

She has proved that Judoonath Bose is the servant of her husband. She has produced three witnesses, Gholam Arub, Gholam Ruhman, and Sheikh Taki, to prove that her husband is the person who is really in the possession or in the receipt of the rents and profits of the property. But nothing can be less satisfactory than the testimony of these witnesses, of whom the first is her manager ; the second, a tailor ; and the third, a menial servant ; none of them having any connection with the lands.

The evidence of possession given on the other side, by ryots and others, may not be altogether trustworthy ; but, such as it is, it outweighs the loose statements of these three witnesses. Some of the inferences to be drawn from the conveyances from her to her husband are also favorable to the respondent's case ; but these apply only to that portion of the property claimed which consists of her original share in the Dum-Dum garden.

It may be conceded that the conveyances from her to her husband in 1848, considered with the light reflected on them from other parts of this case, and in particular from the proceedings in the execution suit, could not stand. It may also be conceded that, if the question were between her and her husband, he ought not to be permitted to say that she is bound by her fraudulent conveyance, since she may be presumed to have executed it under his influence or pressure. And if the property had passed directly from him to his dependent, the presumption that the latter is a mere trustee for him might be stronger than it is.

But what are the facts proved? This portion of the property in dispute passed apparently by sale from Buzloor Ruheem to Dilrus Begum. It remained with her for nearly five years; was sold, ostensibly at least, by her to Jegree Khanum, from whom two months later it passed to Judoonath. These intermediate conveyances are treated in the Courts below, and in the argument before their Lordships, as mere "circuitry of fraud;" and it has been argued that we have no proof who Dilrus Begum and Jegree Khanum are, or, indeed, that there ever were such persons. But what proof, on the part of the respondent, is there to support these arguments? On the other side, there are witnesses who state that Dilrus Begum was the wife of the Nawab of Chitpore, a well-known person, and that Jegree was a wife or concubine of apparently the same person. The conveyance to Dilrus was by English deed, prepared and executed in the office of a respectable English attorney, acting apparently for the purchaser. That circumstance afforded the means of investigating that transaction. But no attempt has been made to do so. Again, that Dilrus Begum was a real personage, not necessarily connected with the appellant the Moonshee, is placed almost beyond a doubt by the undisputed fact that in 1843, several years before the second marriage of the respondent, the six shares of this garden had been conveyed to her by Boalli and Ashruffnissa. What, again, was the motive for this "circuitry of fraud"? If Dilrus Begum held five years' benamsee from the Moonshee, why raise suspicion by transferring the property from her to his known dependent, Judoonath? Sir Roundell Palmer insisted strongly on the fluctuations in the amounts of the purchase-money for which the different instruments purported to convey the same property, as a badge of fraud. The first transaction, which we may admit to have been fictitious, expresses a consideration which, on a comparison with the price for which the six shares were sold in 1843, seems to be below the real value of the property. Tried by that test, the sum of Rs. 4,000, for which it was conveyed to Dilrus, would be about the true value. This fact, taken by itself, tends to support the reality of the sales to Dilrus. Again, if she sold for Rs. 6,000 property which had cost her Rs. 7,000, the difference is not greater than might be accounted for by the necessities of the vendor, or by a diminution in the value of the property in the period during which it remained in her hands. The further reduction of the price to Rs. 4,000 in the sale to Judoonath is certainly a more suspicious circumstance. It is not, however, one which seems to go very far to supply any defect of proof on the part of the respondent. It is not impossible that Jegree Khanum may have found that she had made a bad bargain, or that Judoonath may have made an extremely good one. On the other hand, if the transactions were fictitious, and the price cost the professed purchaser nothing, it is not easy to see why an adequate consideration was not expressed in the conveyance. There seems to have been no enquiry or cross-examination on this point in the Courts below.

Again, what is the case proved in respect of the conveyances from the respondent herself to Judoonath? She is proved to have executed these conveyances. She has not met this fact fairly in her pleadings. In the original plaint there is no mention of Judoonath's title; and on the face of the supplemental plaint, it is not very clear whether she treats the conveyances as forgeries, or admits the execution and impeaches their effect. She has certainly not stated

on what grounds she impeaches them, nor has she come forward as a witness to explain her execution of them. It lay upon her to do so; to show by her own or other testimony under what circumstances they were procured from her, and to rebut the evidence that the consideration money passed to her. Again, the purchase of these parcels of land by Judoonath is not wholly improbable. The purchases are not beyond the means of a person in that rank of life. He already held portions of both gardens by titles not deduced from the respondent, and unimpeached. The first conveyance from the respondent was executed in January 1854, when the Moonshee was absent from home and at Singapore. The Zillah Judge treats the circumstance of his absence as indicative of fraudulent forethought and contrivance. His presence probably would have afforded the inference of pressure and undue influence. The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are perhaps somewhat too apt to see fraud everywhere. The second conveyance was in May 1855. At that time the quarrel with her husband had, according to the respondent's case, begun. She is not likely to have executed this instrument voluntarily at his instigation. She has not shown that she was forced to do it. And on the other hand, it is not improbable that, in the circumstances in which she thus stood, she may have been glad to raise the comparatively inconsiderable sum which is stated to have been the price of the property.

On the whole, then, their Lordships are of opinion that the respondent has failed to show a sufficient title to recover any of the shares in these gardens from the appellant Judoonath. The habit of holding land benamee is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership. This principle was enforced by this Committee in a recent case. Their Lordships do not deny that in the particular case the connection of Judoonath with the other appellant, the proved conduct of the latter towards his wife, and other circumstances threw some cloud of suspicion over the title to these parcels of land. But such suspicions are not proof. Their Lordships think that the Judges of both Courts below have given too much weight to them; that they have not sufficiently considered in what degree the burden of proof lay upon the respondent; and that when the proofs which she ought to have given and might have given were defective, they have allowed the deficiency to be supplied by presumptions and inferences which the facts do not altogether warrant. Their Lordships cannot, therefore, recommend Her Majesty to confirm this portion of the decrees in the "property suit."

Third Suit.

As the third suit also concerns property, and the point raised by the appeal in it is very short, their Lordships think it will be convenient to dispose of it before they proceed to consider the appeal in the "restitution suit." Two objections were taken to the maintenance of this suit. It was pleaded, *first*, that the respondent's claim was barred by the law of limitation; and, *secondly*, that she was precluded from suing to enforce it by the 7th Section of Act VIII of 1859, which provides that, "if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." From the plaint it appears that the company's paper for Rs. 10,000, which is the subject of the suit, was specified in the petitions for a certificate under Act XX of 1841, already referred to, together with the papers for Rs. 9,500 and Rs. 7,000, which are included in the respondent's demand in the "property suit," and that her claim respecting it is precisely the same as her claim for the other two papers. The only reason she assigns for not suing for it in the former suit is that, "as she was a purdanasheen and unacquainted with reading and writing, she could not ascertain anything about the aforesaid Government paper and the interest of the same." She says she discovered her mistake in July 1859,

and insists that her cause of action arose at that time. The Zillah Judge held that the second objection was fatal to the suit, which he accordingly dismissed on that ground.

The High Court has reversed this decision for the following reasons:—They hold with him that the omission to include this item in the first suit was an oversight; that she knew of the existence of this paper before she brought her first suit, and might have included it therein; and that the real question to be decided was whether that omission, neglect, or oversight was sufficient to bar her present claims under the law fairly applied. This question they decide in the negative, on the ground that it was clear she was not actuated by any fraudulent or dishonest motive; that the stamp paid on the first suit would have covered also this paper; that she cannot have omitted this claim in order to bring the case within the cognizance of a particular Court; and that although it may be desirable for the ends of justice that the various items claimed by a plaintiff should form the subject of one single action, yet there was nothing in the law to make it imperative upon her to include every item of such a claim as hers in a single suit.

To these reasons their Lordships cannot assent. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The words of this law are:—"If a plaintiff relinquish or omit to sue for any portion of his claims." It plainly includes accidental or involuntary omissions, as well as acts of deliberate relinquishment. In their Lordships' opinion, the only ground on which (if at all) the judgment of the High Court could be supported, is that which is somewhat doubtfully expressed by the Judges in the following sentence:—"Nor do we think that, under the circumstances of the case, the plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the defendant on a particular date." Their Lordships think that the correct test in all cases of this kind is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the respondent seems to them to be the refusal by the husband to restore, or his misappropriation of, the wife's property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular company's paper for Rs. 10,000, she would have been equally justified in making each one of the company's papers which are comprised in the "property suit" successively the subject of an independent suit. Their Lordships are of opinion that the ruling of the Zillah Judge on this point was correct, and that the suit was properly dismissed. This being their view, it is unnecessary to say anything on the question of limitation. They are disposed, however, to think that the claim being founded on an alleged breach of trust, was not, as pleaded, subject to limitation, either under the old law or under Act XIV of 1859, which, the suit having been commenced in December 1861, seems to be the law applicable to it. If the plaintiff had failed to prove a breach of trust, but had established some other title to relief, the question of limitation might have arisen. But this could only happen upon a trial of the suit on its merits.

Restitution Suit.

Their Lordships will now address themselves to the novel and difficult questions raised by the appeal "in the restitution suit."

The first is that which has been strenuously argued at the bar, though it does not appear to have been raised in the Courts below, or even in the respondent's case, viz., whether any suit by a Mussulman husband will lie in the Civil Courts of India to enforce his marital rights under the Mahomedan law, by compelling his wife, against her will (she being a free agent, and not detained by others), to return to co-habitation with him. If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice. Of authority negating the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of maintenance to the rebellious wife, or, at most, a suit for damages; because a suit to compel the wife to return to her husband, though obviously a more complete remedy than either of them, is in the nature of a suit for specific performance; and being founded on the contract of marriage, which the Mahomedan law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them. And referring to the definition of some of those obligations, as given with somewhat prurient particularity in certain Mahomedan treatises, the learned Counsel argued that it was impossible for Courts constituted like those of British India to exercise such a jurisdiction. It may be admitted that the Courts of India would properly decline to entertain such questions; although amongst the Wahabees of Central Arabia, or other communities in which the Mahomedan law is observed in its utmost strictness, the Magistrate might, perhaps, take cognizance of them. But this admission is not decisive of the question. The canonists lay down many things concerning the relative duties of man and wife which the Courts Christian, at least of our country, feel compelled to leave as duties of imperfect obligation. They do not therefore refuse to enforce the broad duty of co-habitation. In the words of Lord Stowell, quoted by Mr. Attorney-General, "They are content to take the wife to the husband's door and to leave her there."

But how does this question stand upon the authorities? In the case of * *Ardaseer Cussetjee v. Perozeboye*, 6 Moore's Indian Appeals, 390, in which it was here decided that a suit for restitution of conjugal rights between Parsees, and *a fortiori*, one between Hindoos and Mahomedans, did not lie on the ecclesiastical side of the Presidency Courts, Dr. Lushington, in delivering the judgment of the Committee, says, "The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan law to Mahomedans, Hindoo law to Hindoos: but the Ecclesiastical law has no such flexibility." And after ruling that the Court below had not the jurisdiction which it claimed, he adds, "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees). We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between the Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws or some customs having the effect of laws, which apply to the married state of persons of this description." And he afterwards observes, "Such remedies (the remedies afforded by their own usages) we conceive that the Supreme Court on the civil side might administer; or at least remedies as nearly approaching to them as circumstances

* See 4 W. R. P. C. 91; 1 Suth. P. C. R. 265.

would allow." It may be said that those dicta, though proceeding from so high an authority, are extrajudicial, and merely indicate an opinion that suits of this kind might possibly be entertained by the Civil Courts of India. The Attorney-General, however, has cited positive authorities which support the jurisdiction, and show the principles upon which it ought to be exercised. These are the cases of *Mussamut Hingu*, decided in 1832, and reported in 6 S. D. A. R., p. 200; of *Mussamut Ameena*, decided in 1841, and reported in 7 S. D. A. R., p. 27; and the case of *Sona Chand Bibi*, decided in 1848, and reported in the Reports of the Bengal Sudder Court for that year, at p. 795. In the last of these cases the suit was dismissed on the ground that the marriage was not proved, but the jurisdiction was not questioned. The second case may be distinguishable from the present on the ground that the wife was of tender years, and under the control of the co-defendants in the suit. But in the first case the wife was clearly of full age, and a free agent. The co-defendant in the suit, though charged with harbouring her, had little more control over her than the co-defendant in the present case had over the respondent. The suit, which went through three Courts, was resisted by the wife on grounds personal to herself; and it was finally decided that, according to the Mahomedan law, by which the question was to be decided, the plaintiff had a right to the possession of his wife, and she was compelled to return to him. It does not very clearly appear by what process the judgment in this case, or in that of *Mussamut Ameena*, was to be enforced. From some passages it might be inferred that, in the event of disobedience, the wife was to be given bodily into her husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of India, may well be doubted. Disobedience to the order of a Court directing the wife to return to co-habitation, would seem to fall within the 200th section of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

Upon authority, then, as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit in the Civil Courts of India, for a declaration of his right to the possession of his wife, and for a sentence that she return to co-habitation; and that that suit must be determined according to the principles of the Mahomedan law. The latter proposition follows not merely from the imperative words of Reg. IV of 1793 s. 15, but from the nature of the thing. For since the rights and duties resulting from the contract of marriage vary in different communities; so, especially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties.

The matrimonial law of the Mahomedans, like that of every ancient community, favors the stronger sex. The husband can dissolve the tie at his will, subject to the condition of paying the wife her dower and other allowances; but she cannot separate herself from him, except under the arrangement called *khoola*, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband. It cannot, we think, be doubted that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his house if she has left it. We do not find this expressed in the *Hedayah*, which speaks only of her forfeiting her right to maintenance if she be disobedient or refractory, or go abroad without her husband's consent, until she return and make submission (vol. i. p. 394); but it seems implied throughout that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation made with his consent. In fact, the principle of keeping a man's harem in seclusion and under his control is so essential a part of the framework of oriental society that it is naturally assumed and taken for granted by a Mussulman expounder of the law.

On the other hand, the law assures to the wife considerable rights as against

her husband. She may insist on maintenance according to her rank and his ability; and if he fails to give it, she may enforce that right before the Kaze (1 Hedayah, Book IV Chap. XV s. 1 pp. 393, 394). If he has power to keep her within the zenana and to prevent access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appropriated to her use (p. 402). As to personal violence, there are certainly passages in the Hedayah which, founded on a text in the Koran, imply that the husband may use it for correction; but this right of corporal chastisement is expressly said to "be restricted to the condition of safety;" and it may be questioned whether these authorities go the full length of the Futwah at p. 14 of the record (*see* Hedayah, vol. ii. pp. 75-81). The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—"There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it. The Court, as Lord Stowell said, has never been driven off this ground."

If, however, it be granted that, according to Mahomedan law, the husband may sue to enforce his right to the custody of his wife's person; and that, if her defence be cruelty, she must prove cruelty of the kind just described, it by no means follows that she has not other defences to the suit which would not be admitted by our Ecclesiastical Courts in a suit for the restitution of conjugal rights. The marriage tie amongst Mahomedans is not so indissoluble as it is amongst Christians. The Mahomedan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Kaze by the Futwah at p. 32 of the record (if the law, indeed, warrants such a jurisdiction), of selecting a proper place of residence for the wife, other than her husband's house.

Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Mahomedan law, as well as strict proof of the facts to which it is to be applied. Has the present case been so tried and determined in the Courts below? Their Lordships are constrained to say that this has not been the case. In the first place, they think that the *ratio decidendi* adopted by the Judges of both Courts is erroneous. The Principal Sudder Ameen held that oppression had been proved (the correctness of his conclusion will be hereafter considered). He did not then proceed to consider whether the oppression was so far beyond the bounds of marital authority, under the Mahomedan law, as to constitute an answer to the suit. He seemed to think that oppression once proved, the case was taken out of the Mahomedan law, and was to be decided on what the Court, upon general principles, might deem to be expedient for the security of the wife's person. He then proceeded to argue, apparently without the slightest foundation of proof, that the wife, having been ill-treated, had probably been unfaithful; and that if she were restored to her husband, he was not unlikely to revenge himself by taking her life. He afterwards argued, with more reason, upon the danger of restoring her to one who had been decreed liable to pay her a very large sum of money.

The facts upon which the Judges of the High Court proceeded were that the Magistrate had seen fit to release the respondent from her husband's house, and that a decree had passed against him for having made away with her property for a large sum, of which they overstated the amount. They appear to have considered that, according to the Mahomedan law, these facts were not an answer to the suit; and they then say, "This being so, are we required to decide this

case in conformity with the principles of the Mahomedan law? Are we to compel the defendant to return to her husband, convinced as we are that she should not be forced to return? If, under the Mahomedan law, no wife can separate herself from her husband under any circumstances whatsoever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan law giving no relief to a woman, be the conduct of the husband ever so bad, it is a case to be disposed of by equity and good conscience. And on these principles we have no hesitation in saying that the grounds upon which the defendant has separated from her husband justify her in that step," &c.

The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is termed equity and good conscience, *i.e.* according to that which the Judge may think the principles of natural justice require to be done in the particular case.

Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Reg. IV of 1793 s. 15), which directs that in suits regarding marriage and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision, that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Mahomedan law was in plain conflict with the general municipal law or with the requirements of a more advanced and civilised society,—as for instance, if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own sense of what is just and fair, without reference to positive law, would let the wife go free; and yet the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband.

In what they have just said their Lordships must be taken to object only to the general supersession of the Mahomedan law as the *ratio decidendi* in cases of this description, which seems to them to be implied in the judgments under review.

They do not mean to lay down that it was sufficient for the decision of the case to show that, according to the Mahomedan law, the husband has a right to the custody of his wife, or that there was no answer to his suit unless it could be shown that the wife had been separated from him either by Talâk or Khoola, either of which would dissolve the *vinculum*. This assumption, which seems to have been made by the Judges of the High Court, is, their Lordships think, erroneous. It seems to them clear that if cruelty in a decree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan law.

Before, however, any of these principles can be applied, the facts to which they are to be applied must be established by legal proof; and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile and now abandoned issue about freemasonry, there is little evidence in the cause.

The Zillah Judge's judgment in the "property suit" was put in evidence. The fact, therefore, that the appellant had been decreed liable to make good a large sum of money to the respondent in respect of the property which he had misappropriated was established; but the proof of personal cruelty rests almost entirely on the proceeding of the Magistrate. That proceeding is neither one *inter partes* nor even a conviction of the appellant upon a criminal charge. It was treated by the Nizamut Adawlut (Record, p. 33) as being the record of an act done by a police officer, and not the judicial proceeding of a Magistrate. It is, therefore, difficult to see how, in strictness, it can be evidence at all against the appellant; but at most it proves only that the Magistrate set the lady free from what he considered improper restraint.

To establish a case of cruelty as a defence to the suit, the respondent might have called the Magistrate, if then still in India, to speak to the state in which he found her when he set her free. She might also have given such evidence of her treatment as she adduced in the "property suit," but which, whatever were her reasons for it, she did not adduce in this suit. And, lastly, she might have given her own testimony, which it is most desirable to have on such an issue. She has failed to do any of these things; and it is impossible to say that the Courts below had before them, in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.

From what has been said, it must be obvious that their Lordships are not prepared to affirm the decrees under appeal in this suit. They do not, however, feel themselves in a condition to make a final decree, which would put an end to this painful litigation. They will not visit upon the respondent the mismanagement of her cause by sending her back at once to her husband. Enough has been shown to render it doubtful whether she can be restored to his zenana with safety, at least whilst the relation of debtor and creditor continues to subsist between them, unless proper security for her protection is taken. It may ultimately turn out that she ought not to be sent back at all. Their Lordships must, therefore, unwillingly recommend that this cause be remitted to the High Court, with directions to put the same in a course of re-trial, and with power, if necessary, to amend the issues or frame new ones. If cruelty be relied upon as a defence, there should be a distinct issue as to the fact of cruelty.

Their Lordships, however, cannot help suggesting, for the consideration of the parties, that it is for the interest, the happiness, and the respectability of both to settle the questions still open between them by amicable arrangement rather than by further litigation. They have surely friends who might effect such an arrangement between them.

Their Lordships have now only to recapitulate the several recommendations which they will humbly make to Her Majesty on these appeals. These are:—

First.—That the appeal of the appellant, Buzloor Ruheem, in the "property suit," be dismissed, except so far as it relates to his liability to pay the mesne profits of the shares in the Dum-Dum and Narain Mundul gardens jointly with the appellant Judoonath Bose; that the appeal of the last-named appellant in the same suit be allowed; and that the decree of the High Court be amended by omitting so much thereof as relates to the shares in those gardens, and by directing, in lieu thereof, that that portion of the respondent's claim be dismissed with costs, and that the said decree be in all other respects confirmed.

Secondly.—That in suit No. 256 of 1862, the decree of the High Court be reversed, and that, in lieu thereof, the decree of the Zillah Judge dismissing the respondent's suit, with costs, be affirmed, with the costs of the appeal in the High Court.

Thirdly.—That in the "restitution suit" the decrees of the High Court and of the Principal Sudder Ameen be reversed, and the cause be remitted to the High Court, with directions to have the same retried on fresh evidence, and with

power to amend the issues or to frame new issues, if they shall see fit to do so.

That the respondent should pay the costs of the appeals in suit No. 256 of 1862 and in the "restitution suit." That she should also pay the costs of the appeal of Judoonath Bose in the "property suit." And that the appellant Buzloor Ruheem should pay the costs of his appeal in that suit.

The 10th July 1867.

Present:

Lord Cairns, Sir James W. Colvile, Sir Edward Vaughan Williams,
Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Limitation—Suit—Ex-King of Delhi—Government of India—Bond—Interest.

On Appeal from the Judicial Commissioner of the Punjab.

Narain Doss

versus

The estate of the Ex-King of Delhi.

The Government of India, who took upon themselves to pay debts due against the estate of the Ex-King of Delhi out of the assets of the estate of the Ex-King, are entitled to avail themselves of the statute of limitations in a suit brought against the estate; but if a suit could justly, and in equity and conscience, be substantiated against the Ex-King, it ought to be allowed before the Government officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his sovereignty.

Where in a previous suit on a bond, which suit was lost on account of want of jurisdiction, the plaintiff sued for a specific sum and for interest as from a certain date, he was declared in a subsequent suit instituted by him on the same bond, entitled to interest on the bond, only from the date from which he sued for it in the first suit to the date of the present decree of the Judicial Committee.

In the peculiar circumstances of a case of this description, in which the Government of India takes upon itself to pay out of the assets of the Ex-King of Delhi such claims as can be established against the Ex-King, their Lordships are of opinion that the Government does no more than what is incumbent upon it, when it narrowly and jealously scrutinizes claims which are made; it being within the experience of all, that where the claim is against, not the person who originally contracted the debt, but those who have taken upon themselves the duty of satisfying it, exaggerated, and sometimes unfounded demands come to be made. Their Lordships also think that if in those circumstances a claim were made which was found to be barred by the letter of any regulation or statute of limitations, the Government of India might well say that they had not taken upon themselves to provide for the payment of State demands, and that they were entitled to the benefit of any rule of limitation of that kind. Subject, however, to these observations, their Lordships think that any claim which justly and fairly, in equity and conscience, could be made and substantiated against the Ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his sovereignty, leaving of course the question of the payment of that claim when established to be dealt with in reference to the assets out of which the payment is to be made.

Now, as to the bond upon which the claim is made in this case, their Lordships think that the evidence establishes, to their perfect satisfaction, as it appears to have established to the satisfaction of the various Judges below, the *factum*

and the existence of the bond : and they conceive that no imputation can successfully be made against the bond as an instrument in the first instance executed by the Ex-King. Their Lordships think that, with regard to the regulation as to limitation of actions, it does not apply to the present case, because the claim is made, in their opinion, within the period actually allowed by the regulation : and even if there were any doubt as to that, there is amply sufficient reason, from the position of the Ex-King, to account for an action not having been maintained against him within the period prescribed by the rule.

Then arises the question whether the whole amount of principal originally due upon the bond remains due? No evidence appears to have been adduced tending to show any payment on account of principal.

The officer of the Ex-King, who was examined, by his evidence confirms that which is alleged by the appellant, viz., that the whole sums remain due, and that nothing has been paid on account of principal. The witness who was last examined, and who produced the documents which passed between the King and Colonel Skinner, also by his evidence tends to show that the only payments which were made were the payments through Colonel Skinner—payments which, by the very calculation and addition of them, would show that nothing could have been paid on account of principal.

It is said, however, that in the year 1852, when an action was attempted to be maintained against the Ex-King in the Court of Delhi, an action which was defeated by the plea of want of jurisdiction, the claim made was a claim for Rs. 36,000 alone. We have not got the proceedings or the documents in that action. We have the evidence of the appellant, who states that what was claimed in that action was the sum of Rs. 36,000. But their Lordships see no reason to doubt that if the claim in that action was upon the face of it described as a claim for Rs. 36,000, that Rs. 36,000 was nothing more than a short and compendious mode of stating the principal sum due upon the bond. Their Lordships, however, finding that the claim in the action of 1852 was for this sum of Rs. 36,000, and finding also that in the detail of the claim in the present case the principal is taken at that amount, as on the 1st January 1852, and interest claimed from the 1st January 1852 only, are of opinion that while the appellant is entitled in the present proceedings to recover the amount of the principal of his bond, he must be content to take his interest as from the 1st January 1852 until the present time.

Their Lordships, therefore, will humbly recommend to Her Majesty that the decree appealed from should be reversed, and that the appellant should be declared to have established his claim for the principal sum appearing on the face of the bond, with interest from the date that has been mentioned, together with the costs of this litigation in the Courts below, and that he is also entitled to the costs of this appeal.

The 17th July 1867.

Present :

The Master of the Rolls, Sir James W. Colvile, Sir Richard Torin
Kindersley, and Sir Lawrence Peel.

*Mortgage—Deposit by Mortgagee (to save estate from sale for arrears of
revenue)—S. 9 Act I of 1845—Hindoo Widow.*

On Appeal from the High Court at Calcutta.

Nugender Chunder Ghose and others,

versus

Sreemutty Dossee and others.

An estate, mortgaged, was about to be sold for arrears of Government revenue, when it was saved from sale by the mortgagee depositing a sum sufficient to discharge the revenue. The mortgagee brought a suit against the person in possession of the talook, a Hindoo lady, widow of the original mortgagor, seeking under s. 9 Act I of 1845 to obtain repayment from her personally of the money paid to save the sale of the talook, not making the reversioners defendants, and not praying that the talook in its entirety might be sold to pay the amount due. A decree was given in that suit to the mortgagee. On execution of that decree, the reversioners intervened.

HELD that the mortgagee and those claiming under him have no charge on the estate, and are not entitled to have it sold in its entirety to pay the amount which was paid in to stop the sale of the estate. The action brought under s. 9 Act I of 1845 was only a personal action, and the decree gave no remedy against the land, the sale of which for arrears of revenue had been stopped by the deposit. In such a suit the question is not whether the person who pays the arrears acquires thereby a charge on the talook which he saves from sale, but whether he seek to enforce that right, he must not do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the talook. If the person who so pays the arrears of rent seek repayment only, under the section and law cited, as against the person in possession of the talook who has only a limited interest therein, and confines his suit to that object, the decree so obtained against the person in possession, can only be made effectual against the property of that person, including such interest as he had in the talook. This ruling does not affect the general doctrine, that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindoo widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest.

This is an appeal from a decree of the High Court of Judicature at Fort William of 15th December 1862, reversing the decision of the Zillah Judge. The question is whether, under the circumstances set forth in these papers, the appellant is entitled to have a lien upon the talook described as Turruff Kalikapore, recorded as No. 109, as against the respondents, who are interested in that talook, in respect of the arrears of revenue due from that talook, which have been paid by the appellant.

The respondents do not appear, and it is therefore incumbent on the Court to examine closely whether the appellant has made out his case, and has established his right to have the talook sold to discharge that amount.

The facts are shortly as follows:—Hurrololl Mitter had become the owner of this talook by purchase previously to the year 1842.

In May 1842 he executed a mortgage in due form to Nobokisto Singh, to secure Rs. 43,340 with interest at 12 per cent. per annum.

Hurrololl Mitter, the mortgagor, died, leaving Sreemutty Kaminee Dossee, his widow, surviving him. She had no child, and after his death continued in possession of his talook as his widow.

Hurrololl Mitter, however, had had a daughter by a previous marriage, the respondent, Sreemutty Dossee, who is the mother of two infant sons, the grandsons of the mortgagor, Hurrololl Mitter. Nobokisto Singh, the mortgagee, died shortly afterwards, and left Sreemutty Gourmonee Dossee, his widow, who in that character became entitled to all the rights of her husband as mortgagee of this talook.

The revenue due to the Government for this talook was not paid by the widow of Hurrololl Mitter the mortgagor, and, in December 1849, Rs. 10,317 were due in respect of such revenue.

In consequence of the non-payment of this arrear, the talook would have been put up for sale by the Government Collector, and would have been sold according to Act I of 1845, discharged from the mortgage and from all other incumbrances. In order to save the mortgage and the talook, Gourmonee Dossee borrowed from Anundonarain Ghose, on the last day for payment of the revenue, which was the 28th December 1849, the amount necessary to discharge the revenue, viz., Rs. 10,317, and he deposited that amount with the Collector just before sunset on that day.

The appellants are two of the sons and heirs of Anundonarian Ghose, who is dead, claiming under a transfer made to one of them by Gourmonee Dossee of her rights to and interests in the talook, under her decree against Kaminee Dossee of the 29th March 1853, which will be afterwards mentioned; and accordingly they have the same rights and powers which she possessed as regards this talook under that decree, and not further. The question there is the same which is raised on this appeal, viz., whether the appellants are entitled to a charge on this talook, and to have it sold in its entirety to pay the amount of the money so paid to the Government Collector in December 1849.

For the purpose of determining this question, it is desirable to consider what, after such payments, the rights of Gourmonee Dossee were against Kaminee Dossee and the talook itself, and the course she adopted.

Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion that this is not the form in which the question comes before them, and that what they have to decide is not whether such a charge originally existed, or whether it does now subsist, but whether the appellants can enforce such a charge in the present suit. For this purpose it is necessary to refer to the steps taken by Gourmonee Dossee to obtain payment. There were two courses open to her: she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount; or she might proceed under the 9th Section of Act No. I of 1845. She might probably have united both these objects in one plaint; but the course which she did adopt was to sue the widow Kaminee alone, under the 9th Section of the Act No. I of 1845, not making the persons interested in the reversion after her decease party-defendants to that suit, and not praying that the talook in its entirety might be sold to pay the amount due to her.

The plaint is set forth in page 7; it does not raise any claim against the estate itself, the claim is against the widow Kaminee personally. It states, *first*, that the female defendant, for the purpose of doing away with the mortgage loan, threw the talook into arrears, and was endeavouring to have it sold; *secondly*, that the female plaintiff, for the purpose of protecting her rights, and preserving the talook from sale, borrowed the money from the father of the present appellants, and caused the payments to be made. The words of the plaint which follow are these:—"The female plaintiff has paid the money which the female defendant ought to have repaid. The plaintiff has frequently called upon her for it, but no payment, at all is made up to this time;" therefore, after stating the amount, the plaint proceeds thus:—"for the recovery of which amount this suit is instituted against the female defendant, and plaintiff prays that the amount claimed, together with the interest thereof, due to the date of liquidation, be paid to her." The answer to the plaintiff merely contests the debt. It contends that no money was due on the mortgage, and that this would appear to be the case in a suit which had been instituted by the defendant against the plaintiff, seeking for an account against the plaintiff as the executrix of the husband of the defendant. It is solely an answer directed to meet a personal claim, and accordingly the reply is to the same point, and relies on the 9th Section of Act I of year 1845. That section is to this effect:—

"It is hereby enacted that the Collector shall, at any time before sunset of the latest day of payment, receive, as a deposit from any party not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from

it, to be carried to the credit of the said estate at sunset as aforesaid, unless before that time the arrears shall have been liquidated by a proprietor of the estate. And in case the party so depositing, whose money shall have been credited to the estate in the manner aforesaid, shall be a plaintiff in a suit pending before a Court of Justice for the possession of the sum, or any part thereof, it shall be competent for the Judge of the Zillah in which such estate is situated, to order the said party to be put into temporary possession of the said estate, subject to the rules in force for taking security in the case of appellants and defendants. And if the party depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said party which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit with interest from the proprietor of the said estate." (Act No. I of 1845, s. 9.)

This section, therefore, clearly authorises the personal action, but it gives no remedy against the land, which it leaves to the then existing law.

The decree which was made in this suit is, as might be expected, no decree against the land, but it is a general decree against the defendant Kaminee. It is in these words:—"Let the female plaintiff get the money claimed and interest due from date of suit to day of payment, and costs, together with interest, according to practice, from the female defendant. Costs on the part of the female defendant are charged to her."

This decision was appealed from and affirmed; but the only point which seems to have been argued and decided in that suit, either on the original hearing or on the appeal, was whether while the other suit already mentioned was pending, for an account between the same parties, and in which Kaminee Dossee, defendant in this suit, claims a large balance to be due to her from Gourmonee Dossee, the plaintiff in the suit, which is the foundation of the present proceedings, plaintiff, as mortgagee, before the fact that anything was due to her had been ascertained, had such an interest in the talook as entitled her to pay the arrears of the revenue. If she had, it followed as of course that under the 9th Section of the Act I of 1845 already mentioned, she could recover the amount in the suit in question.

Shortly after this Gourmonee Dossee assigned the decree and all rights under it to Girenderchunder Ghose, the son of Anundonarain Ghose, in consideration of the money lent to discharge the arrears, in whose place subsequently the appellants, the sons of Anundonarain, were substituted, and who have all the rights that Gourmonee Dossee possessed.

When execution was sought to be enforced against Kaminee Dossee, by a sale of the whole talook, the respondent Sreemutty Dossee, the daughter of Hurrololl Mitter, and the mother of his two grandsons, intervened to prevent the sale of the entirety, insisting that, as Kaminee Dossee was a childless widow, the son of Sreemutty Dossee, who was then a minor, had a reversionary interest in the talook, which could not be sold to pay a personal debt of Kaminee Dossee. When the intervention took place, it appears that then, for the first time, the holder of the decree raised the claim that, as the talook in its entirety had been saved from sale by the payment of the arrears of the revenue, the talook in its entirety was liable to be sold in order to obtain repayment of that amount.

This question was brought before the Principal Sudder Ameen in March 1856.

He was of opinion that, under that decree, the claim could not be maintained. He refers to a case in the Sudder Dewanny Adawlut, a decision of 16th May 1841, which determines that a decree against a Hindoo widow cannot be executed against the estate of her deceased husband, except when it is clearly specified in the decree that the estate is liable for it. The case, when referred to, fully bears out this construction. The words of the judgment are these:—"The decree is against *B* for himself—not against *B* as guardian of *C*, then a minor. *B* had only

a life estate as widow, and the family property is not liable to sale for the personal debts. Whether this was originally a personal debt has not been judicially determined. But the decree as it stands is against *B* personally, and can issue only against her and her heirs. *C* is not her heir, and the family property is not her property, nor can that property be held liable till a decree be given for it." (Rajah Hurrendronarian Roy, p. 8.)

The result of this decision was that the application to make the talook generally liable to pay the debt was refused, on the ground that the question could not be taken into consideration in an execution case, but that the question ought to be determined in a civil action. This order was affirmed on appeal. Shortly after this the present appellants were substituted for Girenderchunder Ghose; and thereupon in August 1859 the suit was instituted on which the present appeal has arisen. It was instituted by George Smoult Fagan, who had been intermediately appointed receiver of the estate of Anundonarain Ghose, deceased. The plaint in this suit is set out in page 5 of Appendix, in the following terms:—

"The particulars of the case are these:—

"The defendant Gourmonee Dossee borrowed a sum of money from the estate of Anundonarain Ghose, deceased, to pay the rent of talook No. 109, Turuff Kalikapore and others, as per the touzee of the Collectorate of this zillah, the annual sudder jumma of which is Rs. 25,730-3½, for the protection of her interest as mortgagee of the talook. For the recovery of the said sum of money, she obtained a decree from this Court in suit No. 97 of 1851, against the defendant Kaminee Dossee, which decree the decree-holder Gourmonee transferred to Govind Chunder Ghose, the then receiver to the estate of Anundonarain Ghose, under a deed of conveyance executed on the 17th February 1855, in lieu of the money due from her to the said estate. When, consequent on the execution of the decree by the said receiver, a proclamation for the sale of the talook was issued, objections were raised by Sreemutty Dossee and the fictitious putneedars defendants, whereupon by a summary order passed on the 18th March 1856, the sale of the talook was stayed. Hence has arisen the cause of this suit. I, as the present receiver to the estate of Anundonarain Ghose, bring this suit to recover the amount of the said decree, together with interest and costs according to the scale below furnished."

But this plaint does not seek to obtain a determination that the money paid for the arrears of the revenue constituted a charge upon the talook: all that it does is to constitute a suit to recover the amount of the decree, with interests and costs, and to have the talook sold for that purpose. The manner in which this is put by the Judge of the Civil Court is that the suit is, by the agreement of all parties, wholly contingent on the decree obtained in the first suit. He states that the decree "was not one in restriction of the remedies open to the plaintiff, so as to confine the decree-holder to remedies personal to Kaminee Dossee; she was in possession of the estate. The action was brought against her in that character and capacity, and the law makes the proprietary interest responsible for any sums advanced to protect an interest in the estate. The decree being passed upon the recitals in the declaration, that cannot now be impeached upon statements that no mortgage existed; we must take the fact as found, the case having gone to decree against Kaminee, as the party in possession of the estate." (Appendix, page 144.)

The Judge then proceeds, after showing that the action was one, not merely personal against Kaminee, but that it also bound her, in her character as possessor, to answer all the issues in favor of the plaintiff with costs, as between the plaintiff and Kaminee Dossee and Sreemutty Dossee. From this decree an appeal was preferred to the High Court of Judicature, when on the 13th December 1862, a decree was pronounced reversing the decision of the Court below. It is important

to observe that, in the opinion of the Judges of the High Court, they had not to decide the question whether, by payment of the rent in arrear, the person who had such an interest in the talook as to entitle him to pay the arrear, and who thereby saved the talook from being sold, did not thereby acquire a lien or charge on the talook to the extent of the money so paid and interest thereon, but that the question they had to decide was simply and merely whether that equity could be enforced in a suit brought under the provisions of s. 9 of Act I of 1845, which was confined to the object authorised by that section, and which did not proceed against the persons who had an interest in the property in succession after the death of the widow in possession. This will appear plain by the passage in the judgment at the bottom of page 176, and top of page 177, which is to this effect, viz.,—"The only point which we have to determine in this appeal is, whether as the decree in the suit brought against Kaminee Dossee by Gourmonee Dossee for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against Kaminee Dossee, does or does not, under s. 9 Act I of 1845, give, to use the Judge's terms, to the decree-holder a statutory lien on the estate. Were the case one of first impression, we should even then have little hesitation, looking to the plain terms of the law, which simply gives a right of action against the proprietors of the estate in declaring that the decree in a suit brought under the section of the law above cited is only a personal one, and gives no equitable lien on the estate to the decree-holder, so that the property itself, in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed."

They proceed to point out a distinction between the case cited by the respondent in that appeal and the present case, and they decide that the decree against Kaminee Dossee was a personal one against her, and that consequently the action of the Court in execution must be confined to her interest in her husband's interest in the estate, and that the rights of Kaminee's husband in the estate, or the portion of the estate upon which an equitable lien was acquired, cannot be brought to sale. They, therefore, reverse the decision of the Court below, and allow the appeal of Sreemutty Dossee with costs. Upon the fullest consideration that their Lordships have been able to give to this case, they are of opinion the Judges of the High Court came to a correct conclusion as to the construction of s. 9 of Act I of 1845, and the decision of the High Court was correct, and ought to be affirmed.

They repeat that it is not, in their opinion, the question whether the person who pays the arrear of the rent does not acquire thereby a charge on the talook which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the talook. If the person who so pays the arrears of rent seek repayment only under the 9th Section of Act I of 1845, as against the person in possession of the talook, who has but a limited interest therein, and confines his suit to that object, their Lordships concur with the opinion of the High Court that the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the talook.

That this was the character of the suit in this case originally is shown by the pleadings in the case, and by the observation of the Zillah Judge in the passage already cited.

That the present suit, in which this appeal is presented, was only one supplemental to the original suit, and brought to enforce and extend the decree so obtained, is also shown by the consideration of the plaint itself, and observations already cited of the Zillah Judge in pronouncing his decree, which fact is confirmed by the observation of the Judges in the High Court. Their Lordships

think that it is impossible for them, in a case where the respondents do not appear, to upset a decision of the High Court which, in substance, only affirms that an action brought under s. 9 of Act I of 1845, is only a personal action, and that in an action which was personal against Kaminee Dossee, as the possessor of the talook, only her property and her interest in the talook can be affected, and that an equity which the plaintiff possessed and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree obtained against the possessor of the limited interest.

Their Lordships wish it to be understood that they leave unimpaired the general rule that, in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindoo widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. In the present case she is charged by the plaintiffs with having sought to destroy the estate by causing it to be sold for arrears of revenue. If such a charge be true, the reversioners are entitled to recoup out of her life profits the money which is advanced to avert a sale, if they redeem, as they are entitled to do, the actual salvor; and it would be obviously inequitable for a person with such knowledge of the dealings of the proprietress, determining to save the estate, to seek indirectly its destruction by a sale of the whole estate under an ordinary execution, without giving the reversioners the means of protecting their interest by making them parties to a suit the object of which, by a mortgagee who advances to save the estate, should properly be to have an additional charge declared in his favor on it, subject to redemption, and, in default only of redemption, seeking a sale.

Their Lordships, therefore, will humbly advise Her Majesty that the appeal ought to be dismissed.

The 17th July 1867.

Present :

The Master of the Rolls, Sir James W. Colvile, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Mookhtarnamah (execution of)—Absence of legal proof.

On Appeal from the High Court at Calcutta.

Seetul Pershad,

versus

Mussamut Doolhin Badam Konwur.

The issue being as to whether a certain mookhtarnamah, which purported to have been signed by the respondent, was valid or not, the validity of the mookhtarnamah was pronounced against, as there was no legal proof of its execution, and the absence of legal proof was not compensated by any legitimate inference arising out of or by any of the facts disclosed by the other parts of the case, the whole of the transactions relative to the execution thereof being of very questionable character.

This is an appeal from a decree of the High Court of Judicature at Calcutta, which reversed the decision of the Civil Court of Shahabad. The question to be decided in this case is the validity or invalidity of a mookhtarnamah, appearing to have been executed by the respondent in favor of Hazaree Lall. The case, as stated by the appellant, is to this effect:—

“Five brothers, of the name of Pershad Singh, had been owners of a talook in the zillah of Shahabad, called talook Rooppoor. One of them, Kalee Pershad

Singh, died, leaving surviving him the respondent Doolhin Badam Konwur, his widow.

Kishen Pershad Singh, one of the surviving brothers, was the manager.

The Rajah of Doomrao, who was connected with the family, the respondent being his sister-in-law, obtained a decree against the co-sharers in the talook for money borrowed from him by Kishen Pershad Singh to pay the revenue in arrear. This decree bore date 23rd December 1852. Before 1860 the appellant Seetul Pershad had obtained a decree in like manner against the co-sharers of the talook, and another creditor, named Ram Pertab Singh, had obtained a third decree. No steps were taken to enforce these decrees until 1860. In the early part of that year the Rajah of Doomrao obtained an order for the sale of the talook to satisfy his decree; but prior to the sale he purchased the two other decrees obtained against the co-sharers of the talook.

The talook was sold on the 2nd July 1860, and the Rajah of Doomrao was the purchaser at the sum of Rs. 64,000. Thereupon the appellant alleges that an agreement took place between the respondent Badam Konwur and the Rajah of Doomrao, by which she was to be put into possession of the talook in the following manner, viz.: That the respondent Badam Konwur was to execute the mookhtarnamah in question, appointing Hazaree Lall, who was a servant of hers, her mookhtar; to borrow Rs. 180,000 from the appellant, to be paid to the Rajah of Doomrao; that thereupon the Rajah was to execute an utlanamah of the talook in favor of the respondent; that then Hazaree Lall was to execute a kistbundee, or instalment bond on the part of the respondent, and to deliver this to Seetul Pershad, the appellant; and, finally, that a farming pottah, on the part of the respondent, was to be executed in favor of Mussamut Doolhin Champa Konwur, at a rent of Rs. 19,000 per annum for forty-six years, of which rent Rs. 14,725 were to be applied in payment of the Government revenue, and Rs. 4,000 for the liquidation of the principal amount of the instalment debt. The total amount of this is Rs. 18,725, which would leave a balance of Rs. 275 for the respondent.

The appellant further alleges that upon this arrangement being come to, and for the purpose of carrying it into execution, the three instruments were executed, viz., the gift of the talook to the respondent, the widow; the lease to the respondent, Champa; and the kistbundee, or instalment bond, in favor of the appellant, and that the amount of Rs. 180,000 was paid to the Rajah of Doomrao, or the amount was accounted for to him by Seetul Pershad, who acted as a general banker and was also the treasurer of the Rajah of Doomrao.

The appellant further alleges that Champa Konwur, the lessee, entered into possession of the talook, paid the first monthly instalment to the appellant, but paid nothing more; thereupon the appellant paid the Government revenue, and instituted the suit to recover against the respondent the sum of Rs. 198,000 for principal and interest on the debt due to him, and also the amount paid by him for Government revenue, with interest. Such is the account of the transaction given by the appellant, and sought to be established by the evidence produced. The respondent denied that she ever granted or executed any mookhtarnamah to Hazaree Lall, or to any other person. Whether she had or had not executed this mookhtarnamah was the first, and, indeed, the only material issue settled for adjudication in this case.

In support of the appellant's case, the instrument itself was produced, purporting to be signed by the respondent, and to be attested by three witnesses, Bhojawun Singh, Rooghoonath Singh, and Baboo Hurrechurchurn Singh, and to be signed, sealed, and registered by the Khazi of Chainpoor. The appellant called as a witness the Khazi himself, from whose deposition it appears that the instrument was brought to him by Hurrechurchurn Singh, ready executed and attested by Bhojawun Singh and Rooghoonath Singh, both of whom accompanied him on

that occasion. The Khazi deposes that Hurrechurchurn Singh told him the reasons why the instrument had been executed by the respondent; but he does not state that Hurrechurchurn Singh, or either of the two witnesses who had then attested it, represented that he had been present at the execution of it. The Khazi further deposes that he knew Hurrechurchurn Singh of old, and therefore he caused his attestation on the mookhtarnamah to be made in his (the Khazi's) presence. Hurrechurchurn Singh, on whose representation the Khazi seems to have relied in registering the instrument, was not produced as a witness in the cause. The appellant alleged that he was kept out of the way intentionally to defeat his (the appellant's) claim, but no evidence was adduced in support of that allegation. Bhojawun Singh, one of the witnesses to the instrument, was summoned as a witness by the appellant; and a person answering to that name appeared before the Civil Court; but he declared that he was unable to read or write, and that he knew nothing about the mookhtarnamah. This person having been confronted with the Khazi, the Khazi declared that he was not the witness who had appeared before him. The real witness Bhojawun Singh was not produced.

The remaining witness, Rooghoonath Singh, stated that he could not read or write, and denied that he had attested any mookhtarnamah. Steps were taken to confront the Khazi with this witness for the purpose of identifying him, but without success. The appellant says that the witness had absconded to avoid identification. Neither the appellant nor the respondent produced or examined Hazaree Lall, the supposed mookhtar. The appellant states that he made every effort to do so, but ineffectually, and he suggests that Hazaree Lall was kept out of the way by the respondent, whose servant he was. It is stated in the judgment in the High Court of Judicature, that he was forthcoming after the decision of the case in the Civil Court, but no attempt was made on either side to produce him for examination when the case was heard on appeal.

In the circumstances above stated, the Judge in the Civil Court disregarded the absence of legal proof of the execution of the mookhtarnamah by the respondent, and considering that the rest of the evidence afforded the strongest presumption of its genuineness, gave a decree in full to the appellant. On appeal to the High Court of Judicature this judgment was reversed, the Court finding that the execution of the mookhtarnamah was not proved, and that the absence of legal proof was not compensated by any legitimate inference arising out of, or by any facts disclosed by, the other parts of the case.

With this opinion their Lordships concur. They agree with the learned Judges of the High Court in considering the whole of the transactions relative to the sale and subsequent gift of the talook in respect of which the loan was incurred, as transactions of a very questionable character.

The claim is made for 2 lacs and Rs. 9,978; this amount includes the payments of the Government revenue, yet the property was sold by auction for Rs. 64,000. The Judge in the Civil Court considered the discrepancy in value between Rs. 64,000, the amount of sale, and the Rs. 180,000, the amount of the loan, as evidence that the sale was collusive; but their Lordships see no reason to assume that one sum more than the other represents the real value of the talook. The Judges of the High Court considered all this a mere paper transaction, without any real transfer of property. The following circumstances in the case may be referred to as confirming this view. The decree of the Civil Judge in favor of Seetul Pershad includes the payment of the Government revenue, but the receipts produced are given in the name of Kishen Pershad Singh, the manager of the co-sharers. It appears that no change has been made in the Collector's books, and that Kishen Pershad Singh remains now, as he has heretofore been, the person liable to pay the Government revenue, and to whom the receipts for payment are given. This circumstance affects seriously the argument on which the appellant mainly relied, viz., the fact that the respondent is in the possession

of the estate, and that this is not disputed by her; but if this possession is merely nominal, it is consistent with the view taken by the High Court that the whole matter is nothing more than a paper transaction, while the actual *bonâ fide* possession of the respondent is inconsistent with the absence of any change in the books of the Collector, and with the Government revenue being still paid by Kishen Pershad Singh.

In addition to this, the decree taken by consent in 1852; the purchase of the other decrees, one from the appellant, and the other from a stranger; the delay in enforcing them; the circumstance that Hazaree Lall was the mookhtar of Kishen Pershad Singh and of all the co-sharers; that the respondent as well as Champa Konwur, the person to whom the lease of the talook is granted, are ladies secluded in the zenana, and never appearing in public; all are circumstances which cast a grave suspicion on the case, and tend to support the suggestion of the learned Counsel for the respondent, which also seems to have been adopted by the Judges of the High Court, viz., that the whole transaction was a scheme concocted between the Rajah of Doomrao and Kishen Pershad Singh, to whom he was allied by marriage, to make it appear that the estate had been bought by the Rajah, and that it did not belong to the Pershad Singh family, while the real ownership and possession were to remain unaltered.

The mookhtarnamah itself is taken to be registered by the Khazi and not by the English Resident at Agra, as the other deeds were. The witnesses to the instrument itself are three, two of them are unable to sign their own names, and their attestation is worth next to nothing; the third, Baboo Hurrechurchurn Singh, only signed the instrument at the request of the Khazi, and does not pretend to have been present when the respondent signed. In truth, there is no attempt whatever to prove the signature of the respondent herself by any one present at the time of such signature.

On the review of all the circumstances of the case, their Lordships concur in the opinion expressed by the Judges of the High Court of Judicature, that there is no legal proof of the execution of the mookhtarnamah, and that the absence of such proof is not compensated by any legitimate inferences to be drawn from the other facts disclosed in this case. Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal with costs.

The 18th July 1867.

Present:

The Master of the Rolls (Lord Romilly), Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Will—Mohunt.

On Appeal from the High Court at Calcutta.

Greedharee Doss Mohunt

versus

Nundokishore Doss Mohunt.

D, a mohunt, appointed *L* by will to be his successor and representative in the mohuntship, and as such representative to perform the religious duties in the usual manner; and he further directed *L* to instruct *G* in the shasters, and when *L* found himself incapable of fulfilling the duties *L* was to appoint *G* to be mohunt in *L*'s place.

The present suit was brought by *G* to recover the mohuntship and the lands belonging thereto. HELD on a construction of the will that it did not give *G* an absolute, positive, unqualified right at any time to the mohuntship, even on the incapacity of *L* to perform the duties of mohunt; that until *L*

became incapable, no trust or duty is suggested; that even when *L* became incapable, it was no more than a gift in the nature of a precatory trust. HELD also that on the evidence *G* had failed to establish *his own title* to be mohunt, and that the present suit was so framed that he could not in it recover the mohuntship on the mere infirmity of the defendant's title.

The only law as to mohunts and their offices, &c., is to be found in custom and practice, which is to be proved by testimony.

There cannot be two existing mohunts, and the office cannot be held jointly.

Their Lordships do not think it necessary to hear Counsel on behalf of the respondent in this case.

They have come to the conclusion that the decision of the High Court of Judicature is proper to be affirmed by Her Majesty. It is an appeal from the High Court of Judicature at Fort William, which reversed a decree of the Principal Sudder Ameen of Zillah East Burdwan, which was in favor of the appellant; and the only facts in the case to which their Lordships think it necessary to refer are those which I am about very shortly to state.

It appears that Gopaul Doss was the mohunt of the akra, a religious institution wealthy endowed at Rajgunge, in the Zillah Burdwan. In the year 1857, being afflicted with illness and expecting shortly his dissolution, he made his will. The will is set forth in various places in these proceedings. It is addressed to Ladlee Doss. In it he refers to the illness he was labouring under, and after referring to the akra of Rajgunge and the subordinate akras, he says :—

"There is no one among my chelahs (*that is*, my disciples) so fit, wise, virtuous, and leaving (*sic* in record) towards religious men, that I can entrust him with the performance of those duties so as to protect the said immoveable and moveable properties, &c., and perform the religious ceremonies after my death; consequently, I think it expedient and necessary to make arrangements during my own life, whereby the said worship and the entertainments of the guests, &c., will continue as they now do, and whereby the properties annexed thereto may be properly managed."

Then, addressing himself to Ladlee Doss, he says :—

"As you are my gooroo brother (*that is*, my spiritual), and specially since the time of my late gooroomohassy and my election to the guddee, you by your ability, wisdom, and virtue and good conduct, have satisfactorily fulfilled the several duties relating to the akras in your capacity as adhicarry (head) of the akras, and you have authority over everything,—I have therefore a firm conviction that if you are appointed mohunt in my place, the properties belonging to those several akras will be properly managed, and the religious rites which are performed there will have perfect justice in your hand. Therefore, of my own free will, and in a sound state of mind, without any compulsion and coercion, I execute this my last will, whereby I make the following promise and arrangement :—If the present sickness prove, which God forbid, fatal to me, you will succeed me in my absence in the guddee as the next mohunt, and have your own name entered as proprietor in the records of all those properties in substitution of mine, and take charge of all the properties, both real and personal, belonging to the said akras, and keep in safe custody the gold and silver ornaments and plates, and brass utensils belonging to the idols at those akras, and receive the outstanding debts due to the akras, and pay the debts due by them, and, thus representing me every way, you will perform the religious duties in the usual way. Of my chelahs (disciples) Sreejoot Greedharee Doss is a little intelligent, but he is of immature age. If he studies the dhurmo shastro (*that is*, the religious books) for a short time, he may become a fit person; therefore you shall keep him under you, and instruct him in the dhurmo shastro and other books studied by mohunt. When you will find yourself incapable of fulfilling the duties aforesaid, you will appoint the said Greedharee in your place as mohunt. You shall not be able to act otherwise. To this purport I make my will, and after my death any demand or objection by any person against it will not be admissible; but if, by the grace of God, I recover

from illness, then this will shall cease to take effect, and I shall continue mohunt as I used to do."

In this case two questions arise on the construction of this will, and another independently of the will itself. The question on the construction of the will is, whether there is an absolute gift of the mohuntship to the appellant Greedharee Doss, as soon as he becomes competent to perform the duties, or whether the gift of the mohuntship is in reversion after the incapacity of Ladlee Doss. The question independent of the will is, whether, if there be such a gift contained in the will, there exists such an authority within the power of a mohunt as to enable him to make such a gift.

Their Lordships are of opinion that the points which depend on the contents of the will itself must be decided against the appellant on the present occasion. They think, on the true construction of the will, that it does not give the appellant an absolute, positive, unqualified right at any time to the mohuntship, even on the incapacity of Ladlee Doss to perform the duties of mohunt. They think, until Ladlee Doss becomes incapable, no trust or duty is suggested, and that even when Ladlee Doss becomes incapable, it cannot be put higher than Sir Roundell Palmer himself put it, viz., as a gift in the nature of a precatory trust—that is, one requesting Ladlee Doss to perform the wishes of the testator, and to appoint the appellant his successor, provided he found that the incapacity which then existed in the appellant (who was not then of sufficient age to be appointed mohunt) should cease to exist at the time when Ladlee Doss was unable to perform those duties.

It is, therefore, clearly unnecessary for their Lordships to consider the second point, whether, in point of law, a grant of a mohuntship can be made by any holder of the office with the superadded obligation imposing on the grantee the necessity of following the wishes of the grantor as to the person whom he is to appoint to be his successor in that office.

It is to be observed that the only law as to these mohunts and their offices, functions, and duties, is to be found in custom and practice, which is to be proved by testimony; and no evidence has been adduced before their Lordships to show that any such appointment has ever been made in reversion on any former occasion.

The only question, therefore, which their Lordships have to consider on the present occasion is, whether in this state of circumstances, in the events which have subsequently occurred, the appellant has obtained any right which can entitle him to be placed in that particular situation on the decease of Ladlee Doss, in the absence of any compliance by him with the wishes of his testator or grantor.

The facts are these:—Gopaul Doss, after executing his will, died in June 1857, and thereupon Ladlee Doss was installed or invested as mohunt; and it is to be observed that the other mohunts placed the same construction upon the will that their Lordships have placed, by electing him. Accordingly so did the Maharajah, who, as chief benefactor and patron, invested him with the full mohuntship, and gave him the ticca, or mark of investiture. He did not merely appoint Ladlee Doss adhicarry or agent, which according to the contention of Sir Roundell Palmer and Mr. Leith, was the extent of his authority. It is plain, therefore, that they considered him to be entitled to have the full mohuntship, and he was fully invested with the ticca accordingly.

Mr. Leith has called their Lordships' attention to some evidence which was intended to show that there was a double ticca. What the nature of that double ticca was does not very clearly appear. This seems to be clear, from all the evidence in this case, as far as it has been brought under their Lordships' attention,—that there cannot be two existing mohunts; that the office cannot be held jointly; and that, therefore, if there was a double ticca at all, it must have been a

ticca of the office in reversion after the existence of the incapacity of Ladlee Doss to perform the duties. But the evidence upon that point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these mohunts, or that any such mohuntship can be given in reversion.

They therefore consider that Ladlee Doss was invested as the mohunt of the akra.

This was the view also taken in the Court in India when the suit was instituted in September 1859 by the appellant against Ladlee Doss, insisting that he was entitled to be appointed on the ground that he was then capable, and that his right arose as soon as he was so. He appealed from that decision, and the decision was affirmed.

Mr. Leith.—He withdrew his appeal.

The Master of the Rolls.—Yes, he withdrew the appeal, but not till after the death of Ladlee Doss.

Ladlee Doss died on the 5th November 1860, and upon his death Nundokishore Doss received the ticca.

Their Lordships are of opinion that it is not necessary for them—nay, more, that it is very undesirable for them—to go into the question of whether the respondent was duly appointed mohunt or not. They are of opinion that that is not the question which they have to determine ; because for the present appellant to succeed in this case, he must succeed by force of his own title, and not by the infirmity of the respondent's title.

Mr. Leith suggested that the mohunt, or any person connected with the establishment of the akra, would have a right to contest the appointment of the respondent as mohunt, and he insists that it has become necessary that that question should be determined. If that be so, their Lordships are of opinion that it must be raised in a suit properly framed for that purpose. Without expressing any opinion upon the point itself, they are of opinion that this is not a suit properly framed for that purpose.

Their Lordships observe also that the Judges of the Court of Appeal, the High Court of Judicature, make use of these expressions, which are strongly confirmatory of this view of the case. "We can understand," they say, "a suit being brought to set aside the election of the defendant and to order the mohunts to make a new election ; but this was not a suit to set aside the election, but to put the plaintiff in possession of the whole estate. So it was in the case cited. It was a suit to recover the office of mohunt, together with the lands attached to it. Supposing we thought the election of the present defendant an improper one, what authority have we to direct a new election ?"

This is the view which their Lordships took of the case below, and their Lordships here have only had to consider whether upon the case brought before them the appellant has made out his title ?

It is not for them to consider whether he has shown any infirmity whatever in the title of the respondent, but whether he has made out a satisfactory case to entitle him to recover the office and the land and property belonging to the office of mohunt.

Upon a complete review of the case, their Lordships are of opinion, both on the construction of the will, and the evidence brought before them of the facts which have occurred throughout (which they think it unnecessary to detail with greater minuteness), that the appellant has completely failed in the attempt to set up his own title, and that, consequently, the decision of the Court below, which simply asserts that he has failed to establish any title of his own, ought to be affirmed ; and their Lordships will humbly advise Her Majesty to direct that this appeal be dismissed with costs.

The 16th December, 1867.

Present :

The Master of the Rolls, Sir James W. Colville, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Hindoo Will—Construction—Accumulation—Surplus Profits.

On Appeal from the late Supreme Court at Calcutta.

Prankisto Chunder and others

versus

Sreemutty Bamasoondery Dasse and another.

Principle of construction of the will of a Hindoo.

The meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects.

A testator directed his sons, using the words "living jointly in respect of food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. HELD, that this interest is not accurately represented by the words joint estate in England, nor is it analogous to the case of a testator in England who gives property to executors for the purpose of carrying on his trade, but is more analogous to the tenancy in common which prevails in England.

The will also directed that on the death of a son, if that son died leaving a son, the share of that son was to go to that son's son, and if the son dying left no son, that the share should go to the survivors. HELD, that the share of profits made during the joint lives of the sons, which belonged to the deceased son, goes over to the other sons of the testator as they would go according to law, as from a consideration of the various terms of the will itself, there was an absence of all directions on the part of the testator to accumulate the profits, or to dispose of the profits which were the property of the son.

Their Lordships are of opinion that the decree of the Court of Supreme Judicature at Calcutta is correct. It is a question upon the construction of the will, and the meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects.

It is important, in the first place, to consider what is the nature of the interest which he has given to his sons. He has directed his sons, using the words, "living jointly in respect of food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. It is to be observed that this interest is not accurately represented by the words joint estate in England, for if he had given the property simply to the sons with no further direction than that they should live jointly in respect of food, and one of the sons had died, his share, with all the accretions, would have gone to his heir, to the person who was entitled to inherit according to the Hindoo law, so that in point of fact the interest was, as regards succession, more analogous to the tenancy in common which prevails in England. It is also proper to observe that no analogy exists between the present case and that to which it was endeavoured to be likened, viz., where a testator in England has given the property to executors for the purpose of carrying on his trade, in which case a trust is imposed upon the executors, who take no beneficial interest in it, and the question is, how the profits of that trade are to be divided amongst the persons who are pointed out by the testator. It is therefore in this case important to observe whether the testator has pointed out in his will how the share of his property is to go, upon the death of any one of his sons, and also how far that direction extends. According to the will, if one of the sons had died leaving a son, the share of the son so dying would have gone to his son, or, in other words, the grandson of the testator. It is only in the event of his son not leaving a son that the testator has directed that the share shall go to the survivors. This is of the more importance, because their Lordships are of opinion that this construction is not lightly to be inferred, but that it is necessary that the testator should express distinctly what his intention is. This

they think that he has done. It was argued that a considerable distinction existed between this case and the case * in 6th Moore, because in that case one-fifth was given to each son, and if one died the fifth was given over; but their Lordships are of opinion that the effect of this will is to direct that the share which each son took, and which would have gone to his heirs according to the Hindoo law, was, in the case of any one of his sons leaving no son, directed to go to the other sons if not in express words, still by a necessary inference to be drawn from the expressions used by him, and this is indeed the contention of the respondents, and was so held in the Court below, from which decision the appellants have not appealed. The question is, whether the share of profits made during the joint lives of the sons which belonged to the deceased son follows his share of the capital and goes over to the other sons. In the first place, it is to be observed that the testator has given no direction to accumulate; it remains therefore to be seen whether the Court can find, from the words of the will, as Counsel argued, an irresistible inference that such was the intention of the testator. This is the more important, because in the case † in the 8th Moore, which is relied upon as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to the capital. There is an absence of that in this case. It is admitted that the testator could not dispose of the property of his son, or prevent the heir of the son from inheriting his property: therefore the only question here is, whether the testator has directed the accumulations of the property to be added to and made part of his own property, because if he has not, it was the property of the son, and the testator had no power of disposing of it.

In this view of the case their Lordships think that this will, on whichever translation it is taken, shows an absence of any direction to accumulate. The first direction is, that the sons should live joint in respect of food, and that they should carry on the trading business, and so forth. If the will had stopped there, the only result would have been, that upon the death of this son his heir would have taken his share in the business; but the will goes on to give a direction that should the sons disagree, then, after making certain directions as to the application of the income, the surplus was to be partitioned equally amongst them. That is directly opposed to any accumulation. Nor does the testator give any direction whatever in respect to what is to be done with the profits before they disagree and separate. It would follow therefore if the will ended there, that the profits arising from the business would be the separate property of each of the five sons in fifths, after they had provided for the carrying on of the business. We find nothing in the subsequent parts of the will which interferes with that. The second section is the only part of the will which relates to this subject. The testator there directs that if any of the sons should die without a son, then that the daughters of that son should receive Rs. 100, and his widowed wife, if she lived, being included as a member of the family, should receive the expenses of *brito neom*, and the other religious acts and ceremonies which she should perform. Then he directs what is to be done, "if ungovernable, and not living in my house, she should go and live elsewhere, or not wish to live in the family, then she shall receive Rs. 2000." Besides this, he directs that "she shall not be able to make any demand or claim on any moveable and immoveable property, trading business, and estate, &c., upon the allegation of her husband's proper share;" that is to say, she is not to be at liberty to make any claim or demand upon the moveable or immoveable property of the testator, and there it stops. This brings it round exactly to the same question, whether the testator has in fact by these words disposed of anything more than the capital of the fund. The words he uses are: "my moveable and immoveable property, trading business, and estate, &c., upon

* Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick, 6 Moore, 526; 4 W. R. P. C. 114; 1 Suth. P. C. R. 291.

† Sonatun Bysack, *Appellant*, v. Sreemutty Juggut Soonduree, *Respondent*, 8 Moore, p. 66.

the allegation of her husband's proper share,"—that is, his share of the testator's property; that is, the one-fifth of the trading business, which the testator had given to him. If their Lordships are right in coming to the conclusion that the testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows that those profits belong to each of the sons in fifths, and accordingly would be divided as such, and therefore, upon the true construction of the will, their Lordships are of opinion, that the testator has not attempted to dispose of these profits, which are the property of the son; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each son, and would go to his heirs, exactly in the same manner as any other property that he might have acquired. It will be obvious that if the son had taken his share of his profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they disagreed, viz., that they should divide the surplus profit, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think that this case is exceedingly close upon the case in 6th Moore, and, although they would reluctantly allow in the construction of a will, the construction of one will to be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present; and they concur with the observations made by Sir Barnes Peacock in delivering judgment, that the testator has not attempted to dispose of, and, if he had, could not effectually have disposed of the property of his son.

There is another point relative to the property of the partnership, consisting of company's paper. The facts of the case appear to be these: the partnership assets consisted in part of company's paper, which were taken in the name of the deceased son, or in his name jointly with the names of the other brothers, and it was necessary that they should be indorsed. The result was that he indorsed the bills in blank, and gave them to his brothers. This was, in their Lordships' opinion, a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each son had to his share of the profits, not giving to the son, who has died, the exclusive right to the company's paper, which he so indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature in Calcutta be affirmed with costs.

The 20th December 1867.

Present:

Lord Cairns, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, and Sir Lawrence Peel.

Jurisdiction—Under-tenants—The term "pottah" in Act X—Hereditary and transferable tenures—Evidence—S. 15 Act X of 1859.

On Appeal from the High Court at Calcutta.

Baboo Dhunput Singh and others,
versus
 Gooman Singh and others.

Tenants intermediate between proprietor and ryots are subject to the jurisdiction of the Collector under Act X of 1859, which contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes.

A *pottah* must not, *primâ facie*, be assumed to give a hereditary interest, though it contains no words of inheritance; "pottah," as used in Act X of 1859 being a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or ryots.

Where proof exists of long uninterrupted enjoyment of a tenure, accompanied by recognition of its hereditary and transferable character, it is sufficient to supply the want of the words "from generation to generation" in the *pottah*, and the tenant cannot be dispossessed by his superior.

Where a tenure was or has become hereditary and transferable, and the rent has not been changed from the time of the Perpetual Settlement, the tenants (being intermediate between proprietor and ryots) are protected from enhancement by s. 15 Act X of 1859.

This is an appeal against a decree dismissing the suit brought by the appellant under Act X of 1859, for the enhancement of the rent of land within his zemindary. The argument before their Lordships raised various questions of some perplexity and of real public importance, but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the defendants (the actual tenants), and of a right to raise the rent previously paid in the plaintiff (the zemindar). The appellant's title is thus derived:—He is the son and representative of Baboo Pertab Singh, who in 1851 purchased the zemindary in which the lands in question are situate, at an execution sale. The execution, though at the suit of Government, was one in a mere Civil suit for moneys, and accordingly the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment-debtor, and therefore subject to whatever subsisting interests in the lands had been effectually granted or created by any former zemindar.

The following is the history of the respondent's occupation:—In 1792, shortly after the Decennial Settlement of this zemindary had been completed, but before that settlement had been declared perpetual, the then zemindar granted the lands in question to one Augham Singh at an annual rent of 101 Sicca Rupees, under a *pottah*, of which the terms and effect will hereafter be considered. Augham Singh continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the zemindar's receipts or acquittances, which have been produced in evidence, he is described as *mukurrureedar*. After his death, his sons Pertab Singh and Narbhan Singh continued to hold the lands on the same terms, and some of the zemindar's receipts, accepting the same rent of 101 Sicca Rupees from Pertab Singh, and describing him as *mukurrureedar*, are also in evidence. Pertab Singh died on or before 1838; for, in the proceeding at page 20 of the record, his son Gooman Singh, one of the present respondents, and Neebhan Singh, are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands, which failed on proof that they were included in the zemindary, of which the revenue had been permanently settled in 1793, and were, therefore, not subject to any claim on the part of Government. The zemindar being no party to this proceeding, it is material only as showing that the title on which the respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of 101 Sicca Rupees, was received from Gooman Singh, and in these also he is described as *mukurrureedar*. It is not, however, clear that these last-mentioned receipts were granted by the zemindar or his officers. It seems more probable that they were granted by a receiver who, under the Court of Wards, during the minority or incapacity of the zemindar, or under some other

the allegation of her husband's proper share,"—that is, his share of the testator's property; that is, the one-fifth of the trading business, which the testator had given to him. If their Lordships are right in coming to the conclusion that the testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows that those profits belong to each of the sons in fifths, and accordingly would be divided as such, and therefore, upon the true construction of the will, their Lordships are of opinion, that the testator has not attempted to dispose of these profits, which are the property of the son; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each son, and would go to his heirs, exactly in the same manner as any other property that he might have acquired. It will be obvious that if the son had taken his share of his profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they disagreed, viz., that they should divide the surplus profit, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think that this case is exceedingly close upon the case in 6th Moore, and, although they would reluctantly allow in the construction of a will, the construction of one will to be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present; and they concur with the observations made by Sir Barnes Peacock in delivering judgment, that the testator has not attempted to dispose of, and, if he had, could not effectually have disposed of the property of his son.

There is another point relative to the property of the partnership, consisting of company's paper. The facts of the case appear to be these: the partnership assets consisted in part of company's paper, which were taken in the name of the deceased son, or in his name jointly with the names of the other brothers, and it was necessary that they should be indorsed. The result was that he indorsed the bills in blank, and gave them to his brothers. This was, in their Lordships' opinion, a mere ordinary partnership transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each son had to his share of the profits, not giving to the son, who has died, the exclusive right to the company's paper, which he so indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature in Calcutta be affirmed with costs.

The 20th December 1867.

Present:

Lord Cairns, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, and Sir Lawrence Peel.

Jurisdiction—Under-tenants—The term "pottah" in Act X—Hereditary and transferable tenures—Evidence—S. 15 Act X of 1859.

On Appeal from the High Court at Calcutta.

Baboo Dhunput Singh and others,
versus
 Gooman Singh and others.

Tenants intermediate between proprietor and ryots are subject to the jurisdiction of the Collector under Act X of 1859, which contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes.

A *pottah* must not, *prima facie*, be assumed to give a hereditary interest, though it contains no words of inheritance; "pottah," as used in Act X of 1859 being a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or ryots.

Where proof exists of long uninterrupted enjoyment of a tenure, accompanied by recognition of its hereditary and transferable character, it is sufficient to supply the want of the words "from generation to generation" in the *pottah*, and the tenant cannot be dispossessed by his superior.

Where a tenure was or has become hereditary and transferable, and the rent has not been changed from the time of the Perpetual Settlement, the tenants (being intermediate between proprietor and ryots) are protected from enhancement by s. 15 Act X of 1859.

This is an appeal against a decree dismissing the suit brought by the appellant under Act X of 1859, for the enhancement of the rent of land within his zemindary. The argument before their Lordships raised various questions of some perplexity and of real public importance, but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the defendants (the actual tenants), and of a right to raise the rent previously paid in the plaintiff (the zemindar). The appellant's title is thus derived:—He is the son and representative of Baboo Pertab Singh, who in 1851 purchased the zemindary in which the lands in question are situate, at an execution sale. The execution, though at the suit of Government, was one in a mere Civil suit for moneys, and accordingly the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment-debtor, and therefore subject to whatever subsisting interests in the lands had been effectually granted or created by any former zemindar.

The following is the history of the respondent's occupation:—In 1792, shortly after the Decennial Settlement of this zemindary had been completed, but before that settlement had been declared perpetual, the then zemindar granted the lands in question to one Augham Singh at an annual rent of 101 Sicca Rupees, under a *pottah*, of which the terms and effect will hereafter be considered. Augham Singh continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the zemindar's receipts or acquittances, which have been produced in evidence, he is described as *mukurrureedar*. After his death, his sons Pertab Singh and Narbhan Singh continued to hold the lands on the same terms, and some of the zemindar's receipts, accepting the same rent of 101 Sicca Rupees from Pertab Singh, and describing him as *mukurrureedar*, are also in evidence. Pertab Singh died on or before 1838; for, in the proceeding at page 20 of the record, his son Gooman Singh, one of the present respondents, and Neebhan Singh, are described as the then occupants of the lands.

That proceeding was in a suit brought by Government for the resumption and assignment of these lands, which failed on proof that they were included in the zemindary, of which the revenue had been permanently settled in 1793, and were, therefore, not subject to any claim on the part of Government. The zemindar being no party to this proceeding, it is material only as showing that the title on which the respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of 101 Sicca Rupees, was received from Gooman Singh, and in these also he is described as *mukurrureedar*. It is not, however, clear that these last-mentioned receipts were granted by the zemindar or his officers. It seems more probable that they were granted by a receiver who, under the Court of Wards, during the minority or incapacity of the zemindar, or under some other

unexplained circumstances, was at that time in possession of the zemindary. It also appears that, although the rent was often taken from one member of the Singh family, as shown by the receipts, there were many persons of that family beneficially interested in the lands; Pertab Singh having left five sons, besides Gooman Singh, and Neerbhan Singh having on his death left two sons, Dabee Singh and Akbur Singh. And from one of the documents in evidence in the cause, it appears that fees were paid by the two last-named persons to, and accepted by, the receiver in 1845, on a mutation of names as upon the devolution of a *mukurruree* tenure.

The father also of the appellant is shown to have brought in 1855 a summary suit for the recovery of one year's rent, at the rate of 101 Sicca Rupees, alleging that the lands were held as a *mukurruree* at that rent by the defendants there named.

So far the tenure, whatever was its nature, remained in the Singh family, but it afterwards became the subject of transfer by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the respondent, Muddun Lall Doss had, before the commencement of the present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of Gooman Singh, and of one of his brothers; and it is stated in the respondent's case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the decree under appeal. The result, therefore, of what has been stated is, that at the time of the commencement of this suit, the lands had been held as against the zemindar at one unvarying rent since 1792, under a tenure originating in the *pottah* of that year, but treated *de facto* as a hereditary tenure, and from time to time described by both the zemindar and the tenants as a *mukurruree* tenure: and that, as such, it has been made the subject of sale and transfer to the knowledge, and with the assent, of the zemindar, who, on one occasion, bid through his manager for a portion of it.

The first proceeding in this suit was necessarily the notice which the 13th Section of the Act directs to be served on the under-tenant or ryot whose rent is sought to be enhanced. That document stated that the *taidad*, meaning probably the rent-roll, of the lands was extremely small; that the respondents had produced "no reliable document," showing on what special grounds they occupied them; that with a view to settle the rent, the lands had been measured and were found to consist of 11,645 beegahs; and that the rent of them, according to the rate paid by other ryots cultivating the same kind of land, would amount to 24,842 rupees 10 annas and 8 pies.

And the plaint founded on this notice, accordingly, claimed the sum with interest amounting in all to 26,752 rupees 6 annas and 9 pies, as due from the respondents to the appellant.

The learned Counsel for the appellant have argued that the defence set up by the respondents must be taken to be that they are the holders of a *mukurruree istemruree* tenure, i.e., a hereditary tenure at a fixed rent, under the *pottah* of 1792, and that they must stand or fall according as the terms of that instrument establish or fail to establish such a title. Their Lordships cannot accede to that argument. It is to be observed that Act X of 1859 (see s. 59) does not require the defendants to put in any written pleading. And in their Lordships' opinion the fair construction of the written statement, which, under the option given to him, the respondent Muddun Lall did put in, is, that under all the circumstances stated above, he and those from whom he derives title must be taken to have held as hereditary *mukurrureedars*, which of itself would be an answer to the suit; and that, if that contention could not be supported to this full extent, they were protected against an enhancement of rent by the provisions of Act X of 1859.

The respondents have been successful in every stage of the suit in the Courts

below, but the several decisions in their favor have proceeded on different grounds. The Collector (the Judge of first instance), in his judgment of the 31st March, seems to have held that, though the *pottah* neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the defendants have proved that they have held for upwards of seventy years at one rate, and that the plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an appeal to the High Court. The petition of appeal treats the respondents as ryots; and on the first argument in the Court, their Counsel argued their case on the assumption that they were properly described as ryots. On that occasion, the Judge held that the *pottah* did not in its terms confer any *mukurruree* title; and that the statement of the appellant's father, and the receipts describing the tenants as *mukurrureedars*, would not, in the absence of all *mukurruree* title in the original lease, confer such a title or form an estoppel to the appellant's suit. But they also held that the law, as declared by the 3rd and 4th Sections of Act X of 1859, conferred in fact a *mukurruree* title on all ryots in the position of defendants who held lands at fixed rents, which had not been changed since the date of the Permanent Settlement. The appellant petitioned for a review of this decision, partly on the ground, afterwards decided against him, and now abandoned, as to what in legal contemplation is the date of the Permanent Settlement, and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th Sections of the Act, which were specifically applicable to ryots only, whereas it ought to have proceeded under the 15th and 16th Sections, relating to persons possessing a transferable interest in the land intermediate between the proprietor of the estate and the ryots, such as the defendants were; that between these last mentioned sections, on the one hand, and the 3rd and 4th Sections, on the other, the right may be dependent on the conditions of a lease, whereas under the latter it would be independent of the conditions of any lease; and finally, that the question was to be treated not as one of prescriptive right, but as one dependent on the terms of the *pottah*. The High Court, on this final hearing, held that the defendants were not ryots, but tenants intermediate between the proprietor and the ryots; that they did not hold under a terminable lease, nor under the *pottah*, which did not in any way refer to them but only to the original lessee; but that, inasmuch as they had been allowed by the proprietors to hold the tenure without any *pottah* for fifty years and ever since the death of the first lessee, and the proprietors had by their acts admitted the tenure to be transferable and *mukurruree*, i.e. permanent, it was not for the Court, sitting as a Revenue Court under Act X of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable; and that the respondents holding a tenure at a fixed rent, which had not been changed from the time of the Permanent Settlement, were protected by the 15th and 16th Sections of the Act from enhancement.

It is now assumed on both sides that whatever was the interest of the respondents in these lands, they were not ryots, but tenants intermediate between the proprietor and the ryots. And one of the points taken for the first time here was, that that being so, they were not subject to the jurisdiction of the Collector under Act X of 1859; that this tenure, if it could be made the subject of enhancement of rent at all, could be made so only by a suit in the Civil Court; and for examples of this we were referred to the cases of the Ranee Surnomoyee * and that of Gopaul Lall Thakoor,† which are both reported in the 10th Volume of Moore's Indian Appeals.

Their Lordships cannot entertain any doubt of the jurisdiction of the Courts below. Both the cases cited were tried before Act X of 1859 was passed. That Act throughout contemplates under-tenants as distinct from ryots, and contains

* See 2 W. R. P. C. 13; 1 Suth. P. C. R. 548. † See 3 W. R. P. C. 1; 1 Suth. P. C. R. 558.

provisions relating to both classes. And their Lordships think that the 23rd Section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, viz., "a suit for the determination of the rate of rent at which a *pottah* and *kuboolut* should be given," or, as what it is in form, a suit for "arrears for rent due on account of land."

This being so, the first question is what is the nature of the respondents' subtenure? If it can be shown to be a *mukurruree istemraree*, there is an end of the case. If this cannot be established, the question whether the respondents are not protected by the 15th or 16th Section of the Act will arise.

The *pottah* is addressed to Augham Singh as *Mostajir*, which is translated "farmer," of Mouzah Cheloone and other villages in forests of *Sukhooa* trees in the Zillah named; and the operative part of it, according to one version of it, is in these words:—"Inasmuch as in accordance with your application the lands of the villages in the said forests have been assessed with a rental of Rs. 101, everything being consolidated and a *pottah* granted to you, it is required that you will, in all confidence, have the lands of the said forests occupied by Purbutea and other ryots, and keep paying to the Sircar the rent year by year according to this *pottah*, and whenever you may be summoned for the purpose of hunting, you will attend, accompanied by all the Purbuteas."

In the course of the arguments for the appellant, a question was raised whether this *pottah* was more than a lease of the village lands then in cultivation, and whether the greater part of the land now in the occupation of the respondents had not been acquired by subsequent and gradual encroachment. Their Lordships, however, are of opinion that the *pottah* covered, not only the lands then in cultivation, but also the forest lands which the grantee was to settle and re-claim by bringing Purbutea and other ryots upon them; and upon the pleadings and evidence in this cause, they must assume that it included all the lands which the appellant now seeks to re-assess. The nature and extent of the interest in these lands which it conferred on Augham Singh have now to be considered.

Upon these points their Lordships are not prepared to dissent from the judgment of the High Court, in so far as it found that the *pottah*, taken by itself, cannot be held to have granted a *mukurruree istemraree* tenure. It does not contain the term *mukurruree* or any equivalent words, from which an obligation on the part of the grantor never to raise the rent is fairly to be inferred; nor does it contain the expressions "from generation to generation," or other like words, importing that the tenure, whether the rent was to be fixed or variable, was to be hereditary. Their Lordships cannot accede to the argument for the respondents, that a *pottah* must *primâ facie* be assumed to give a hereditary interest, though it contains no words of inheritance. They do not think that the case cited from Morton's Decisions, still less that of *Freeman v. Farlie*, is any authority for such a proposition. *Pottah*, as may be seen by referring only to Act X of 1859, is a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or ryots. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favor of the hypothesis that the intention of the grantor was to create a perpetual tenure at a fixed rent. It may be conceded to respondents that the zemindar in 1791 may have deemed himself capable of granting such a tenure: for though, according to the preamble of Reg. XLIV of 1791, zemindars, before the Perpetual Settlement, had no power to enter into engagements for a period exceeding that of their own engagements with Government,—and in 1792, the Decennial Settlement, which had just been completed, had not been declared perpetual,—yet at that time, there was every reason to believe that the settlement would be declared perpetual; and the 2nd Section of the Regulation last referred to, which restricts

the zemindar's power of disposition, had not been enacted. The whole policy, however, of the Decennial Settlement, as appears by Reg. VIII of 1793, was adverse to *mukurruree* tenures. It made them all subject to re-assessment, unless they fell within the protection of the 49th Section of that Regulation. It is, therefore, not probable that the zemindar would, immediately after the completion of the settlement, grant such a tenure except upon special grounds and adequate consideration; and of these there is no proof. Though the *pottah* contains some reference to future services as incidental to the tenure, the transaction, on the face of it, is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the grantee, of bringing the latter into cultivation.

If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands, it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of his lands. But passing from the *pottah* taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case.

The appellant, as we have already remarked, is not, as was the plaintiff in the case of Gopaul Lall Thakoor * (10 Moore's Indian Appeals), which was cited in the argument, an auction-purchaser who, under the Revenue Laws, can throw upon the tenant the burden of showing that his tenure would have been valid against a zemindar unfettered by any personal engagement at the time of the Perpetual Settlement. He is bound by the engagements and acts of his predecessors in the zemindary; and we must consider the evidence of these as it bears, first, upon the tenure, and next, upon the question of fixed or variable rent. And, in doing this, we must recollect that after the passing of Reg. V of 1812, there was no restriction upon the disposing power of the zemindar.

The facts already stated afford incontestable proof that, ever since the death of Augham Singh, the hereditary character of his sub-tenure has been recognized by the successive zemindars. There is also evidence, which is not contradicted, that some of them have recognized its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the *pottah*, or that, if the original grant were limited, as was suggested, to the life of Augham Singh, his tenure has, by some subsequent grant, become hereditary and transferable. And upon the proof here given of long uninterrupted enjoyment, accompanied by the recognition of the hereditary and transferable character, it is almost impossible to suppose that a suit by the zemindar in the Civil Court to disturb the dispossession of the respondent could not be successfully resisted. The case of Joba Singh (4 S. D. A. R., 271) is an authority for the proposition that evidence of this kind will supply the want of the words "from generation to generation" in the *pottah*, which is the foundation of such a title.

Upon this second point, the evidence of the subsequent acts and conduct of the zemindars is material only in so far as the receipts and proceedings above referred to show that both Augham Singh and his successors were described as *mukurrureedars*. Their Lordships are not prepared to say that from this evidence a Court or Jury might not legitimately infer, as against the first zemindar and his successors, either that the rent had been always fixed, or that by subsequent contract that which had been originally variable had been made invariable. It is not necessary, however, for the determination of this appeal that they should so decide; and they are unwilling without necessity to draw from the facts proved conclusions which were not drawn by the Court below.

It is sufficient to say that, if the tenure was or has become hereditary and transferable, as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the Perpetual Settlement, the case, as ruled by the High

* See ante.

Court, falls within the protection of the 15th Section of Act X of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression "a terminable lease," it is clear that a tenure under which the tenant can no longer be dispossessed by his superior cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their Lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the respondents were sued as occupying ryots, liable for the rent assessed upon them in that character; that the High Court held that, considered as ryots, they were protected by the 3rd and 4th Sections of the Act; and that thereupon the appellant, shifting his ground and treating the respondents not as ryots but as tenants intermediate between him and the ryots, obtained an order for review.

But if the respondents were tenants intermediate between the proprietor and the ryot, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not, in that case, accurately specify "the ground on which enhancement of rent was desired," and the assessment on which the sum sued for was calculated was improperly made. Dyaram's case (1 S. D. A. R., 139), and the note of Sir Wm. Macnaghten at the foot of it, show that where the suit is against an intermediate tenant, the enhancement ought to be made according to the pergunnah rate of the rents payable, not by the ryots, but by the holders of similar tenures. To assess such an intermediate tenant according to the rents paid by ryots, must necessarily deprive him of all beneficial interest in his tenure. Their Lordships, however, do not decide the case on this last ground.

For the reasons above stated, they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this appeal with costs.

The 20th December 1867.

Present :

Sir James W. Colville, Sir Edward Vaughan Williams, Lord Justice Rolt, and Sir Lawrence Peel.

Alienation—Succession—Mahomedan Law—Deed of Gift—Act of State—Procedure.

On Appeal from the Judicial Commissioner of. Oude.

Nawab Umjad Ally Khan

versus

Mohumdee Begum and another.

Where a Mahomedan transferred certain property (company's paper) to his son, reserving the interest to himself for life, the object of the disposition being to give the son a larger share of the father's property than would come to him by succession *ab intestato*;

HELD, that the transaction could not be impeached on moral grounds, as a design to alter the disposition of property so as to defeat a succession by an alienation which the law allows is simply a design to conform to the law while working out an unforbidden object.

HELD, that the intention of the parties did not violate any provision of the Hedaya, and the transfer was complete and the gift valid.

To question an act of State, directly or indirectly, the contention must be raised on a suit duly constituted, to which the Government must be made a party.

This is an appeal under an order made on a special application to Her Majesty, for leave to appeal against so much of the decree of Mr. George Campbell, made

by him when Judicial Commissioner of Oude, as reverses or varies a decree of Mr. Fraser, the Civil Judge of Lucknow, in favor of this appellant. The suit in which Mr. Fraser's decree was made was brought by the respondents Mohumdee Begum and Nawab Begum, as daughters and co-heirs of the deceased Nawab, against the appellant as the son and administrator of his father's estate under Act XXVII of 1860, against the widow of their father, and two sisters of plaintiffs, also co-heirs; and, lastly, against certain other persons described as nominal defendants, whom it is unnecessary here to name or further to describe.

The suit was in the nature of an administration suit; it sought a discovery of a portion of the assets alleged to be withheld, and an account and a division of the assets amongst the heirs according to the Mahomedan law. The deceased and his family were Mahomedans, and followers of the "Sheah" school. The widow of the deceased instituted also a distinct and separate suit against the heirs, claiming her dower according to a settlement of it upon her by her husband, and claiming, in addition to it, a large sum of money by gift from her husband during his lifetime. Her share to one-eighth of the clear assets seems not to have been disputed. The appellant claimed a large portion of the property, consisting of promissory notes of the Government, commonly called company's paper, amounting to Rs. 735,300, as his property by gift from his father in the lifetime of the latter, the validity of which gift was disputed by the respondents, the plaintiffs in the suit, as well as by the widow, a co-defendant.

Mr. Fraser's decree established this gift in favor of the appellant. The decree of Mr. Campbell reversed that portion of Mr. Fraser's decree, and declared the gift invalid according to Mahomedan law. The appellant claimed also against the co-heirs, the immoveable property described in the suit. Of this a large portion was situate in Oude, and was claimed by him under a firman from the Government of India granting it to him exclusively as property which had been declared forfeited and to be the property of the State by Lord Canning's proclamation on the suppression of the rebellion in Oude, and a small portion, being land situate in Furruckabad, was claimed by him under a certain instrument of conveyance from his father, termed a *solehnamah*. The property was adjudged to him by Mr. Fraser's decree. Mr. Campbell did not adjudicate upon that part of Mr. Fraser's decree relating to the above-mentioned immoveable property, otherwise than by declaring his intention to reserve the consideration of these issues to a further time, for the reason assigned in the concluding paragraph of his judgment. The appellant treats this reservation of judgment as a variation by Mr. Campbell of Mr. Fraser's decree, and makes the propriety of it a ground of appeal. The respondents, on the other hand, contend that as a mere reservation of a judgment on appeal by the Appellate Court is neither a reversal nor a variation of a decree appealed against, the appellant is not entitled to insist on this part of Mr. Campbell's judgment as a grievance against which he has been permitted to appeal. The appeal is brought not as of right but by special leave, and in the petition on which leave to appeal was granted, the appellant named only the two respondents who were plaintiffs in the suit, but the appellant has nevertheless now named all the parties interested in the general estate, including the widow, as respondents.

Application was made on the part of the widow to their Lordships, on the first day of their sittings, to dismiss or suspend the hearing of the appeal on the ground of irregularity. Her Counsel stated that the widow had not appealed against the decrees affecting her claims to the sum disallowed as a gift, being, on the whole, content to take her portion of the seven lakhs which, by Mr. Campbell's decree, fell into the residuary estate; but that, if this appeal succeeded, she would be prejudiced thereby to so large an extent that she should then desire to appeal against the disallowance of a part of her claim by the decrees of the two Courts. Leave was given to her to appeal against that portion of the decrees, and she has been heard by her Counsel as a party respondent on the present appeal. The

decision of their Lordships on their present appeal will be without prejudice to her rights in her own appeal if preferred, as respects the claims disallowed her by those decrees: in other respects it will conclude her rights, in the ordinary way, as a party respondent to this appeal.

The matters to be determined on this appeal are three in number, and are, *first*, the validity of the gift to him of the company's paper, amounting to Rs. 735,300; *secondly*, the appointment of a stranger to be and act as co-trustee with the appellant in the trust as to the family religious or charitable fund called *Ruddi Muzalim*, and the direction to settle a scheme for the administration of that fund; and, *thirdly*, the reservation of his judgment, indefinitely, by the Judicial Commissioner on the right of the appellant, as declared by Mr. Fraser in his decree, in respect of the landed property adjudged to the appellant by that last-mentioned decision.

The first in order of these matters involves an important point of Mahomedan law relating to gifts *inter vivos*.

If the gift be sustained as a valid gift *inter vivos*, it will be unnecessary to review the evidence as to the genuineness of certain documents propounded by the appellant, and said to constitute a valid testament by the Mahomedan law, or to consider in any way the validity or effect of those documents.

The effect of the non-assent of co-heirs to a bequest to an heir by a Mahomedan of the *Sheah* sect becomes also immaterial as a subject of enquiry here, if the gift be valid as a gift *inter vivos*.

Before the validity of this gift as one *inter vivos* is determined, it must first be considered by their Lordships what the real nature of the transfer was. The legal title in the promissory notes was undoubtedly in the appellant in his father's lifetime, by virtue of an act of the father.

But though the transfer of a legal title will satisfy that provision of the Mahomedan law which relates to the point of seisin, in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. Fraser, the Civil Judge. The Judicial Commissioner, paying a just tribute of commendation to Mr. Fraser on his accurate investigation of the facts, expresses no dissent from his conclusion as to them, but reverses his decision as to this gift as erroneous in point of law. Mr. Fraser's observations as to the mode of dealing amongst natives living amongst themselves as a family in a state of family union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family, and on the deference to his wishes and arrangements and acquiescence in them commonly exhibited, are forcible as arguments to exclude the notion of fraudulent concealment or design in a transfer circumstanced as the present. They strengthen the probability of an intended transfer of property in the lifetime of the donor, with a reservation of the use or proceeds of the money transferred during the lifetime of the donor only.

In consequence of the tendency amongst natives to disguise their ownership under *benamie* transfer of property, a natural suspicion arises often that such is the design when the transaction is really fair and open, and the apparent and real title are entirely consistent. The transaction questioned in this case, though between natives, differs in no respect as to the manner of dealing with the property in question (company's paper in the hands of the Government Agent at Calcutta at the time of and after the gift), from the mode in which a European father and son, designing to make between themselves a similar disposition of the like property, giving the paper to the son with a reservation of the interest to the father for life, might have dealt with it so as completely to effectuate their intention. There is no evidence of any attempt or design to conceal from the Government

Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment. Mr. Fraser accordingly, and very reasonably, negatives any fraud in the transaction as to these notes, and Mr. Campbell, though he treats the case as one undeserving of support in a Court of Justice, proceeds not on actual fraud, but on his views of the policy of the law, and treats the transaction as fraudulent in contemplation of law, and done in evasion of its provisions, which limit the testamentary power of a Mahomedan, and aim in some degree at equality of division amongst the descendants *ab intestato*.

Everything which took place in respect of these notes at the Government Agent's office was perfectly consistent with the appellant's real title in them. It is true his case is stated higher in his pleadings than the real title warrants; but the case as stated includes the real title, and is only the common error which is so frequently observed in the cases of natives in India, where their legal advisers, from ignorance or foolish craft, mis-state a good case, and place it on false grounds. This was not an absolute personal transfer of the whole property including all future interest, beneficial as well as legal; nor was it a *benamée* transaction. A mere *benamée* or *ism furzee* title is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a donor, where the transfer of the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favor, and would, of course, leave the disposition *ab intestato* undisturbed. But such was not the intention here, and such is not the nature of the disposition. The object of the disposition is correctly stated by Mr. Fraser to have been to give the son a larger share of the father's property than would come to him by succession *ab intestato*. Mr. Campbell, the Judicial Commissioner, treats that intention and act as evasive of the testamentary law of Mahomedans, and as inconsistent with their law of gifts. Upon the first ground of decision it is to be observed that in the absence of immoral or illegal purposes accompanying and prompting an act of disposition of property, a disposition which the law admits cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question whether a subject of property is an asset or not raises simply the question whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unforbidden design. The other view of the subject, that this is an incomplete gift by the Mahomedan law, is one which presents more difficulty, and will be presently considered. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from the cause assigned for it in Mr. Fraser's judgment, viz., a desire to maintain the dignity of the eldest branch of the family. Neither can the policy of the law be invoked, for the reasons above assigned, that the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that if the law suffers a father by an act *inter vivos* to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.

It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mahomedan law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Mahomedan law. The text of the *Hedaya* seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. (See "*Hedaya*," tit. "Gifts," vol. iii., book 30, page 294, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is:—"The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article); for his gift related to the substance of the article, not

to the use of it." Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahomedan law defeats not the grant, but the condition. (See "*Hedaya*," vol. iii., p. 307.) But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the *Hedaya*, and the transfer is complete. The Mahomedan law authority whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion unsupported by authority ; but it is to be observed that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties.

The *second* matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an application with the *status* and dignity of the appellant and with family usage, seems to their Lordships to be displaced by one of the documents which the appellant propounded and used before the Court, which does associate a co-trustee with him. As against the appellant, the appointment of a co-trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His direction as to a scheme for the administration of this trust seems to their Lordships reasonable.

The *third* point requires a more detailed statement of the grounds on which their Lordships think that the decision of Mr. Fraser may be affirmed here, rather than by the Judicial Commissioner acting under their Lordships' expression of opinion. As it is clear that the appellant meant to include this part of the judgment in his appeal, any merely verbal insufficiency in his grounds of complaint, or of the order made thereon, might be removed by leave given to renew and extend the application to appeal, so as to cover and remove a mere technical defect. But as the intention is manifest, and the decree of Mr. Fraser, though untouched in terms, is in effect suspended by Mr. Campbell's judgment, upon a liberal construction of the language of the petition to appeal, this part of the judgment of Mr. Campbell may be considered as included within the term "*varied*." When the Appellate Court in India on appeal has omitted to decide a question raised by the appeal, their Lordships have remitted the case for decision to that tribunal, in all cases where they did not find clearly on the record before them materials for a final judgment doing complete justice between the parties. This case is not of that nature. Mr. Fraser forbore to question the appellant's title under the firman, because that firman could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an act of State, under which the firman had its origin. The proclamation was necessarily impeached by impeaching the firman, and it was undoubtedly an act of State. Even if this act could be directly or indirectly questioned in a Municipal Court (on which we express no opinion), the contention must be raised on a suit duly constituted, to which the Government must be made a party. The forfeited estates were not an asset at the time of the Nawab's death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the suitors in unnecessary expense and subject them to unnecessary delay, since it must be accompanied with a declaration that in that suit, between those parties, and on those pleadings, the legality of the title of the grantors of the firman could not be questioned.

The objection raised to the *Solehnamah* by Mr. Bell (which it is necessary to notice only as respects the lands in Furruckabad) does not arise on the facts. The consideration, two rings, may be small and inadequate in the sense of purchase-money; but it cannot be treated as of no pecuniary value: and the record furnishes no grounds to justify a remand to the Judicial Commissioner on this comparatively trifling point.

Their Lordships think that a valid gift *inter vivos* as to the company's paper was effected by the Nawab in his lifetime in favor of his son, the appellant, and therefore they deem it unnecessary to consider the question as to the genuineness of the document set forth as constituting his will, or to consider whether the non-assent of the heirs does or does not vitiate the will of the Mahomedan of the *Sheah* school in favor of an heir.

On the whole case, they will humbly advise Her Majesty to reverse the decision of the Judicial Commissioner of Oude, except as to the appointment of a co-trustee, and to affirm the decision of a Civil Judge, Mr. Fraser, with that variation.

As the contention in this appeal arises from the acts of the last owner, who has subjected his property by his mode of dealing with it to questions fairly raised, their Lordships think that the costs of the appeal of both parties should come out of the residuary estate. Their Lordships, therefore, direct that the costs of the appellant and the respondents be taxed by the Registrar as between solicitor and client, and likewise the costs of Iftakaroonissa Begum Afzal Muhul, with reference to this appeal.

The 20th December 1867.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Alienation by Hindoo widow—Suit by Reversioner—Onus probandi.

On Appeal from the High Court at Madras.

Cavalry Vencata Narainapah

versus

The Collector of Masulipatam.

Where a party entitled to impeach an alienation by a widow of her husband's estate sues to set aside such an alienation, and the defendant establishes not only that he had a charge on the estate in virtue of a mortgage deed executed by the widow, but that the debt to him was on account of advances made to her for purposes for which she would have been entitled to alienate the estate as against the next heirs, it does not follow that because plaintiff had a right to demand this peculiar proof, the ordinary rule which requires the party who alleges payment to prove payment is to be inverted in his favor, or that the debt is to be presumed to be satisfied unless the contrary is shown by the creditor; and if he alleges that the mortgage deed was not *bonâ fide*, the burden lies on him to prove his allegation.

This is the third appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the respondent, was entitled to the zemindary in question by escheat, subject to whatever interest the appellant might have acquired therein by virtue of the transactions between his late father and Lakshmiddevammah, the widow of the last zemindar. The order made on the second, which bore date the 6th January 1862, amongst other things declared that the Crown, taking by escheat, had the same right to impeach the alienation of the widow which the next heirs of the husband (if such

there had been) would have had ; and that the appellant, then the respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout the full amount of all such of the advances (if any) made by his father to the widow as were made for purposes for which according to the Hindoo law, she would have been entitled to alienate the estate against the next heirs of her husband, in so far as she had no other estate of her husband to answer such purposes ; and by the same order the cause was remitted to the Sudder Adawlut of Madras with directions to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the razeenamah relied on by the appellant, and, if not, to inquire what advances, if any, were made by the appellant's father to the widow, and whether all or any, and which of such advances, and to what amount, were made for the purposes for which, according to the Hindoo law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, and whether the widow had, when such advances were made, other estates of her husband sufficient to answer such purposes.

The Sudder Court sent down the issues so directed for trial in the Zillah Court. The judgment of Civil Judge (Mr. Elliot) states very carefully the facts which he found to have been proved before him, and came to the following conclusions :— 1st, that the alienation by the widow was for legal purposes sanctioned by Hindoo law, and that the right of the Crown, as next heir of the husband, was therefore actually defeated by the razeenamah ; 2ndly, that the sums due for such advances amounted in April 1838 to 48,614 rupees 13 annas 6 pies, the balance of the account then adjusted and settled ; and 3rdly, that the zemindar, the late husband of the widow, died possessed of no property available for any purpose, save and except the estate in dispute, which at his death was not unencumbered.

The decree of the High Court, made on appeal from this judgment, declared that the right of the Crown to take by escheat was not defeated by the razeenamah ; that from the death of the zemindar in 1810 up to 1813, advances were made to the widow by the appellant's father for purposes for which, according to the Hindoo law, the widow would have been entitled to alienate the estate as against the next heirs of the husband, and that on the 18th May 1822 the balance due to the widow on these advances, with interest, was about Rs. 20,000 ; that in the year 1828, a further advance of 1,033 rupees 3 annas 3 pies was made for similar purposes ; and that when the before-mentioned advances were respectively made, the widow had no other estates of her husband sufficient to answer the purposes for which they were taken and to which they were applied ; but that the defendant had not shown what, at the date of the advances last mentioned, was the debt on the former advances, or whether such former debt, or any part of it, still subsisted ; that no advances were made from that date to the date of the mortgage deed in 1838 ; that it lay upon the appellant to show, and that he had failed to show, that the widow was in debt to his father at the date of the execution of the mortgage deed for advances made for the purposes aforesaid ; and that accordingly the respondent, on the part of Government, was entitled to take the estate by escheat, unencumbered with charges created in favor of the appellant or his father.

Against this decree the present appeal has been brought ; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's order of the 6th January 1862, and what conclusions ought to be deduced from them.

That the zemindar, the husband of the widow, died in debt and left little or nothing except the zemindary in question, is undisputed. There is, therefore, no contest as to the correctness of the conclusion to which both the Courts below have come upon the last issue. It seems to be also admitted that the gross annual revenue of the zemindary was, on the average, little, if at all, in excess of 10,000 rupees ; that the peishcush or Government Revenue was upwards of Rs. 4,000 ; and that the balance was not much more than would cover the zemindary and

other expenditure of the widow. The probability, therefore, of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again, it is proved that the pecuniary transactions between the late zemindar and the uncle and father of the appellant, who were first cousins of his wife, began before 1804. This is shown by Exhibit 13, which both the Courts below have treated as genuine, and from which they have, as their Lordships think, legitimately inferred that the statements in Exhibit 14 (also found to be genuine) may be accepted as true. If this be so, we have it established that in 1810, when the widow came into possession, her late husband was indebted to the appellant's uncle Seethiah in a sum exceeding Rs. 20,000, and that she had to borrow from him a further sum amounting to about Rs. 3,200, in order to defray the expenses of her husband's obsequies, and perhaps also for other purposes. That the debt so due to Seethiah was transferred to the respondent's father on the 15th April 1811, is proved by Exhibit No. 16.

It is unnecessary to consider whether the debt thus assigned included any further sums paid for peishcush, as the appellant would infer from Exhibits 15 and 16, because the Courts below have, as their Lordships think, correctly held that effect must be given to the widow's admission, contained in her letter (No. 18) of the 18th May 1822; that at that date the debts on her own showing did not exceed the sum therein mentioned, a sum which this paper states to be about Rs. 20,000, but which according to the printed record is Rs. 22,000. The antecedent proof, in the absence of any evidence to the contrary, is, their Lordships think, sufficient to establish that the whole of that sum represented debts which the widow was entitled to charge upon the zemindary as against the heirs of her husband. The High Court has held that the only other advance established to their satisfaction is that of 1,033 rupees 3 annas 3 pies paid for peishcush in 1828, and their Lordships will accept that finding as correct, though there is undoubtedly some evidence of other advances of the like nature.

This being so, determination of this appeal must turn on the question whether the High Court was right in holding that it lay on the appellant to show, by positive proof, what part (if any) of these debts remained unpaid in 1838, at the date of the mortgage, and that, in the absence of such proof, it was to be inferred that no part of these debts subsisting in 1822 or in 1828 was subsisting in 1838.

The appellant had, no doubt, to sustain an extraordinary burden of proof. He had to establish not only that he had a charge on the estate by the act of the widow, but that the debt charged was of a particular character. He has shown that such a debt once existed. It does not, however, follow that because the respondent had the right to demand this peculiar proof, the ordinary rule which requires the party who alleges payment to prove payment is to be inverted in his favor, or that the debt is to be presumed to be satisfied unless the contrary is shown by the creditor. If, indeed, the facts had shown a strong probability of the satisfaction of the debt by the proper application of the surplus revenues of the estate by the widow, the High Court might have been justified in pressing against the appellant the non-production of accounts, or of other satisfactory proof that the debt had not been so satisfied. They might legitimately have held that the facts establishing that probability afforded *prima facie* evidence of payment. But to their Lordships it appears that the facts proved are such as fairly lead to the opposite conclusion.

The widow is shown to have succeeded to the zemindary encumbered with debt which she had no means of discharging, except the revenues, that are admitted to have been in ordinary years little more than sufficient to pay the Government Revenue and provide for the expenses of her establishment and family. A landholder, whether male or female, when in such circumstances, rarely, very rarely in India, succeeds in getting out of debt. Again, in the present

case, the Zillah Judge has shown that more than one of the years in the course of which the process of payment is assumed to have taken place, were years of distress and famine, when the collections from the estate must have fallen short of the Government Revenue. And there is also evidence of occasional litigation, in which the widow had to defend her title against adverse claimants. She seems to have been throughout her tenure of the estate a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822 and 1838, she was in a condition to make payments in excess of those which, from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

The transaction of 1838 is on the face of it a settlement of accounts between the widow and her creditor; a balance struck, and a mortgage to secure that balance. It is treated by the respondent as a mere contrivance to give the estate to the appellant's family in accordance with the desire which the widow's correspondence with Government shows she had expressed in 1832. There might be good grounds for so treating it, if the other evidence in the cause was in favor of the conclusion that she had then discharged the whole of the debts of Rs. 22,000 and Rs. 1,033. But their Lordships have already stated that they cannot draw that conclusion from the evidence.

They think that the burden of proof that this settlement of accounts was not a *bonâ fide* transaction between the debtor and the creditor, lies on the respondent, and that he has failed to adduce any evidence to that effect. Assuming it, then, to have been a *bonâ fide* transaction, it follows that advances with which she was entitled to charge the estate as against her husband's heirs, had previously been made to her to the amount of Rs. 21,000 or Rs. 23,000; and that there is no sufficient proof that she had then paid off these debts. What, then, is the effect of the transaction? Those advances, with the interest thereon, would considerably exceed the sum secured by the mortgage. Their Lordships think that it is a fair and just inference to take this sum of Rs. 48,614 13 annas 6 pies, which was secured by the mortgage, to be the balance due in respect of such advances after giving credit for all payments on account and after deducting the Rs. 5,000 paid at the time of the settlement. If it be urged that the appellant's case assumes other advances which the Courts below have not found to be of the character required, the answer is that in a case like this, wherein both debtor and creditor were interested in appropriating the payments so as to make this balance a charge upon the estate, the transaction itself, which could only be valid in the event of appropriating the payments made towards discharge of advances which could not constitute a charge upon the estate, may reasonably be treated as evidence that such an appropriation was made. Their Lordships, therefore, are of opinion that the appellant has succeeded in establishing that under the mortgage of 1838 his father acquired a charge on the estate for the sum therein named, which, on the widow's death, would have been valid against the next heirs of the husband if such there had been.

Further than this their Lordships are not prepared to go. They do not agree with the finding of the Zillah Judge that the title of the Crown was absolutely defeated by the razeenamah of the 5th April 1841. They do not think that the Crown is bound by that document, or by the judgment of the 20th March 1839 on which it was founded.

The result is that their Lordships must humbly recommend Her Majesty to reverse the decree of the High Court, and to declare that on 20th April 1838 there was due from the widow to the father of the appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, the sum of Rs. 48,611 13 annas 6 pies; that that sum was duly charged upon the estate by the mortgage of the 20th April 1838; and that accordingly the appellant is now entitled to hold the

zemindary against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the respondent's claim to immediate possession of the zemindary ; but it will leave an equity of redemption in the Crown. In strictness the present suit should stand dismissed, leaving the Crown to assert that equity, if it shall be so minded, in a suit properly framed for that purpose. It has, however, been suggested at the bar that provision for redemption might be made in this suit. If the parties can agree as to the terms of redemption, their Lordships would not be unwilling to have them embodied in the order to be made on this appeal. But if they do not so agree, the order which their Lordships must recommend to Her Majesty, as the consequence of the before-mentioned declaration, is that the respondent's suit stand dismissed without prejudice to the right of the Crown to redeem.

The appellant is entitled to have the costs of this appeal and of the proceedings in the Courts below under Her Majesty's order of January 1862, and the general costs of the suit below, except such portion of them as was occasioned by his contesting the title of the Crown to take by escheat. This latter portion ought to be borne by him, and unless already paid, should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below in India.

The 10th February 1868.

Present :

Sir James W. Colville, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, Lord Justice Rolt, and Sir Lawrence Peel.

Bond—Lands not pledged—Form of action—Disqualified female—Court of Wards—Regs. X of 1793 and LII of 1803.

On Appeal from the late Sudder Court at Agra.

Mahomed Zahoor Ali Khan

versus

Thakooranee Rutta Kooer.

Plaintiff sued on a simple money-bond for the recovery of a sum of money lent by him to *R. A.*, a female, whose estates were under the management of the Court of Wards, and he made co-defendants in the suit certain other parties whom he charged with endeavouring to have the estates of *R. A.* transferred to them. He also tendered in evidence another bond, by which *R. A.*, the principal defendant, purported to secure a further advance, and to pledge her zemindaree estates to the plaintiff till the debt was paid off.

HELD, that the plaintiff had no ground of suit against the other defendants, except *R. A.*, the principal female defendant, as his cause of action against *R. A.* was based on the first bond, which did not create any charge upon the lands with which they are said to have meddled.

HELD, further, that, as against *R. A.* herself, plaintiff could only get a personal decree for payment of the amount due on the bond on which plaintiff sued, and that he could not in the present suit rely on the second bond. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings.

On a consideration of the provisions of Reg. LII of 1803—(the provisions of Reg. X of 1793 are similar),—it was held that the mere fact that the Court of Wards has charge of the estates of a female did not necessarily disqualify her from contracting debts. That Regulation must be construed strictly, the provisions requiring the Collector to report to the Board a female as disqualified, and the subsequent procedure thereon should be strictly carried out, as not mere matters of form but necessary preliminaries before the female can be considered disqualified. From the absence of the observance of those provisions in the case of *R. A.*, and the conduct of the Government officials representing the Court of Wards, the custody of the Court of Wards of her estates was held to be of such a character as did not render her a disqualified female incapable of contracting debts.

The case having been framed incorrectly, it was, under the circumstances, remanded for trial to the High Court under special directions.

This is an appeal from a decree of the late Sudder Dewanny Adawlut of the North-Western Provinces of Agra, bearing date the 11th July 1864, which affirmed a decree of the Principal Sudder Ameen of Meerut, bearing date the 25th February 1863.

The plaint was filed in the Court of the Principal Sudder Ameen of Allygurh on 3rd May 1861, and is entitled the petition of plaint of the plaintiff against Rutta Kooer and nine other persons there named, and against the zemindaree rights in certain mouzahs there named, the property of the said Rutta Kooer; and it claims to recover Rs. 21,280, amount due on a bond dated 19th August 1856, and states that Rutta Kooer borrowed from the plaintiff Rs. 10,000, and executed a bond engaging to pay the amount on demand with interest at 2 per cent. per mensem, and that the plaintiff had repeatedly demanded the amount due, but she evaded payment and had not discharged the debt. It further stated that, in order that the money might be lost to the plaintiff, the other defendants had combined, and got the above estates belonging to Rutta illegally transferred to them, though they had not been put in possession; and, therefore, as a precautionary measure, the plaintiff filed that petition of plaint, *with the bond on which his suit was based*, against Rutta Kooer, the principal defendant, and the other defendants who claimed her property: and it concludes by praying that the amount sued for might be decreed against the defendants, *and the property aforesaid*, with interest to the date of realization.

The bond of the 19th August 1856, thus filed with the plaint, and on which, as stated in the plaint, the suit is based, is a simple money-bond purporting to have been executed by Rutta Kooer for Rs. 10,000 and interest. None of the other defendants are in any way parties to it, nor does it purport to be a mortgage or charge upon, or in any way to refer to, the property mentioned in the plaint.

The plaintiff has also tendered in evidence another bond, dated the 28th November 1857, by which Rutta Kooer purports to secure a further advance, and to pledge her zemindaree estates to the plaintiff until she should pay off the whole debt to him: but his suit is in no way based upon this second bond.

Now, as to all the defendants, except Rutta Kooer, it is obvious, on the face of the plaint, that no relevant case is made against them. The allegation that they have combined with the plaintiff's alleged debtor to get her estates illegally transferred to them is no ground of suit against them, if, as is the case here, the plaintiff sues upon an instrument which creates no charge upon, or estate or interest of any kind in, the lands. If he can obtain judgment on his bond, and it is not satisfied, he may possibly be entitled hereafter to raise such a case as that suggested in the plaint, against the land and against these defendants; but any such proceedings before execution on the judgment are premature. It follows, therefore, that, as against these defendants, at all events, the appeal must be dismissed, and it is wholly unnecessary to consider as to them the other defences set up in their several written statements.

Nor, as to Rutta Kooer, was it open to the plaintiff, on this plaint, to ask for any decree other than a personal decree for payment of the amount due on the bond. The plaintiff is not entitled to rely on his second bond. Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings, and the only thing that can be rightly insisted on by the plaintiff here is a decree for payment against Rutta. To a decree so limited, he would be entitled in a suit properly framed, if he proved his case; and the only defences that could usefully be raised by Rutta are—that she was incompetent to contract debt, or that she did not in fact contract debt, or that she had satisfied it.

Two of these defences she has in fact pleaded, viz., *first* (in substance and effect), that no such money was ever lent her, and that the bond was fabricated ; and, *secondly*, that her property was under the Court of Wards, and that the Government officials had not been made cognizant of, or accorded their sanction to, the institution of the suit, and that, even supposing the bond to be genuine, the claim of the plaintiff could not lie against the person and property of the defendant.

Amongst the issues fixed for trial by the Principal Sudder Ameen (besides those relating to the validity of the bond and the existence of the debt), was one in the following terms :—

“3rd.—Had the defendant the power to contract debts, her estates being under charge of the Court of Wards ; and is the fact of no notice having been given of the execution of the bond and the contracting of the debts at the Collectorate a sufficient argument for the falsity of the bond or not ?”

The form of the issue apparently assumes that Rutta's estates were under charge of the Court of Wards, and that the only question was the effect of this circumstance on her power of contracting debts ; but it will be observed that the question is, “Had the defendant the power to contract debts ?” and not the more limited question whether she had power by contract to charge her land with debts.

It is further to be observed that though the third issue appears to assume that the defendant's estates were under the charge of the Court of Wards, yet the fact of their being or of their having been under charge was the only fact or point treated as open to dispute or question in the Courts below. It was assumed by both the Courts that if her estates were in charge, the case was at an end ; the plaintiff could have no relief of any kind ; and both Courts being of opinion that there was sufficient proof of the estates having been in the custody of the Court of Wards, from a time anterior to the date of the bond to a time subsequent to the institution of the suit, the plaintiff's suit was dismissed with costs, and there was no examination of, or observations upon, the evidence which the plaintiff had tendered of the loan of the money to Rutta, and the execution by her of the bond.

Under these circumstances, the principal questions to be considered on this appeal are, whether the estate and property of Rutta were in fact under the charge of the Court of Wards when the bond is alleged to have been executed ; and, if so, whether such custody of charge was of a character which made her what is called, under the Regulation to be presently referred to, a disqualified female, and incapacitated her to contract debt in any way ?

These questions turn mainly on Reg. LII of 1803. That Regulation, after reciting that it is essential to the interest and happiness of minors, and of such females as shall not be deemed competent to the management of their own estates, and of idiots, lunatics, and other proprietors of land paying revenue to Government, who are or may be rendered incapable of managing their lands by natural defects or infirmities of whatever nature, that the lands of persons coming within the above descriptions should be managed for the benefit of the proprietors by persons appointed to the trust by Government, and that a Court of Wards should be instituted with powers to superintend the conduct, and inspect the accounts, of the managers of the estates of such persons, it was enacted (s. 5) that the superintendence of the Court of Wards should extend to the persons and estates of (amongst other persons) all proprietors of entire estates paying revenue immediately to Government who were or might be females not deemed by the Governor-General in Council competent to the management of their own estates.—(S. 6.) That the lands of disqualified landholders should not be liable to be sold for arrears of public revenue on account of the periods during which such lands might be under the charge of the Court of Wards ; (s. 8),—that the Collectors of the revenue should ascertain and report to the Board of Revenue what proprietors were dis-

qualified. (S. 9).—If a proprietor of lands were disqualified solely from being a female, the Court was to take charge of the estate and to report to the Governor-General, with power to the Governor-General to declare her exempt from the Regulation; (s. 10).—managers and guardians were to be distinct, and managers to have care of estates, real and personal; and by ss. 22 and 23 provision was made for the application of moneys received of managers, in which there was a provision that any just debts then outstanding against, or thereafter adjudged against the estates of disqualified landholders, must necessarily be satisfied; but that the circumstances of all such debts were to be reported to the Collector, and by him to the Court of Wards, previous to payment by the manager; and by s. 26, females, though disqualified, were not to be subjected to guardians, but might themselves receive and disburse their own maintenance.

There is no pretence for saying that, but for the application of this Regulation to her, Rutta Kooer was incapable of contracting the debt in question. The Regulation itself does not in terms declare the incapacity, or define the circumstances in which it is to arise. The provisions of such a law should be strictly pursued, in order to effect the disqualification of any particular person; and no one should lose her natural liberty of contracting unless the relation of ward and guardian between her and the Court of Wards be regularly and completely constituted.

The examination, however, of the evidence in the Court below appears to have been addressed solely to the object of discerning whether the talook was, in fact, under charge; and it seems to have been assumed that, if in charge, Rutta Kooer was a disqualified person. But their Lordships are of opinion that this does not necessarily follow. The Court of Wards may have obtained the custody originally under circumstances not affecting her personally, and may have continued in charge after the estate devolved upon her under circumstances which do not necessarily make her a disqualified female under Reg. LII of 1803. It becomes, therefore, material to ascertain, not merely whether the estate was under charge, but also what were the circumstances under which it was first brought under charge, and afterwards so continued.

The material facts are these :—The landed property of Rutta Kooer in question (usually called throughout these proceedings the Talooka Chukkatul in the Collectorate of Allygurh) had previously belonged to her sister Maha Kooer. She was declared a disqualified female under Reg. LII of 1803, as far back as the year 1811; and the talook was then placed under the Court of Wards, and a manager was appointed under the Regulations. But in 1838, in lieu of continuing it in the hands of a manager, the talook was let to farmers, who paid their rents to the Collector, who exercises the powers of the Court of Wards, and throughout the whole period from 1811 to Maha Kooer's death (with the exception of a few years arising from circumstances not material to the question) the malikana or maintenance was paid by the Collector to Maha Kooer.

Maha Kooer died in 1853. On her death adverse claims were set up to the property: one by Aram Singh, claiming as heir of her deceased husband; another by one Ali Buksh, claiming under a deed from her; and the third by Rutta, claiming as her sister and heir. The claim of Ali Buksh appears to have been first disposed of, and was found to be groundless. As between Aram Singh and Rutta Kooer, the Government, through the Sudder Board of Revenue, appears to have decided in favor of Rutta, whose name was recorded as proprietor of the talook in place of the deceased Maha; but she was not put into possession. About this time, and apparently in consequence of the decision of the Sudder Board, and certainly in or before 1855, a Civil suit was instituted by Aram Singh in the Court of the Principal Sudder Ameen of Allygurh, to enforce his claim against Rutta, and to this suit he made the Government a party, on the ground of the estate being under the control of the Court of Wards. Thereupon the official

correspondence which is set forth in the proceeding No. 19 of the Collector, at pp. 16 and 17 of the record, took place. This mentions that in August 1855 a petition was filed by Rutta in the Court of the Allygurh Collector, stating "that she was not subject to the Court of Wards; that Government had been wrongly made defendant; also that she had succeeded by inheritance to the property of her deceased sister, Mussamut Maha Kooer, who was subject to the Court of Wards; that the functions of the said Court had ceased with the ward's demise; and that the Board, in paragraph 16 of their Order No. 83, dated 6th February 1855, had ruled that, in the absence of any other rightful claimant, the málgoozaree management must depend upon her discretion;" and from this correspondence it appears that the final determination of the Government was to put in an answer to the effect that Government was not interested in the suit; that the question of right should be settled between the contending parties themselves; and that Government should be exempted from all costs. This was done; the litigation went on between Aram Singh and Rutta Kooer; a decree was made in favor of the latter by the Principal Sudder Ameen, the date whereof does not appear in the proceedings; there was an appeal from that to the Sudder Court, where, as appears at p. 36 of the record, the suit finally ended in a compromise some time in or before the year 1862. If the evidence stopped there, it would be impossible to hold that the continued possession of the Court of Wards was more than that of a stake-holder; since, if it really held the talook as a Court of Wards on behalf of Rutta Kooer, treating her as a disqualified proprietor, it was clearly the duty of the Collector representing the Court of Wards actively to defend her title to the estate. It appears, however, that the Revenue authorities have not acted consistently on their then view of the case; for in February 1856, Rutta being recorded as proprietor, a mutation of names as to several villages in the talook was applied for on behalf of certain persons, including the present appellant, who claimed under assignments from her; and this application having been disallowed by the Collector, because a Civil suit was pending, and it was difficult to say who was in possession, the Sudder Board confirming, on appeal, the Collector's decision, declared that Chukkatul never had been emancipated from the control of the Court of Wards, and had never been given into the possession of Rutta.

In 1856 the farmers set up claims to a settlement adverse to the proprietary title of Rutta in Chukkatul. This claim was disallowed, and thereupon a correspondence between the Government authorities took place, in the course of which the Secretary to Government, in a letter dated 21st August 1856, stated that the Lieutenant-Governor agreed in opinion with the Sudder Board that no claim adverse to the proprietary title of the Thakooranee (Rutta Kooer) existed, nor had any sprung up during the administration of the Court of Wards, and that he authorised the acceptance of proprietary engagements from the Thakooranee, with certain terms of settlement in favor of the theekadars or farmers. And it appears from the judgment of the Sudder Dewanny Adawlut (App., p. 481, though the document itself is not set forth in the record) that a proclamation, dated 1st October 1856, issued from the Collector's Office, in conformity to the orders of Government and the Board, giving full proprietary possession to Rutta Kooer, who had filed the usual durkhast or petition, asking to engage for the payment of revenue, and that the putwary of the talook acknowledged receipt of the proclamation and the possession of Rutta on the 13th October 1856. This arrangement, however, was not finally carried out. It appears from the letter of the Collector of the 18th September 1858 (App., p. 31), that before the contemplated settlement was completed, the Mutiny broke out. He says:—"Then happened the Mutiny, with the farmers still in possession of the villages, and the Government orders for giving possession to Rutta Kooer were not carried out." From the same document it appears that in October 1857, when order was restored to

the district, he, as Collector, resumed charge of the talook, of which, on the 2nd March 1858 (App., p. 19), he appointed a manager. And at pp. 24 and 25 of the record is further proof that, between the last-mentioned date and April 1862, the talook was under the management of the Court of Wards. But in or before the month of August 1862, the Court of Wards for some unexplained reason gave up the possession and management of the property, as appears from the perwannah of the Collector filed in this suit, which is referred to by the Principal Sudder Ameen in his proceeding fixing the issues at p. 44 of the record.

Their Lordships are of opinion that the Courts below were warranted in concluding from this evidence that, with the exception perhaps of the period during which all order and government may have been suspended in this district by the Mutiny, the Court of Wards was continuously in the actual possession of this talook from 1811 to August 1862. They do not, however, think that by reason of that possession, which began in the time of Maba Kooer, Rutta Kooer was, when this bond is alleged to have been executed, incapable of binding herself by contract. They have already observed that, in order to effect such a disqualification, the Regulations must be strictly pursued. Under this Regulation the Collector is to report a female proprietor as disqualified to the Board of Revenue, and the Board of Revenue in their capacity of a Court of Wards is to report that they have taken the estate under their charge to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms; they are necessary preliminaries to the disqualification of a female so as to invalidate an alienation even of the property under charge of the Court of Wards by her. This was expressly decided in the case of Jan Khátun (5 S. D. A. R., 240). That case arose in Lower Bengal and under Reg. X of 1793. But Reg. LII of 1803 is little, if anything, more than an extension of the earlier Regulation to the North-Western Provinces. The provisions of the two upon the point in question are absolutely identical. Again, the present case is far stronger than that of Jan Khátun. The contract here impeached does not, like that which was then in question, affect the land. It is a simple money obligation. And the evidence in this case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the Revenue authorities to treat Rutta Kooer as a disqualified proprietor, or a person incompetent to manage her affairs. It shows that when her title was attacked in 1855, they declined to act as a Court of Wards in its defence, but left her to sue or be sued as a person *sui juris* on her own responsibility, and at her own cost. It further shows that in 1856, and in the very month in which she is alleged to have executed the bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the talook, as a proprietor competent to its management, on her entering into proper engagements for payment of the Government revenue; and that the completion of that arrangement was only prevented by the accident of the Mutiny. The fact, if fact it be, that for some time in and after 1858 the property was regularly managed by the Court of Wards, can have no bearing on the question of her capacity to bind herself by contract in 1856.

The decisions of the Principal Sudder Ameen of Meerut, and of the Sudder Court of Agra, were nevertheless rested exclusively on the ground that Rutta Kooer had no capacity to contract debt, because the talook was in the custody of the Court of Wards. The Sudder Court expressed itself thus:—

“Holding the opinion that the superintendence of the Court of Wards did not cease until 1862, and hence, that Musst. Rutta Kooer was not competent to incur any debt or make any alienation of her property, or that she is in any way answerable for the claims, there is no necessity for our inquiring into the second issue.”

The question whether any formal report was ever made of Rutta being a disqualified female was left wholly unnoticed.

The attention of the Sudder Court was called to the unsatisfactory nature of the decision in this respect on an application by the present appellant for a review of the judgment, when he stated as one of the grounds of his application that "no formal order was passed placing Musst. Rutta Kooer under the charge of the Court of Wards. Hence, though the property to which she succeeded may have been under the charge of the Court, yet Rutta Kooer in person was a free agent, and should be held responsible for her acts." And the Sudder Court, in refusing leave to review, gave the following among other reasons for so doing :—

"Even allowing, for the sake of argument, that no formal order was given during 1855, 1856, and 1857, placing the person of Musst. Rutta Kooer under the charge of the Court of Wards, yet, as it is admitted by Counsel for the plaintiff, that the property to which she succeeded was under the Court of Wards during 1855 and a part of 1856, we cannot allow that such omission, if omission there be, in any way affects the case; for to all intents and purposes Musst. Rutta Kooer was under the charge of the Court of Wards. We are unable to dissociate the person of Musst. Rutta Kooer from the property to which she succeeded. We think that she in person and her property were under the charge of the Court of Wards, and that she was not free to contract debts and to hypothecate her property for the liquidation of such debts. Reg. LII of 1803 certainly does provide for the liquidation of the just debts of disqualified landholders, 'just debts now outstanding against or hereafter *adjudged against the estates* of disqualified landholders;' but it does not permit a ward to contract debts without the sanction of the Court of Wards. It would be strange, indeed, if the law allowed the ward to contract debts, to alienate and hypothecate property under charge of the Court of Wards, when it distinctly declares that the manager in charge shall not dispose of any portion of the property confided to his care without the consent of the Court of Wards."

For the reasons already given, their Lordships cannot agree with this conclusion. They are of opinion that the finding of the Courts below, on the only issue which they have really tried, is wrong.

They have, however, felt some doubt as to the order which it will be their duty to recommend Her Majesty to make on this appeal. They have already intimated that the appeal must be dismissed against all the respondents except Rutta Kooer. And they have felt some doubt whether, inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the appellant to bring a new suit against Rutta Kooer upon this bond, treating it as a mere money-bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitations; that in the circumstances of this case such a defence would be inequitable; and that, the respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit; they have come to the conclusion that the fairer course is to do what the Judge of the first instance might, under the Code of Procedure, have done at an earlier stage of the course, namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Kooer alone for the recovery of money due on a bond. Her liability on the bond may thus be tried on the issues already settled. Upon those issues, and the evidence taken on them, their Lordships will intimate no opinion. The nature of the transactions, and the *status* of the obligor, make it peculiarly desirable that the Appellate Court should have the benefit of the judgment of the Courts below on those issues.

The order, therefore, which their Lordships will humbly recommend to Her Majesty is, that the appeal be dismissed against all the respondents except Rutta Kooer; that the decrees of the Courts below be reversed, except so far as they

dismiss the suit against those respondents with costs ; that it be declared that Rutta Kooer was not, at the date of the alleged bond, incapable of binding herself by contract by reason of the talook Chukkatul being still in the custody or under the charge of the Court of Wards ; that the cause be remanded to the High Court of Judicature for the North-Western Provinces, with directions to allow the appellant to amend his plaint so as to make it a plaint against Rutta Kooer alone for the recovery of the money alleged to be due to him on the bond ; and to take all necessary steps for the trial of the said suit upon the issues already settled, or to be hereafter settled ; with liberty to the respondent, Rutta Kooer, to make any defence to the suit which is not inconsistent with the declaration aforesaid. Their Lordships will give no costs on this appeal.

The 4th March 1868.

Present :

Lord Cairns, Sir James W. Colville, Sir Edward Vaughan Williams,
and Sir Richard T. Kindersley.

*Nuncupative Will—Power to make Will—Succession—Family custom—
Rights of junior members of a family—Reg. XI of 1793.*

On Appeal from the High Court at Calcutta.

Baboo Beerpertab Sahee

versus

Maharajah Rajender Pertab Sahee.

And the cross-appeal.

The land sued for was originally an impartible Raj, and by family custom descended on the death of each successive Rajah to his eldest male heir. It was confiscated by Government, and in 1790, when the Decennial Settlement was made, was permanently conferred on A, a Hindoo. A in his lifetime, by his acts, and otherwise, showed that he wanted the estate to descend to a single heir, and shortly before his death he made B, the son of his eldest grandson, such heir, and left a testamentary paper in furtherance of that object.

The present suit was brought by some of the grandsons of A, who claimed to be co-heirs with B under the ordinary Hindoo Law of Inheritance, and contended that the will was a forgery ; that A had no power to make it ; and that the special law of inheritance ceased when the first proprietor was expelled.

It was observed that a person who rests his title on so uncertain a foundation as the spoken words of a man since deceased is bound to allege, as well as to prove, with the utmost precision, the words on which he relies with every circumstance of time and place. The finding below as to the *factum* of the will in this case was however upheld.

It was also found from the acts of the Government, and its dealings with the property, that A derived his title by grant from the Government who had full dominion over the estate. The estate, consequently, must be taken to have been the separate and self-acquired property of A, and the nature of the estate granted was held to be a fresh grant of the family Raj, as it had existed before the confiscation with its customary rule of descent, the omission of the title of Raj in the grant (there being no sunnud in this case) not affecting the case, the title of Rajah not being absolutely essential to the tenure of the estate as a Raj.

Reg. XI of 1793 does not apply to this case in which the grant was made before the passing of that Regulation, which, moreover, does not affect the descent of large zemindaries held as Raj or subject to family custom.

The grant being of the nature found, it was further held that the question as to whether A had, by law, power to make a will, did not really arise in this case, the only person who could impeach the will being the eldest grandson of A, who had waived his right in favor of his son B, there being no inchoate rights of inheritance in the junior members of the family.

The subject of this appeal is the right of succession to the very considerable estate of the late Maharajah Chutterdharee Sahee, who died at Hutwah in Zillah

Sarun on the 16th March 1858. He was the owner of a large zemindary called Hunsapore, which had been in the family of which he was a member, for many generations before the East India Company, under the grant of the Dewanny in 1765, became the virtual rulers of Bengal, Behar, and Orissa. Like some other extensive zemindaries in Behar, it was during that period an impartible Raj, and by family custom descended on the death of each successive Rajah to his eldest male heir according to the rule of primogeniture, who took the whole subject to the obligation of making to the junior members of the family certain allowances by way of maintenance called *Babooana*. The nature of the tenure, and the custom regulating its descent, were no doubt in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this appeal.

The Rajah in possession of the property, when the East India Company assumed the Government of the Province, was one Futteh Sahee. In consequence of his refusal to acknowledge the sovereign or *quasi*-sovereign rights of the Company, or to pay revenue to them, a contest ensued; and, about the end of 1767, he had been driven from Hunsapore by the Company's troops into the jungles dividing their territories from Goruckpore, which then formed part of the dominions of the Nawab Vizier of Oude.

The East India Company thereupon attached the estate of Hunsapore, and let it out to farmers. Futteh Sahee, however, from his retreat in the jungles, or in the dominions of the Nawab Vizier, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed Govindram, one of the farmers under the Company. Soon after that occurrence there was a sort of treaty of peace between him and the Company's Government: he was permitted to return to Hunsapore, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the Province and renewed his predatory life on its borders; and in May 1755 he attacked and murdered his own cousin, Bissunt Sahee, the grandfather of Chutterdharee Sahee, who was then the rentor or farmer of Hunsapore under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its officers during their possession of the estate. For the present, it is sufficient to state that the Company retained possession of it from the date of the first expulsion of Futteh Sahee until 1790, either making the collections, by their own officers, or letting it out to farmers, but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the Decennial Settlement was in contemplation, or in the course of being made, the Government of Lord Cornwallis granted the property to Chutterdharee Sahee, then a minor, under circumstances which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837, the title of Maharajah was, on his application, conferred upon him by Government for the first time. He had not previously been distinguished by any title from other zemindars.

The pedigree at p. 2 of the appellant's case (the correctness of which is not disputed) shows that the late Maharajah had two sons who pre-deceased him. The elder of them (Ram Sahee) left two sons, viz., Oogurpertab and Deoraj; and the other (Pritipal Sahee) also left two sons, viz., Tilluckdharee and Beerpertab (the appellant). These four grandsons were living at the time of the Maharajah's death, and were his co-heirs according to the ordinary Hindoo Law of Inheritance. Oogurpertab is the father of the respondent, the Maharajah Rajender Pertab Sahee. Upon the death of the Maharajah Chutterdharee, a contest arose as to the succession to his estate; Deoraj, Tilluckdharee, and the appellant, insisting that it descended as *ab intestato* to his four grandsons in equal shares, according to the ordinary course of the Hindoo law; the respondent setting up the exclusive title which will be

next stated, and Oogurpertab favoring the pretensions of his son and relinquishing his own rights in his favor.

The title set up by the respondent is shortly as follows:—

The late Maharajah had for several years before his death expressed his desire that his estate should descend, as the Raj of Hunsapore had, up to the time of Futteh Sahee, descended, to a single heir; and that the respondent, in whose favor his father had waived whatever rights he, as the eldest male descendant of the Maharajah, might possess, should be that heir. Accordingly, on the 15th March, being the day before his death, the Maharajah made, in the presence of some members of his family, including the appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment (*tusleem*) of the Raj to the respondent. On the same day, he caused his servants to write out four *urzees* for the purpose of notifying this fact to the principal authorities in the district, viz., the Magistrate, the Judge, the Collector, and the Commissioner. These are the documents at pp. 361, 364, 365, and 367 of the record. All these were directed to be forwarded to Chuprah, the Sudder or principal station of Zillah Sarun. Early the next morning, the Maharajah directed his servants to prepare a similar *urzee* for transmission to the Deputy Magistrate, Mr. Lynch, who lived at Sewan, a place much nearer than Chuprah to the Maharajah's residence at Hutwah. Before this was done, Mr. Lynch, accompanied by Dr. MacDonnell, the Sub-Deputy Opium Agent of the district, called to pay a visit at Hutwah. They had an interview with the Maharajah, who presented the respondent to them as his heir, recommended him to Mr. Lynch's protection, and told him that an *urzee* to his address was in course of preparation and would be forwarded. That *urzee*, which accordingly varies in form from the others by introducing the circumstances of this visit, is at p. 363 of the record. Later in the day, the Maharajah gave what is called "*tilluck*" to the respondent, and afterwards caused his servants to prepare the testamentary paper which is set out at p. 167 of the record, which he executed. He died somewhat suddenly at 4 P.M. of the same day.

In these circumstances, the respondent rests his title to succeed to the whole estate of his great-grandfather, *first*, upon the several before-mentioned acts of the Maharajah, relying on the latest instrument as a will, but insisting that if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative will in his favor. He contends, however, further, that the Raj being impartible, and descendible by custom according to the rule of primogeniture, he, by reason of his father's abdication in his favor, is entitled to it, to the exclusion of the other members of the family, independently of any act of the late Maharajah. But he admits that in either case they are entitled to have *babooana* allowances of a proper amount assigned to them.

The contest between the parties was commenced very shortly after the death of the late Maharajah, by those summary proceedings touching the fact or the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title. The respondent, on the 26th March, instituted a proceeding before the Collector for the mutation of names, and this was opposed by the appellant, and also by Tilluckdharee and Deoraj. The respondent also instituted a summary suit in the Judge's Court for a certificate, under Act XX, as to the whole estate of the late Maharajah, which was met by cross-suits of the same nature by the appellant, Tilluckdharee, and Deoraj, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act XIX of 1841, for the appointment of a Curator. All these suits were decided in the respondent's favor by the Judge on the 22nd May, and his judgments were confirmed on appeal by the Sudder Court in the month of August 1858. And on the 14th June 1858, the Collector, proceeding in part on the decisions of the Judge in the last-mentioned suits, granted the muta-

tion of names, for which the respondent had applied. That order was confirmed by the Collector on the 5th August, and again by the Commissioner on the 8th October 1858. The effect of these preliminary proceedings was to put the respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival claimants the burden of disputing that title in a regular suit.

Deoraj did not accept this burden, but seems to have abandoned his claim, after making an arrangement with the respondent for his *babooana* allowance. The appellant, however, and his brother Tilluckdharee commenced the suit out of which this appeal has arisen, on the 31st December 1858; but the latter, after the decrees in the respondent's favor had been made in it, also came to an arrangement touching his allowance, and abandoned the appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the appellant alone and the respondent.

The appellant insists on his title as one of the co-heirs of the late Maharajah, according to the ordinary Hindoo law. He impeaches, as fraudulent fabrications in support of the respondent's title, the will, and the several *urzees* or petitions alleged to have been sent by the Maharajah's desire, and under his seal, to the different Civil authorities of the district; and he denies that the alleged consignment or installation of the respondent took place. These are all questions of fact. But he further denies, as matter of law, the power of the Maharajah to make a will to the prejudice of his male descendants, of whom he is one. He contends that whatever may have been the previous course of descent of the Raj of Hunsapore, according to family custom or otherwise, up to the time of Futteh Sahee, the law or custom determining that course of descent ceased on his expulsion; and that the grant to Chutterdharee was not one of an indivisible Raj, descendible according to a special custom, but one of a mere zemindary, governed by the ordinary law. In his case he further contended that even had the grant been one of a Raj, or had the Raj continued in the line of Futteh Sahee, the special rule of succession would have been abrogated by the provision of Reg. XI of 1793. These points, with one or two others, to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit, which are at p. 155 of the record.

The judgment of the Zillah Judge, Mr. Wilkins, which was given on the 24th April 1860, found that the family custom, according to which the estate was impartible and descended to the eldest male heir, subsisted at and up to the time of Futteh Sahee; that this custom was not abrogated by his expulsion, the retention of the property by Government, and the grant of it to Chutterdharee; and that the estate was in his hands an impartible Raj, descendible to his next male heir alone, and, therefore, on the renunciation of Oogurpertab, to the respondent. The Judge made no distinction in this respect between the moveable and immoveable property, and on the above ground decreed in favor of the respondent. He held, however, that the alleged consignment or transfer of the 15th March, and the will, were not well proven. And he decreed an allowance of Rs. 2,000 per mensem to each of the plaintiffs, viz., the appellant and his brother.

The judgment of the High Court on appeal from this decree is at page 17 of the second record, and is dated the 24th April 1863. That Court also held that the Raj was originally impartible, and descendible by custom to the eldest male heir alone; and that it did not lose this character on its restoration to Chutterdharee. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice Levinge's separate note at p. 26, this point is more fully argued. But the High Court, differing therein from the Zillah Judge, affirmed the validity of the will. It also reduced the allowance to each of the plaintiffs to Rs. 1,000 per mensem.

At the close of the argument for the appellant, their Lordships intimated that in their opinion the judgment of the High Court, touching the *factum* of the will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusion. That the disposition was in accordance with the Maharajah's general wishes and intentions, is shown by the strongest and most trustworthy evidence. Upon this point the concurrent and unimpeachable testimony of Mr. Dampier (Appendix, page 392), Dr. Fleming (page 393), Mr. L. MacDonald and Mr. John Macleod (page 394), Mr. W. F. McDonnell (page 395), Mr. Tayler and Mr. R. Macleod (page 396), and Mr. Richardson (page 397), being all of them European gentlemen in the public service, or otherwise of respectable station, is to the effect that from 1851 up to the time of his death the Maharajah continuously entertained and constantly expressed the desire to keep his property together as a Raj, and his intention to make the respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. Lynch and Dr. McDonnell. The general intention of the alleged testator in favor of the respondent, and his testable capacity, are therefore established. It is true that in the interview with Mr. Lynch and Dr. McDonnell the Maharajah did not express his intention to make a will. It is also true that to the *factum* of the will there is no testimony but that of his native servants and dependents. It is, however, most improbable that the Maharajah should have relied on what passed between him and the two European gentlemen when none of his family, except the respondent, and but few of his dependents, were present. And though he might also have relied on the *tusleem* or consignation of the preceding day as the public expression of his wishes, and the formal installation of the respondent as the new Rajah (supposing that ceremony to have taken place), yet it must be recollected that the question whether the estate was impartible and descendible as a Raj was a doubtful one, and that he himself, as Mr. Dampier proves, had long known it to be so. There is, therefore, nothing improbable in the hypothesis that, pressed by this doubt, as well as urged by his strong desire to secure the succession to the respondent, he may, even after his interview with Mr. Lynch and Dr. McDonnell, have conceived and executed the intention of making a will, in order to supply, by the force of that instrument, any defects which his preceding acts may have left in the respondent's title. And if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the Maharajah, are utterly discredited by the evidence of Mr. Lynch and Dr. McDonnell; and it is not contradicted (as it might have been contradicted) by the oath of the appellant, whom the witnesses deposing to the *tusleem* and to the execution of the will, state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of natives of rank to appear and be examined as witnesses in a Court of Justice. There are, however, examples, increasing fortunately in number, of men who disregard this prejudice: and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains that there is no contradiction of the respondent's witnesses, except the testimony of witnesses wholly unworthy of belief, and that the probabilities are in favor of the truth of their story. Their Lordships must, therefore, hold that the execution of the will has been proved—a conclusion which, though opposed to that of Mr. Wilkins, was also that of the Judge of first instance and of the Sudder Court when dealing with the same question in the summary suits under Act XX of 1841, as well as that of the High Court in this suit. This being so, we have in the will

executed by the Rajah a corroboration of the positive testimony as to the facts of the *tusleem* or consignment, and of the execution and despatch of the *urzees*, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached Chuprah. Nor do their Lordships see anything in the objection that the *tusleem* and the execution of the will are inconsistent acts; that if the former took place, the Rajah had nothing to dispose of, and the will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the will was the crowning one, all being designed by the Maharajah to effectuate, so far as his acts legally could, his intention to leave his estate as a Raj, and to make the respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favor of the respondent by nuncupative will. They will only remark that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The respondent seems at one time to have relied on the *tusleem*; at another on what passed between the Maharajah and Mr. Lynch as a nuncupative will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

Having thus determined the principal issues of fact on this appeal, their Lordships have now to consider whether the Maharajah had, by law, the power to make the will which he did make; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the Raj of Hunsapore, is to be regulated, if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which Chutterdharee acquired through the acts of the East India Company's Government in 1790. And for that purpose it is necessary to go more particularly into the history of the estate after the expulsion of Futteh Sahee.

It has already been stated that, after that event, the property was for nearly twenty-three years held by the East India Company, who, whether they let it to farmers, or kept it under their own management, applied the whole of the surplus revenues to their own use. During great part of that period, Futteh Sahee continued to wage war with them from his retreat in the jungles or in the territories of the Nawab Vizier, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of Bishunt Sahee took place, as before stated, in 1775. In 1778 the Revenue Council of Patna, on the application of Mohesh Dutt, the son of the murdered man and the father of Chutterdharee Sahee, proposed that Futteh Sahee should be declared to have forfeited his zemindaree, and that it should be bestowed on Mohesh Dutt; but the Government of Mr. Warren Hastings declined to comply with that proposal, or to do more at that time than hold out vague hopes of reward to Mohesh for his fidelity.

In 1784 the claims of Mohesh Dutt were again under the consideration of Mr. Hastings' Government. The proceedings are set out in the Appendix (pages 328 to 331). They clearly show that it was then considered that any grant to him, though he founded his claim on being the next heir to the zemindary after the extinction of Futteh Sahee's line, was matter not of right but of favor; and that it was actually proposed to insert in the sunnud, by which any such grant should be made, a condition for avoiding it in case the grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of Futteh Sahee within one year. Ultimately nothing was done on this

application. Mohesh afterwards died, and the estate remained, as before, in the hands of the East India Company.

In 1790, the question what should be done with it came before the Government of Lord Cornwallis in consequence of the steps which were then being taken in order to effect the Decennial Settlement. On the 16th June in that year the Collector, Mr. Montgomerie, having received instructions for the disposal of all lands "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his district which answered that description, unless they were this zemindary and another somewhat similarly circumstanced. On the 21st July the Board of Revenue submitted this letter to Government, with a recommendation that such part of Hunsapore as was the property of Futteh Sahee should be declared confiscated and sold, subject to the interests of the existing farmers. But on the 28th July the Government, in answer to this communication, directed "that such part of Hunsapore as was stated by the Collector to have been the real property of the rebel Futteh Sahee, should be conferred on the infant son of the late Mohesh Dutt after the usual publication had been made." That letter also provided that upon the lands being finally confirmed to the son of Mohesh Dutt, he should receive the allowance fixed for disqualified landholders.

The Collector having, on the 18th November 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to Chutterdharee Sahee," the Board of Revenue, on the 17th January 1791, recommended that Chutterdharee Sahee, infant son of Mohesh Dutt, should be "declared proprietor of the land in Hunsapore which belonged to Futteh Sahee," and the Government on the 21st January ordered accordingly.

These proceedings are at pages 237, 238, and 239 of the Appendix. A subsequent letter of the Board, of the 29th April 1791, fixes the malikana allowance for the infant at 1,027 sicca rupees 7 annas 4 pies per mensem, and makes it payable from the 11th October 1790.

In October 1802, Chutterdharee, having come of age, entered into a formal engagement for the payment of the Government Revenue; and the Revenue Officers, who had managed the estate during his minority, relinquished it to him and issued a proclamation directing the ryots and tenants to pay the collections to him. These documents, called respectively the dowl and the amuldustuck, are at pages 296 and 297; but they do not throw much light upon any of the questions raised in the suit.

It is material to observe that during all these proceedings, Futteh Sahee and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a fukeer, having given up even his Gorruckpore property to his family in 1790; his wife and one of his sons appealed to Government for an allowance, but their application was rejected on the 25th June in that year. In April 1792 one of the sons, and in April 1808 four of the sons of Futteh Sahee made applications for the restoration of the estate and for allowances out of it. On the 29th April 1808, the latter application was rejected by Government in a letter which stated that "the estate of Futteh Sahee had been forfeited to Government." Areemurdhun Sahee, one (and apparently the eldest) of the four, made similar claims by petition in 1816 and again in 1821. In both these petitions he stated that his younger brother had come forward before Mr. Montgomerie in 1790, claiming on behalf of Futteh Sahee's line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The order indorsed on the petition of 1821 is to the effect that "whereas the property of Futteh Sahee was confiscated on account of rebellion," no further proceedings on the petition are necessary. In June 1829, the great-grandson of Futteh Sahee brought a regular suit against Chutterdharee and the Government for the recovery of the estate, which was dismissed on the simple ground that the claim was barred

by the Statute of Limitations. And the same persons seem to have appeared on the proceedings before the Collector, of the 14th June 1848, which is above referred to, alleging that the grant to Chutterdharee was for life only, and again setting up his own title as the descendant and representative of Futteh Sahee.

On these facts, it is at least clear that there was a virtual confiscation of the interest of Futteh Sahee and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government has not only persistently treated the estate of Futteh Sahee as forfeited, and refused to recognise any claim on the part of his descendants; it has for more than twenty years applied the revenue to its own purposes; it held itself at liberty either to reject (as it ultimately rejected) the applications of Mohesh Dutt, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure; it held itself at liberty in 1790 to dispose of the property by sale, though as a matter of grace and favor it finally conferred it on Chutterdharee.

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice Levinge, have founded upon the supposed obligation of the East India Company to govern the provinces which they held under the Mogul Emperor by virtue of the grant of the Dewanny according to Mahomedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an argument might, perhaps, have been plausibly urged in the suit which the great-grandson of Futteh Sahee brought against Chutterdharee and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under Chutterdharee; and as between them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and therefore the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of Chutterdharee. The fact that he was the member of the family, which had so long held the estate, next in succession to the line of Futteh Sahee, and the son and grandson of persons who had established claims on the gratitude of the company, may have been a motive determining the selection of him as grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the Shevagunga case * (9 Moore's Indian Appeals, 606).

The question remains—what was the nature of the estate granted; whether it was a fresh grant of the family Raj with its customary rule of descent, or a grant of the lands formerly included in that Raj to be held as an ordinary zemindary?

There was not in this, as in the Shevagunga case, a new sunnud. We have no evidence of the intention of the grantors except that which is to be collected from the proceedings and correspondence already referred to, nor have we any record of the proceedings in the Council-room, or any means of knowing the precise grounds on which Lord Cornwallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on Chutterdharee. Again, it cannot be denied that in these proceedings the term "Raj" is never used, or that in some of them the subject of the grant is spoken of as "the land in Hunsapore, which belonged to Futteh Sahee." On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the Company, had never been broken up. The policy of the Decennial Settlement was to form a body of landholders by ascertaining in whom the zemindary interest in the soil actually was, and making with those persons a

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

permanent settlement of the Government revenue so as to give them greater fixity of tenure. Lord Cornwallis's Government determined to set up Chutterdharee as the zemindar with whom the settlement in respect of this property should be made. But the estate of a zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent talookdars or other under-tenants, ryots of various classes, and others; and the Decennial Settlement, as a reference to the rules re-enacted by Reg. VIII of 1793 will show, proceeded upon an inquiry into all, or many of these particulars. In the absence of all evidence to the contrary, it must be presumed that the settlement was made precisely as it would have been made, had the estate continued in the line of Futteh Sahee; and therefore, that the subject conferred on Chutterdharee was the old zemindary with all its incidents, excepting, at most, its descendible quality. It seems to follow that the intention to alter that quality, if it existed, would have been expressed. Again, the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favor of the hypothesis that the intention of Government was to restore the zemindary as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Futteh Sahee and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*.

The circumstance that the grant was in the first instance of the zemindary, without the title of Rajah, has been urged as a strong argument in favor of the appellant's view of the case. But that the title was not absolutely essential to the tenure of the estate as a Raj, is shown by the Tirhoot case * (6 Moore's Indian Appeals, p. 191); and in 1837 the title was conferred on Chutterdharee, upon his application founded on the fact that it had been enjoyed by his predecessors and annexed to the zemindary. This act of the Government in 1837 could not alter the legal effect of what was actually done in 1790; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which Chutterdharee then put upon the acts of their predecessors in 1790.

Another argument for the appellant is founded on Reg. XI of 1793. Mr. Field does not contend, in the face of the authorities cited by Mr. Leith, that if the estate granted to Chutterdharee in 1790 were a Raj, descendible by family custom according to the rule of primogeniture, it lost that character on the passing of the Regulation in question. But he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord Cornwallis's Government was, presumably, to make the property restored to Chutterdharee subject to the ordinary law of succession.

Their Lordships, however, are of opinion that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing, in 1793, of a general law, which confessedly does not affect the descent of the large zemindaries held as Raj, or subject to *kooloochar* or family custom.

Upon the whole, then, their Lordships have come to the conclusion that the Courts below were right in holding that the estate granted to Chutterdharee in 1790 was the Raj of Hunsapore, and that the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary

* Baboo Gunesh Dutt Singh v. Maharajah Moheshur Singh, p. 29 *ante*.

power of the late Maharajah, which it is nevertheless necessary to consider, since the title of the respondent to at least part of Chutterdharee's estate may depend on the will.

It is too late to contend that because the ancient Hindoo treatises make no mention of wills, a Hindoo cannot make a testamentary disposition of his property. Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes to alienation, by gift *inter vivos*. Accordingly, it has been settled that even in those parts of India which are governed by the stricter law of the Mitacshara, a Hindoo without male descendants may dispose, by will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. It is, however, objected that a Hindoo in those provinces, who has sons or other male descendants, must, on the application of the doctrine in question, be held to be incapable of making by will an unequal distribution amongst them of immoveable property, whether self-acquired or ancestral; because by the law of the Mitacshara, his sons in both cases take, on their birth, an interest in the property, which their father, without their consent, cannot displace.

For the respondent it is contended, that this question is concluded by the Bithoor case * (9 Moore's Indian Appeals, p. 96). It cannot be denied that in that case, the testator being a Mahratta domiciled at Cawnpore, and having real as well as personal estate, made by will an unequal distribution of both amongst his sons; and that his legal power to do so was affirmed by this committee, and by both the Courts below. The appellant, however, insists that this decision is opposed to the law of the School of Benares, and relies on the texts of the Mitacshara which show that a father cannot alienate his self-acquired lands, or make an unequal distribution of them by partition, without the consent of his sons; and also upon passages in "Strange's Hindoo Law," and other authorities. Mr. Leith, on the other hand, has argued that all these authorities are to be reconciled with the decision in the Bithoor case, by holding that they relate to property acquired by the father, with the use or by the aid of ancestral estate; and that they have no application to separate and self-acquired property, in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well founded, or whether, if it be not so, the present case must be governed by the Bithoor case: for if they are right in holding that the grant was of a Raj descendible according to custom to the eldest male heir, the question whether, according to the law of the Benares School, a Hindoo can by will make an unequal distribution of his self-acquired immoveable property amongst his male descendants without their consent, does not in this case arise. The only person entitled to impeach the disposition by will is Oogurpertab, the eldest grandson, who is a consenting party to it. There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their grandfather in his self-acquired lands, which is the foundation of the supposed restriction of his power. And *cessante ratione cessat et ipsa lex*. (See the remarks of Sir William Macnaghten on the case of Esarchunder Rai, 1 W. Mac., 7).

It follows, then, that either by the special law of inheritance, or by the will, the respondent was entitled to the estate of Hunsapore, and to whatever other wealth the late Maharajah could dispose of by his will.

Mr. Field has objected that this ruling does not cover that portion of the estate (if any) which came to Chutterdharee from his father Mohesh Dutt. This

* This case turns entirely on facts, and has therefore been omitted. The question in the appeal was as to the genuineness of a will.

may be true, but their Lordships are of opinion that the pleadings and evidence in this suit do not properly raise such a case, and utterly fail to show what that property (if any) was. And the respondent being in possession of the whole, it was for the appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With respect to the questions raised by either appeal touching the amount of the *babooana* allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross-appeal with costs. The appellant and the respondent will each bear the costs of his appeal.

The 14th March 1868.

Present :

Sir James W. Colville, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, Lord Justice Rolt, and Sir Lawrence Peel.

Hindoo widow's acquiescence in a third party's title—Alienation of her share—Husband's estate no part of widow's streedhun—Widow's power of disposition—Review.

On Appeal from the late Sudder Court at Agra.

Bhugwandeem Doobey

versus

Myna Bae.

A Hindoo banker dying intestate left two widows (*D* and *M*) as his co-heiresses. A document put forward by a third party (*H*) as a will of the deceased having been set aside by the Courts, an order was passed in a summary suit, under Act XIX of 1841, by which the property was equally divided between the widows. One of them (*D*) subsequently died, leaving a will disposing of her share to her relatives. Steps were taken during *D*'s life by the other widow (*M*) and by *H* to resist the registration of the will; and after *D*'s death, *M* applied for the attachment of *D*'s share and the appointment of a curator. Her application being dismissed, she commenced a regular suit.

HELD, that *M*'s original acquiescence in the title set up by *H* did not deprive her of any rights which accrued to her as one of the co-heirs of her husband when that claim was decided to be untenable, nor could her alleged alienation of her share bar her present suit.

HELD, that according to the law of the Benares School, no part of her husband's estate, whether moveable or immoveable, to which a Hindoo widow succeeds by inheritance, forms part of her *streedhun* or peculiar property; and the text of *Katyayana*, cited, must be taken to determine, *first*, that her power of disposition over both is limited to certain purposes; and, *secondly*, that on her death both pass to the next heir of her husband.

HELD, that Judges of the Sudder Court admitting an application for review were competent to make a qualified order, leaving in the Court which was to review the decision a discretion as to the extent to which the review should be carried.

The following are the undisputed facts upon which this appeal arises:—Rae Deena Nath, a Hindoo banker of great wealth, carrying on business at Benares, Hyderabad, and other places, died at Benares on the 7th June 1855, childless. He was separate in estate from his brethren, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindoo law of the Benares School, were his two widows, viz., the respondent and Doola Bae, since deceased. Immediately after his death, however, a document, purporting to be a will, executed by him in favor of one Hunwunt Pershad, to whom, jointly with a person named Bithul Pershad, it gave the management of the property, was propounded. The title of Hunwunt Pershad claiming under this alleged

will, or as the adopted son of Rae Deena Nath, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decisions is pending, but it has not yet been set down for argument in consequence of the death of one of the parties ; and for the purposes of this appeal it must be assumed that Deena Nath died childless and intestate, and that the claim of Hunwunt Pershad was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the appellant's Counsel have founded on the partition between the widows, which was in some measure caused by it, and upon the alleged collusion of the respondent with the claimant.

The first consequence of the claim was that a summary suit, under Act XIX of 1841, to determine the right to the immediate possession of the property, was instituted in the name of Doola Bae, who was then a minor, by her uncle and guardian, in which a curator was appointed under that Act. When this suit came to a hearing, the Judge pronounced against the will, and directed that the whole estate of Deena Nath should be equally divided between the widows, and that the curator should carry out that order without delay. The property was thereupon divided according to the two lists set forth at pp. 51 and 58 of the record; each widow was put in possession of her share; and Doola Bae continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th November 1857, having on the 21st August 1857 made a will which was registered on the same day, whereby she disposed of her share of the property inherited from her husband in favor of her father (the appellant) and her infant brother Kalooram, who is also represented by the appellant on this record.

Some steps seem to have been taken by the respondent and also by Hunwunt Pershad to resist the registration of this will in the lifetime of Doola Bae ; and upon her death the respondent applied for the attachment of the property in dispute, being that taken by Doola Bae under the partition as specified in the list before referred to, and for the appointment of a curator under Act XIX of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld Doola Bae's will, she commenced the regular suit, out of which this appeal has arisen, on the 21st December 1857, in the Court of the Principal Sudder Ameen of Benares.

The issues settled in the suit were :—

1. Whether there was any informality in the institution of the suit.
2. Whether the plaintiff (the respondent) was legally competent to institute it.
3. Whether Doola Bae was a minor or not at the date of the alleged execution of the will.
4. Whether the will was fraudulent or a *bonâ fide* instrument.
5. If a person die leaving two widows, and one of the widows subsequently die leaving a will, who is entitled to succeed according to the shasters,—the surviving widow or the legatee of the will (supposing the husband's estate to have been divided between the widows, and also supposing no such division to have been made)? And is a widow competent to make a will in favor of her brother and father under the shasters?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favor of the appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal Sudder Ameen found, *first*, that the respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcilable with the averments made by her in the suit under Act XIX of 1841, wherein she had supported the claim of Hunwunt Pershad ; *secondly*, that by reason of the partition Doola Bae was fully competent to leave

her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the Sudder Court of Agra. The first judgment of the Court was adverse to the finding of the Principal Sudder Ameen on the first and second issues, and held that the respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding that Doola Bae was competent to dispose of the inheritance derived from her husband, when it had been distinct and divided, and had effectually done so, it dismissed the appeal. It treated her power to dispose of the moveable property as certain; her power to dispose of the immoveable property, as more open to question.

The respondent applied for a review of this judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was that the case was re-heard before a Full Bench, when the Court decided that, according to the law of the Benares School, Doola Bae was incompetent to dispose of either the moveable or immoveable property which she had inherited from her husband, and made a decree in favor of the respondent. This present appeal is against that decree.

From the foregoing statement it is obvious that the principal question between the parties is the broad and general one, whether, according to the law of the Benares School, a Hindoo widow is competent to dispose, by will or deed of gift, of either moveable or immoveable property inherited from her husband, to the prejudice of his next heirs.

The learned Counsel for the appellant have, however, contested the right of the respondent to have the present case decided on this issue upon various grounds. They contend—

First.—That, if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal Sudder Ameen, she has so shaped her case on the pleadings that she cannot in this suit insist on her rights, whatever they may be, as next heir of her husband in succession to Doola Bae.

Secondly.—That it was not competent to the Sudder Court, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immoveable property.

Two other points were taken at the bar, which it will be convenient to consider after, rather than before, the determination of the principal and general question of Hindoo law. One was raised by Mr. Leith on behalf of the respondent, and was to the effect that as one of two Hindoo widows taking as co-heirs to their husband, she is in a more favorable position than that of a person claiming as next heir of the husband in succession to a single widow deceased. The other, which was taken by the other side, is, what was the effect of the partition, either by way of enlarging the power of Doola Bae to dispose of the property, or affecting the right of the respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for the appellant, they intimated that in their judgment the respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her husband against the claims of Doola Bae. Their Lordships agree generally in that part of the first judgment of the Sudder Court which ruled that the respondent, because she originally acquiesced in the title set up by Hunwunt Pershad, had not lost any rights which accrued to her as one of the co-heirs of her husband when that claim was decided to be untenable. Nor do they think that her alleged alienation of her share can be urged against her by the appellant as a bar to the present suit. It may have been an improper act: it may be one which Doola Bae, had she been the survivor of the two widows, could have questioned, or which the next heirs of Deena Nath may yet question; but the improper aliena-

tion of part of her husband's estate cannot affect the respondent's right to recover other parts of it from those who, if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings, their Lordships have to observe that the plaint does not inaccurately state the respondent's claim to the right to succeed, on the death of Doola Baee, to that property which the latter took by inheritance from her husband. The replication and the petition of appeal from the decree of the Court of first instance are no doubt more open to the objection taken. In order to meet the case of *quasi estoppel* set up, they attempt to draw a distinction between the claim to the original share which the respondent took on her husband's death, and her claim to that to which she became entitled on Doola Baee's death; and make some confusion as to the character of her heirship. But this misleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of this Committee to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is whether the decree now under appeal ought to be reversed, so far as it affects the moveable property, merely on the ground that it was not competent to the Sudder Court to review its prior decree with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied that the proceedings on review were not within the powers of the Sudder Court. Two objections have been taken to them, viz., first, that the respondent never petitioned for a review of judgment, except as to the immoveable property; next, that whatever was the scope of her petition, the order of Mr. Gubbins upon it must be taken to have conclusively confined the review to the immoveable property.

Upon the first point their Lordships think that the application for review at p. 84 must, on a fair construction of it, be taken to embrace the question as to the moveable as well as that relating to the immoveable property. Plea 1 seems to be confined to the latter, but plea 2 is more general. It insists that the opinion of the Calcutta Pundit ought to be accepted as correct. That opinion, which is at pp. 72 and 73, made (as he himself stated in his second opinion) no distinction between moveable and immoveable property, but denied the right of the widow to dispose of either, to the prejudice of her husband's heirs.

Again, as regards the acts of the Court, the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final order contemplated by that section was the order which, in the ordinary course, would have been made by Messrs. Ross and Pearson on the 15th January 1863. (See p. 86.) The proceeding of Mr. Gubbins was merely his *fiat* for the issue of that notice to the opposite party which is required by the proviso of the section.

It may be admitted that Mr. Gubbins understood the application to be limited to the immoveable property; that he so limited the notice; and that when the parties were together *in presence* before Messrs. Ross and Pearson, the written grounds for review "impugned the correctness of the decision, so far as it related to the real property only." But the question still remains whether it was not competent to the Judges by whom the order allowing or rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so doing. And their Lordships are of opinion that Messrs. Ross and Pearson, though they might have made a final order granting or rejecting the application *in toto* or *in part*, were not incompetent to make the qualified order which they did make, leaving in the Court which was to review the decision a discretion as to the extent to which the review should be carried.

They are also of opinion that even if the Court below had been wrong in its procedure, its miscarriage ought not to prevent this Committee from deciding the question touching the disposition of the moveable estate on its merits. There has been no surprise. The question was fully argued before the Full Bench of the Sudder Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be to place the respondent at a very unfair disadvantage. She had a right to appeal to Her Majesty against the whole or any part of the first decree of the Sudder Court. She would not have lost that right of appeal even if she had limited her application for a review to the immoveable property. She was relieved from the necessity of appealing, by obtaining a final decree in her favor as to the whole of the property, whether moveable or immoveable. If this objection were to prevail, there could be no final determination of the question as to the former on its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first decree of the Sudder. They are of opinion that no such formality is necessary, and that it is competent to the respondent, who has been brought here on appeal, to maintain, if she can, the decree which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion that there is no obstacle to the determination on this appeal, and between these parties, of the general question involved in the judgment under appeal, will now address themselves to the consideration of that question.

The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the *Bywastas* or opinions of Pundits, partly of decided cases, and partly of passages from ancient or modern authorities, which are accepted as authoritative in the Courts of India.

It is impossible to reconcile the various opinions of the Pundits which are to be found in the record. They are divisible into three classes, viz., *first*, that of opinions taken in other suits; *secondly*, that of opinions taken by the parties themselves for the purposes of this suit; and, *thirdly*, that of opinions given in answer to the questions put by the Sudder Court in this suit.

Of the first class are No. 10 at p. 9, probably No. 11 at p. 19, No. 33 at p. 63, and No. 28 at p. 36. Three of these are not very material. As far as they go, the two first support the contention of the respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the widow, the daughter or a nephew should succeed to property derived from the husband; and inasmuch as the widow could not have taken the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate, and therefore to a daughter before a nephew. The fourth is strong against the right of a widow to alienate immoveable property inherited from her husband: and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same Calcutta Pundit who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a widow has power to dispose of land inherited from her husband.

The second class consists of No. 12 at p. 19, being the opinion of thirty-seven, Benares Pundits, filed by the respondent; and of No. 14 at p. 49, being the opinion of twenty-one Pundits of the same place, filed by the appellant. The first ruled that the surviving widow was entitled to succeed to the share of the deceased widow, and that that right could not be defeated by the disposition of the deceased widow. The other goes the length of contesting the right of one widow to succeed to another widow of her deceased husband in any case; it affirms the proposition that the property being once vested in the wives, each had an absolute interest in her share and might dispose of it as she pleased. It held also that in the case

intestacy, the father and brother of the deceased widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 at p. 72, being the opinion of Ram Nath, one of the Pundits at the Sudder Court of Agra; of No. 7 at p. 73, being the opinion of four Benares Pundits, taken by the Judge of that place under orders from the Sudder Court at Agra; No. 5 at p. 72, and No. 3 at p. 85, being the two opinions of Heerna Nund, the other Pundit at the Sudder Court of Agra; and No. 6 at p. 72, and No. 2 at p. 84, being the two opinions of the Calcutta Pundit. All these except the later opinions of Heerna Nund and of the Calcutta Pundit, which were taken on the proceedings in review, were given in answer to the question put by the Sudder Court before its first judgment.

The questions were prefaced by the following "Preamble" or statement:—

A dies, leaving two wives, *B* and *C*, who inherit his property, real and personal. *B* and *C* make a complete partition of the property, and live separately from each other. *C* dies, having as blood relations a brother and an uncle; and the questions were—

First.—Does the property left by *C* descend by inheritance to the other widow *B*, or to the brother or uncle of *C*? and

Second.—Would *C* be competent to bequeath by will to her blood relatives the share of the property which she inherited from *A* (so divided), to the prejudice of *B*, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two widows, and it substitutes an uncle for the father of the deceased widow. The only variation in the references to the different Pundits was that, from accident or design, that to Heerna Nund was confined to *real* property.

To these questions the four Benares Pundits answered:—*first*, that the brother of *C* was her foremost heir, and after him her uncle, and that while these two existed *B* could not succeed; *second*, that any testamentary disposition by the widow of the property, which she had inherited from her husband, should be held valid, the property having been exclusively her own, and that she was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted Pundits appear to be included amongst the twenty-one who had previously given the opinion above referred to, at the instance of the appellant; and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first, the right of the surviving widow to succeed to the share of the deceased widow in any case.

The answer of Ram Nath to the first question was that *C*'s share would descend by inheritance to *B*, because *C* could not be succeeded by her brother or uncle during the existence of her husband's *sapinda*: and, although in his answer to the second question, he admits the power of *C* to defeat this right of *B* by her will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly:—"She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of Heerna Nund and the Calcutta Pundit, upon which the ultimate judgment was in great measure grounded, were of course in favor of the respondents on both points. They, too, make no distinction between real and personal property. The first opinion of Heerna Nund was confined to real property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the *Vyvastas* of the Pundits. If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court Pundits would agree in holding that the respondent, as the next heir of her husband, is entitled to take by succession the share of

Doola Baee; and that that right cannot be defeated, either as to moveable or immoveable property, by the will of Doola Baee. Ram Nath, however, holds that, by reason of the partition, Doola Baee acquired the right of disposition. Again, the twenty-one or twenty-two Benares Pundits, who are in favor of the appellant's title, are opposed by the twenty-seven Pundits of the same place, who have given their opinion in favor of the respondent. And the *Vyvastas* given in other cases are more favorable to the respondent than they are to the appellant.

The Benares Pundits, who are in favor of the appellant, refer only generally to the Mitacshara; but the particular passages on which they rely are probably the 1st and 11th Sections of the second Chapter, and especially the second article of the 11th Section. Those passages, and the arguments in favor of the widow's right of disposition which were deduced from them, were lately under the consideration of this Committee in the case of Choteh Beebee, decided on the 1st February 1867. The following is the conclusion to which their Lordships then came (see printed judgment, pp. 10 to 13):—"The result of the authorities seems to be that, although the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband." To the authorities then cited and reviewed by their Lordships may be added Sir William Macnaghten's observations in his work on Hindoo Law, Vol. I. pp. 19 to 21; cases 14 and 15 in the second volume of the same work, pp. 31 and 37; and also some of the cases which will hereafter be mentioned, which, whilst they support the doctrine of the widow's power to dispose of moveable property, admit that she cannot dispose of immoveable property inherited from her husband.

It must, then, be taken upon the authorities to be settled law, that under the law of Benares a Hindoo widow has not the power to dispose of immoveable property inherited from her husband to the prejudice of his next heirs; and the only question open to doubt is whether she has any such power over moveable property.

It must be admitted that in favor of this supposed distinction there appears at first sight to be a considerable body of positive authority. In the case of Cassinauth Bysack *v.* Hurroosoondury Dabee, the leading case upon the rights and disabilities of a Hindoo widow in Bengal, it was at first supposed that the distinction was recognised even by that school. The first decree in that case declared the widow entitled to an interest for life in the immoveable, but to an absolute interest in the moveable, estate of her late husband. That was altered by the decree made on a bill of review, which declared her entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindoo husband dying without issue, in the manner prescribed by the Hindoo law. On an appeal from that decree the whole subject was reviewed by Lord Giffard. His judgment (which is reported in the Appendix to Mr. Longueville Clark's rules and orders), whilst it establishes that, according to the law of Bengal, there is no distinction between moveable and immoveable property in respect to the widow's power of disposition over it, seems to proceed on the ground that the treatises known as the *Vivada Chintamani* and the *Ratnacara* are overruled and qualified in this respect by the *Dayabhaga* and *Dayatutwa*, which give the law to Lower Bengal, and that where the two former treatises prevail the distinction may exist. This judgment, therefore, affords some ground for the argument that the law of Bengal, which does not recognise the distinction, is an exception from the general Hindoo law. Again, in *Bijai Govind Sing v. Najunder Narain Rae* (2 Moore's Indian Appeals, 181), decided here in 1839, the right of the widow to dispose of moveable property inherited from her husband, and its

devolution on her dying intestate, are treated as open questions under the law of the Mithila School.

Of decided cases affirming the distinction, we have that in the High Court of Bengal, which we cited at the Bar from the "Indian Jurist" of the 31st March 1866, p. 128, and which appears to be a case governed by the law of the Mithila School.

We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognised by the Sudder Court of Madras as prevailing in the Presidency of Madras; and two show that it has also been recognised by the High Court of Bombay as prevailing in that Presidency. And, lastly, we have case 2, at p. 46 of the second volume of Sir William Macnaghten's *Hindoo Law*, in which the law which ought to have been applied was that of the Benares School.

If it were clear that the law upon the point in question was necessarily the same for all parts of India except those provinces of Lower Bengal which are governed by the Dayabhaga, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of Calcutta say in the judgment just referred to:—"This case comes from Tirhoot, one of the districts forming the ancient province of Mithila, but the law is admittedly the same in this particular, both for Mithila and for the provinces governed by the Mitacshara." Their Lordships, however, are not satisfied that this statement is correct.

The Mitacshara is, no doubt, accepted as a high authority by all the schools, even by that of Bengal, when it is not controlled by the Dayabhaga and other treatises peculiar to that school. But the other four schools have, like that of Bengal, though in a less marked degree, their particular treatises and commentaries which control certain passages of the Mitacshara and give rise to the differences between those schools. In proof of this it is only necessary to refer to the "preliminary remarks" of Sir William Macnaghten, pp. 21 to 23. From these it would appear that whilst the Mithila School follows implicitly the Vivada Chintamani and the Ratnacara; the south of India, the Smriti Chandrika and the Madhavya; and the Presidency of Bombay, the Vyavahara Mayukha; these works are by no means held in equal estimation at Benares.

Now, it appears from the judgment of Lord Giffard that the works which were supposed to go furthest towards establishing the distinction between moveable and immoveable property, which is now under consideration, were the Vivada Chintamani and the Ratnacara. These may well be taken to establish such a distinction according to the law of Mithila, and yet fail to do so according to the law of Benares. Again, the Mayukha is cited as an authority for the decision of the case at p. 43 of the second volume of Macnaghten; and in the judgment under appeal it is expressly stated that that treatise is not accepted as an authority by the Benares School, and consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at Madras, if it be so established, may depend on treatises and authorities peculiar to the south of India, and not accepted at Benares. From the reports of these, at p. 117 of the Sudder Decisions for 1849, and at p. 77 of the Sudder Decisions for 1850, it appears that both were decided on the *Vyvastas* of Pundits. In the former case the authorities relied on by the Pundits are not given; but in the latter, mention is made of the books called Madhavyen and Suraswativilasa, as well as of the Mitacshara (then called Vijnanswareyen); and it appears from Sir William Macnaghten's remarks that the two latter works are of paramount authority in the territories dependent on the Government of Madras, whilst they are not enumerated amongst the works accepted at Benares.

If this be so, it follows that even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of Calcutta, in so far as it confirmed the title of the purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of Moore's Indian Appeals, were determinable by the law of Mithila; the two cases in the High Court of Bombay, and that at p. 46 of the second volume of Macnaghten's, were decided according to the peculiar law of the Bombay Presidency, including the Mayukha; and those at Madras, according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of Benares.

How, then, does the law stand independently of these decisions?

The startling differences of opinion amongst the Pundits show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitacschara, on which, as has already been shown, the appellant must mainly rely, is the second paragraph of s. 11, chap. ii., which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between moveable and immoveable property; yet it is settled, beyond all question, as we have already stated, that the immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *streedhun*. The legitimate inference from this seems to be that neither moveable nor immoveable property inherited from her husband forms part of a woman's *peculium* or *streedhun*. Sir William Macnaghten indeed (Vol. I. p. 38) excludes from *streedhun* all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of *streedhun* all property inherited from the husband; that from the fact of its inclusion the power of disposition over it is *prima facie* to be inferred; but that the right to alienate immoveable property, whether inherited from the husband or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between moveable and immoveable property has arisen.

This argument, however, would fail to show why immoveable property inherited from a husband should not (and all the decided cases show it does not) descend as *streedhun*, but passes on the widow's death to the next of kin of the husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immoveable property given to her by her husband in his lifetime are different from those which both restrict her power over immoveable property inherited from her husband and regulate the course of its devolution.

To the former class belong the text of Nareda, "Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses;" and the text of Katyayana, "What a woman has received as a gift from her husband, she may dispose of at pleasure after his death, if it be moveable; but as long as he lives, let her preserve it with frugality." To the second class belongs the text of Katyayana, on which the judgment under appeal so much proceeds, viz., "The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these texts as rendered by Mr. Colebrooke (3 Dig., 575 and 576).

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the commentators concerning the text. The better opinion, however, seems to be that they relate to different subjects.

Again, the latter text certainly includes both moveable and immoveable property: and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from, the husband, that the words "after her the legal heirs shall take it," can be restricted to the immoveable portions of the husband's estate. The preponderance of authority is certainly in favor of the proposition that whether the widow has or has not the power to dispose of inherited moveables, they, as well as the immoveable property, if not disposed of, pass on her death to the next heirs of the husband.

It is also worth remarking that the doctrine that property inherited from her husband forms part of a woman's *streedhun*, receives no color from two of the treatises current in other schools which are supposed to recognise the widow's power to dispose of moveables so inherited. Both the Vivada Chintamani and the Mayukha confine *streedhun* within the definitions of Menu and Katyayana. They exclude property inherited and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitacshara, but are excluded by Sir William Macnaghten.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The Vivada Chintamani expressly says (p. 262) that the text of Katyayana does not refer to the peculiar property of a woman; and although it cites from Katyayana, "Let a woman on the death of her husband enjoy her husband's property at discretion," and explains that this refers to property other than immoveable, it also, at page 292, quotes from the Mahabharata, "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth;" to which it adds by way of explanation—"Here waste means sale and gift at their own choice."—(See Vivada Chintamani, pp. 256 and 266, and Mayukha, pp. 84 and 78.)

Another argument against including the wealth inherited from her husband in a woman's *streedhun*, as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitacshara, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default of the issue, the heir to "the whole property as above described." This is intelligible, if the words "property which she may have acquired by inheritance," in the second clause, are considered to be property inherited in her husband's lifetime, or from some persons other than him.

The reasons for the restrictions which the Hindoo law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares Pundits is sufficient to show that the supposed distinction between moveable and immoveable property is anything but well established in that school. And the unanimous judgment of the five Judges of the Sudder Court, supported by the opinion of the Court Pundits, has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly overruled.

Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitacshara, no part of her husband's estate, whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her *streedhun* or particular property; and that the text of Katyayana, which is general in its terms, and of which the authority is undoubted, must be taken to determine, *first*, that her power of disposition over both is limited to certain purposes; and, *secondly*,

that on her death both pass to the next heir of her husband. They have already stated the grounds on which they think that the cases decided in India are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions, except that in so far as they proceed, as that in the High Court of Calcutta unquestionably does in part proceed, on a different construction of the passage in the Mitacshara, they cannot be supported on that particular ground.

Their Lordships have now to consider whether the effect of the so-called partition was to give Doola Bae any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with co-parceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question whether her interest does not become absolute, though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta. But here the so-called partition was between two widows, each having the limited interest of a Hindoo widow in her husband's estate. It does not appear that it was made at the suit or on the application of either. It was made by order of a Judge who in the particular proceeding (one under Act XIX of 1841) had no jurisdiction to determine questions of title and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her husband.

It may be said that the question here is only whether the respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and as part of that contract, to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition *in invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.

If this be so, it follows that the opinions of those Pundits which were given in favor of the appellant on the assumption of a complete and regular partition lose much of their power. It follows also that the case of the respondent is stronger than it would have been had she claimed merely as next heir to her husband in succession to Doola Bae. For the estate of two widows who take their husband's property by inheritance, is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. (2 W. Mac, Hindoo Law, p. 38, note 1.) They are, therefore, in the strictest sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other. And, accordingly, this case might have been decided in favor of the respondent on this ground alone.

Upon the whole, then, their Lordships are of opinion that the decree under appeal is substantially right and ought to be affirmed. Considering, however, that what has here been decided in respect to Doola Bae's interest is equally applicable to that of respondent, and that the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration that the property recovered by the respondent is to be possessed and enjoyed by her as a widow of a Hindoo husband dying without issue, in the manner prescribed by the Hindoo law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the Sudder Court of Agra. The appellant must pay the costs of this appeal.

The 21st May 1868.

Present :

Lord Westbury, the Master of the Rolls, Sir James W. Colville, Sir Edward Vaughan Williams, and Sir Lawrence Peel.

Hindoo widow—Adoption—Permission of husband—Consent of kinsmen—Administration of Hindoo Law—Usage—Opinions of Pundits—Maintenance.

On Appeal from the High Court at Madras.

The Collector of Madura

versus

Muttu Ramalinga Satthupathy ;

Annudai *alias* Ranee Kunjara Nachear, and another,

versus

Ranee Purvata Vurdany Nachear, and another,

and the cross-appeal.

Power of a childless Hindoo widow to adopt a son to her husband with or without his permission under the various schools of Hindoo law considered. The difference between them relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

According to the doctrine of the Benares and Mahratta Schools, a Hindoo widow can adopt a son without her husband's express authority, if the adoption be made with the consent of her husband's kindred. Rule indicated as to the kinsmen whose consent is essential.

The duty of a European Judge in administering Hindoo law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal and has there been sanctioned by usage.

Under the Hindoo system of law, clear proof of usage will outweigh the written text of the law.

Extent of authority to be given to the opinions of Pundits laid down.

The *quantum* of maintenance to be awarded is a question with which the Courts in India are best able to deal, and the Judicial Committee will not interfere with the discretion exercised in this respect, unless on strong grounds.

The principal question raised by these appeals is the validity of an adoption made by the widow of the last male zemindar of Ramnad.

His title to that zemindary, which is of great extent, and, like many of the large zemindaries in the south of India, in the nature of a Raj or Principality descendible to a single heir, was thus derived. In 1795, the then zemindar, Muttu Ramalinga Satthupathy, having rebelled against the Government of the East India Company, was deprived of his zemindary, which in the month of July in that year was granted to his sister Ranee Mangalaswari. Her title was confirmed by a formal sunnud, executed on the 22nd April 1803 by Lord Clive, the then Governor of Madras, which granted the zemindary to her, her heirs, successors, and assigns. She was married to Ramasami Taver, who died some time between 1797 and 1804; and in the latter year Mangalaswari, then a widow, and professing to act under a written agreement between her and her late husband, adopted one Annasami, his nephew, whose title she afterwards confirmed by a will executed on the 11th April 1807. She died in that year, and was succeeded by Annasami. He had seven wives, of whom only his chief wife, Mootoo Verayee, and the appellant Kunjara, need be mentioned; but had no male issue by any of them. And on the 26th January 1820, he adopted a son, Ramasami, who was the natural brother of Mootoo Verayee, and, by a testamentary instrument of that date, confirmed that adoption, stating it to have been

made "by himself and his chief wife, Mootoo Verayee, unanimously." He died in February 1820, and was succeeded by Ramasami, who died in 1830 without male issue, but leaving a widow, the respondent Purvata, and two infant daughters, Mangalaswari and Dorarajah, surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of Annasami and Ramasami were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of Ramasami to the zemindary, as stated above, is the common ground of all the parties to this litigation, and, on the consideration of these appeals, must be taken to be incontestable.

On the death of Ramasami without male issue, his successor in the zemindary, according to the course of succession *ab intestato*, was his widow. He had, however, two days before his death, addressed to the Collector, as the representative of Government, the urzee of the 16th April 1830, which is set forth at p. 84 of the record. In that document, after stating that he was suffering from small-pox, and that the issue of his illness was uncertain, he expressed himself as follows:—"I have made an arrangement that my mother, Raneé Mootoo Verayee, who is my guardian in every respect, and who holds chief right to this zemindary, should enjoy this zemindary and all other things; pay peishkist to the Sirkar; maintain my royal wife, my daughter Managalaswari of five years old, and her younger sister, a small child; and when these children shall attain their proper age, to make an arrangement with regard to their right to the zemindary, and continue the same; that my natural brother Muttuchella Taver should manage the affairs of the zemindary until my children shall attain their proper age; and I have issued necessary orders for the strict observance of the above arrangement."

The affairs of the zemindary seem to have been managed under this arrangement between 1830 and 1840. The respondent Purvata is said to have been herself very young at the date of her husband's death; her children were infants; and the mother-in-law was probably the only member of the family with any capacity for business. In 1840 Mangalaswari, the elder daughter of Ramasami, who had previously been married, died after giving birth to a male child, who did not survive her. About that time differences arose between Purvata and her mother-in-law, who appears to have set up some claim to the zemindary in her own right. The Board of Revenue, acting as Court of Wards, intervened; appointed, in April 1840, Purvata guardian of Dorarajah, her infant daughter, in the place of Mootoo Verayee; and assumed the management of the estate, treating apparently Dorarajah as *de facto* zemindar, either by virtue of the urzee executed by Ramasami or by reason of Purvata's waiver of her rights in favor of her infant daughter.

Dorarajah died on the 24th September 1845. She had previously been married, and having no children attempted on the day before her death to adopt as a son a child named Annundai. By the document called her will, she declared, however, that this person would only be entitled to the zemindary in succession to her mother Purvata, whom she calls "chief heiress to the zemindary." This adoption was communicated to the Collector by a letter of the 23rd September 1845, but was treated by him as invalid under s. 25 Reg. V of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of Purvata to the zemindary as heiress either to her husband or to her daughter was therefore recognised by the Revenue authorities, who in April 1840 put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime, and ever since 1840, Mootoo Verayee had been engaged in active litigation with Purvata and others for the enforcement of her alleged rights to the zemindary. The proceedings in her last suit are set forth in the record from p. 16 to p. 48. For the most part they have no bearing upon any of

the questions which their Lordships have now to determine ; and it is unnecessary to notice any of them except the supplemental rejoinder which was filed by Purvata on the 6th March 1846 ; and the razeenamah or agreement of compromise by which this litigation was terminated on the 26th February 1847. In the former Purvata asserted, apparently for the first time, a right to adopt a son to her husband either under an alleged authority from him, in the event, which had happened, of both his daughters dying without issue, or under the more general power of adoption which is disputed in these appeals. By the latter Mootoo Verayee, in consideration of the provision made for her foster son Sevasami, declared that Purvata might thenceforward enjoy the zemindary for ever ; and, besides, might adopt a son at her pleasure as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the zemindary and its management between the death of Ramasami in 1830, and the month of May 1847, Purvata was at the last mentioned date in undisputed possession as zemindar of Ramnad.

In that state of things she made the adoption which is the subject of the present dispute. On the 19th May 1847, she gave notice to the Collector of her intention to adopt her sister's younger son, and invited him to be present at the ceremony. On the 24th of the same month she formally adopted the respondent Ramalinga. It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an order dated the 10th March 1849, declared that the adoption was invalid, and that on the death of Purvata the zemindary would escheat to Government. On the 23rd July 1855, the Madras Government set aside this order, and determined to recognise the adoption until it should be declared invalid by a decree of a Civil Court. But on the 29th October 1855, the same Government cancelled its former order, and confirmed the order of the Board of Revenue of the 10th June 1849, and caused this its final determination to be intimated to Purvata through the Collector, by a letter dated the 15th November 1855.

The first of the suits out of which these appeals arise (No 3 of 1856) was instituted in that year by Kunjara, claiming as the last surviving wife of Annasami, and her daughter, Mangalaswari, against Purvata alone. They impeached the validity of the adoption, insisted that on Purvata's death Kunjara, as the next in succession, would be entitled to the zemindary, and claimed maintenance in the meantime. Purvata, by her answer, alleged that Kunjara was not the wife but the concubine of Annasami, and could have no title to the zemindary. Various persons afterwards intervened under different titles, and were all, by supplemental plaint, made parties defendants to this suit. But none of them, except the respondent Ramalinga, and the Collector, are parties to these appeals, or have any interest therein.

The second of the two suits (No. 1 of 1860) was brought in February of that year by the respondent Ramalinga, who had then attained his majority, against Purvata and the Collector. Against the latter it sought to have the before-mentioned order of intimation of the 15th November 1855 set aside as illegal ; and against the former it prayed that immediate possession of the zemindary might be adjudged to the respondent Ramalinga.

The second suit was the first heard, and by his decree, dated the 18th March 1861, the Civil Judge ordered that the order of the Collector of the 15th November 1855, and his orders to certain subordinate officers therein referred to, should be cancelled ; and that as he had failed to establish any right to the estate, or to invalidate the acts of Purvata in respect to it, he should abstain from all further interference ; and that Purvata, subject to the provisions of Hindoo law, and s. 8 Reg. XXV of 1802, might, without the previous consent of the Collector or any

other authority, assign and transfer to the plaintiff (the respondent Ramalinga) or whomsoever she might think proper, by the sale, gift, or otherwise, her proprietary right in the Ramnad zemindary. The decree further declared that it was to be without prejudice to the Collector's right to bring a regular action for the estate, if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat whilst there were heirs.

The decree made by the same Judge in the first suit bore date the 12th April 1861. It found that Kunjara was one of the wives of Annasami, but that as such she had no right to succeed to the estate after Purvata, being only her step-mother, and therefore excluded from inheriting; it further decreed that the zemindar of Ramnad for the time being should pay to the plaintiffs (the appellants Kunjara and her daughter) maintenance at the rate of Rs. 400 per mensem, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, against the second Kunjara and her daughter, appealed to the High Court of Madras; and on the 26th March 1863, that Court made an order on both appeals, whereby it directed the Civil Judge to try the following issue :—"Was the adoption made with the authority of Mootoo Verayee, widow of Annasami, or with that of any others of the kindred of the late zemindar Ramasami, in whose behalf the said adoption was made?" It further gave certain directions as to the evidence to be produced on the trial of the issue.

This issue was accordingly tried on the 1st September 1863; and the findings of the Civil Judge are in effect that the consent of Mootoo Verayee, and of all the then surviving kindred of Ramasami, had been obtained to the adoption. Against this finding the Collector, as well as Kunjara and her daughter, again appealed to the High Court, which on the 7th November 1864, after two hearings, pronounced an elaborate judgment in favor of Purvata's right to adopt, and her exercise of it in the particular case, and in doing so, the Court came to the following conclusions :—

1. That the widow of the late zemindar had made a valid adoption; that there was no doubt that it was made with the assent of the majority of her husband's sapindas; and that though it might be doubtful whether the Civil Judge was right, there were not sufficient grounds for saying that he was wrong in thinking that all the sapindas then living had been proved to have assented.

2. That considering the extent of the property, and the fact that she was the last surviving widow of the zemindar Annasami, Kunjara was entitled to a more liberal maintenance than that awarded by the Civil Judge; and that such maintenance should be at the rate of Rs. 10,000 per annum. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with the judgment, the following appeals have been presented, viz. :—

First.—An appeal by the Collector, impeaching the validity of the adoption and also objecting to so much of the decree of the 18th March 1861 as declared or implied that Purvata had power to alienate or affect the zemindary beyond her life interest.

Secondly.—An appeal by Kunjara and her daughter, also impeaching the adoption, and further objecting to the decree of the 12th April 1861, in so far as it declared that Kunjara had no right of succession to the zemindary.

Thirdly.—A cross-appeal by Purvata and Ramalinga, objecting to the maintenance awarded by the High Court as exorbitant, and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question whether by the Hindoo law as current in what is known as the Dravada country (wherein Ramnad is situate), a widow can adopt a son to her husband without his express authority: and if so, by whose assent that defect of authority must be supplied?

Their Lordships think it will be convenient to consider in the first place how this question really stands upon the authority of Mr. Colebrooke and Sir Thomas Strange.

Mr. Colebrooke's note on the Mitacshara (c. I s. 11 Art. 9), which has been much discussed, clearly involves three propositions:—1, that the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the Schools of Hindoo law except that of Mithila; 2, that the Bengal (or Gaura) School insists that the widow must have the formal permission of her husband in his lifetime; 3, that some at least of the other Schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The two first propositions are admitted; but it has been argued for the appellants, that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta School, in which the treatise called the *Mayukha* is the predominant authority. Balambhatta, however, whom he cites as an authority for a power of adoption in the widow wider even than that expressed in the third proposition, was a commentator of the Benares School. And the several notes of Mr. Colebrooke, at pp. 92, 96, and 115 of the 2nd volume of Strange's Hindoo Law, seem to their Lordships to show conclusively that he considered the doctrine embodied in the third proposition to be common "to the followers of the Mitacshara in the Benares as well as in the Mahratta School," and as such to be receivable as the law current in the Zillah Vizagapatam, which lies within the northern or Andra division of the Dravada country.

Again, Sir Thomas Strange's statement of the law in his work, Vol. I. p. 79, is clear and unambiguous. He says:—"Equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given to take effect, like a will, after his death; and according to the doctrine of the Benares and Mahratta Schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal provinces."

Their Lordships entertain no doubt that the term "the Peninsula," as used here and in other passages by the same author, denotes that part of India which is south of the line drawn from Ganjam to the Gulf of Cambay, and includes the whole of the Dravada district. The learned Counsel for the appellants, however, appeal from Sir Thomas Strange as a text writer, to Sir Thomas Strange as a Judge, and cite his dictum in *Pillai v. Pillai* (2 Strange's Notes of Cases, p. 103), as opposed to this passage. In that case, Sir Thomas Strange, after citing the text of *Vasish'ta*, says:—"Hence it may be inferred what appears confirmed by opinions of living Hindoo lawyers, and by every case of the kind we are acquainted with, that the consent of the husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir Thomas Strange. The precise question which is now under consideration was not in issue in that case, where there was a written authority from the husband, and where the real issue was whether the widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindoo law were far less accessible to an European Judge than they have since become. And Sir Thomas Strange, in his work composed twenty years later, says of this very case of *Pillai v. Pillai* that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. Colebrooke's translation of the Law of

Inheritance, and the treatises on adoption since translated by Mr. Sutherland, to say nothing of the MSS. materials that came subsequently to his own hands, and which had contributed largely to every chapter of his work. There can, therefore, be no doubt but that the passage in his book contains the matured opinion of Sir Thomas Strange, and that it must be treated as an authoritative declaration of that opinion controlling his dictum in *Pillai v. Pillai*.

Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindoo law current in the south of India, their Lordships have next to consider whether any sufficient reason has been assigned for treating that opinion as unfounded.

The remoter sources of the Hindoo law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received, became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, Schools with conflicting doctrines arose. Thus the *Mitacshara*, which is universally accepted by all the Schools except that of Bengal as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the *Dayabhaga* in those points where they differ, was a commentary on the *Institutes of Yajñawalkya*; and the *Dayabhaga*, which, wherever it differs from the *Mitacshara*, prevails in Bengal, and is the foundation of the principal divergences between that and the other Schools, equally admits and relies on the authority of *Yajñawalkya*. In like manner there are glosses and commentaries upon the *Mitacshara*, which are received by some of the Schools that acknowledge the supreme authority of that treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of *Vasishtha*, which says:—"Nor let a woman give or accept a son unless with the assent of her lord." But the *Mithila* School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the *Dattaca* form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the *Mayukha* and *Koustobha* treatises, which govern the *Mahratta* School, explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

The duty, therefore, of an European Judge who is under the obligation to administer Hindoo law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindoo system of law, clear proof of usage will outweigh the written text of the law. The respondent *Ramalinga* insists that, tried by either test, the proposition for which he contends will be found to be correct.

The industry and research of the Counsel in the Courts below have brought together a *catena* of texts, of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest European authorities, Mr. *Colebrooke*, Sir *Thomas Strange*, and Sir *William Macnaghten*, all concur in treating as works of unquestionable authority in the

south of India the Mitacshara, the Smriti Chandrika, and the Madhavyam, the two latter being, as it were, the peculiar treatises of the Southern or Dravada School. Again, of the Dattaca Mimansa of Nada Pandita, and the Dattaca Chandrika, two treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India; but that when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares. The Dattaca Mimansa, by the author of the Madhavyam, is also recognised as of high authority in the south of India by Mr. Ellis in his note at page 168 of the 2nd volume of Strange.

Of these treatises, the Mitacshara is silent on the point in question. The Dattaca Mimansa of Nanda Pandita (s. 1 Arts. 15 to 18 and Arts. 27 and 28) is opposed to the respondent's view of it; but it seems equally opposed to an adoption by a widow under any circumstances. The Dattaca Chandrika (s. 1 Arts. 31 and 32) allows a widow to give a son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The Smriti Chandrika also permits a mother to give her son if she be authorized to do so by an independent male. And it is argued that, what these two last authorities lay down concerning a widow's right to give, must, by parity of reasoning, be taken to be laid down concerning her right to receive a son in adoption. The Madhavyam (if that term is confined to the Parasara Madhaviya, and does not embrace all the works of Vidya Narainsamy) seems also to contain no direct determination of the point in question; but the Dattaca Mimansa of that author clearly and explicitly declares the right of the widow to adopt with the authority of her father-in-law, and whatever other kinsmen of her husband may be comprehended under the *et cætera*. It cannot, therefore, be said that the proposition laid down by Mr. Colebrooke, and adopted by Sir Thomas Strange, is not supported by at least one of the original treatises of undoubted authority in Dravada. The Dattaca Mimansa of Sri Rama Pandita, who is stated by the Judges of the High Court to be an authority very generally cited in the south of India, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of Dravada the peculiarly Mahratta treatises (the Mayukha and Koustoobha), and also the Viro Mitrodaya, which is a treatise of especial authority at Benares. It must, however, be admitted that the fact of the reception of the doctrine in question by Schools so closely allied to that of Dravada is in favor of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence that the doctrine for which the respondents contend has been sanctioned by usage in the south of India, consists partly of the opinions of Pundits, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time adjoined to be followed, and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindoo law in various parts of British India. Upon such materials, the earlier works of European writers on the Hindoo law, and the earlier decisions of our Courts, were mainly founded. The opinion of a Pundit, which is found to be in conflict with the translated works of authority, may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country. A considerable body of these futwahs, or opinions, is collected in the third part of what has been called throughout the argument in this case "the green book." It is not necessary to consider whether they can all of them be supported to the full extent of what they affirm. But they show a consider-

able concurrence of opinion to the effect that where the authority of her husband is wanting, a widow may adopt a son with the assent of his kindred in the Dravada country.

The decided cases, exclusive of those in the Bombay Presidency which may be taken to be governed by the Mayukha, are certainly not many. But there is at least the case G, decided by the late Sudder Court of Madras, and there are the French cases, which ought not, their Lordships think, to be wholly disregarded as recognitions of the law prevailing in the south of India. They are to be relied on in this case as affording evidence of a long continued series of opinions officially given and judicially received, which were adopted as the grounds of decision, showing a continued and recognised existence of a doctrine which suffices to remove from the opinions of the Pundits in this case every suspicion of being opinions given to support the interests or judgments of others. Against these authorities the appellants have invoked that of the case in 2 Knapp, p. 203. But what was, in fact, decided by the very guarded judgment delivered by the late Lord Wensleydale in that case? It was that, according to the native text-writers—including probably Vasishta, certainly including the Dattaca Mimansa of Nunda Pandita—the authority of the husband was a requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the Mahratta States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular district of Etawah, in Upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held that they could not say that the law in that district did not require the direction of the husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the south of India.

Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that according to the law prevalent in the Dravada country, and particularly in that part of it wherein this Ramnad zemindary is situate, a Hindoo widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the Dattaca form, and the obsolete practice with which that form of adoption co-existed, raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaca Mimansa of Vidya Narainsamy, the author of the Madhavyam; but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

It must, however, be admitted that the doctrine is stated in the old treatises, and even by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindoo family—i.e., undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this deputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to the maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize

an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bond fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased, and not *bond fide* obtained. The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption.

Again, it appears to their Lordships that inasmuch as the authorities in favor of the widow's power to adopt with the assent of her husband's kinsmen, proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites.

Their Lordships having thus stated the conclusions to which they have come upon the general question of law involved in these appeals, will now consider whether the High Court of Madras has correctly applied that law to the facts of the present case.

They are of opinion that both the Courts below were right in holding that the collateral kinsmen of Ramasami were to be found in the Taver family, of which the printed pedigree forms part of the record. According to Hindoo law, Ramasami was the son, though by adoption, of Annasami; and he again was the son, though by adoption, of the first Ramasami, who was a Taver; and the heirs of Ramasami, in the absence of descendants, were traceable upwards through these two persons, as if they had been his natural father and grandfather. There is no ground for saying that this, the legal consequence of the successive adoptions, was affected by the assumption of the name of Satoopati, the family name of the ancient zemindars of Ramnad and of Mangalaswari, the grantee of the zemindary. It is to be observed, however, that this line affords none but very remote kinsmen, if their relationship to Ramasami be calculated on the principle just stated. The nearest of them, Mootosamy, would on that principle stand in a degree of relationship to Ramasami, which, according to the rule of the Mitacshara

(Cap. 2 s. 5 Art. 6), would exclude him from the category of Sapindas, and place him in that of Samanodacas, or those connected only by a libation of water and a common family name. He was, however, the natural brother of Annasami, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of Ramasami's widow. Again, the person who really filled the office of protector, and that by the express appointment of Ramasami, was, up to the time of her quarrel with her daughter-in-law, Mootoo Verayee. Nor is it by any means unusual in a Hindoo family to find the mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to Purvata, after failure of Ramasami's descendants. It, therefore, appears to their Lordships that in this state of the family the assent of Mootoo Verayee, of Mootoosamy, and of the other persons who are proved beyond all question to have assented, was sufficient to legitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsman Ramrajah Taver.

It has been argued, however, that even if this adoption would have been regular had Ramasami died childless and intestate, his urzee relating to the management and descent of the zemindary contains an indication of his intention that his daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his widow. Their Lordships cannot accede to this argument. Ramasami, no doubt, intended to be represented by his daughter's line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission, are powerful to exclude a presumptive prohibition to adopt if on a new and unforeseen occasion the religious duty arises. His widow has not claimed a power to adopt, except on the happening of the contingency for which her husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the appellants was founded on the attempted adoption of a son, Annasami, by Dorarajah. That person is not a party to either of these suits; he has not impeached the adoption of the respondent Ramalinga; he has, on the contrary, supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue authorities at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining whether that adoption was, in fact, valid or invalid; or whether, if valid, it would have any, and what, effect on the title of the respondent Ramalinga. In that state of things neither of the present appellants can be allowed to insist on this supposed *jus tertii* as an objection to the decrees which they impeach.

Their Lordships have, therefore, come to the conclusion that these decrees and the judgment on which they proceed are substantially right in so far as they affirm, as between the parties to this litigation, the validity of the adoption by Purvata of the respondent Ramalinga.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th March 1861, on the ground that it asserts a power in Purvata to alienate or affect the zemindary beyond her life interest. Her power of alienation is expressly stated to be "subject to the provisions of Hindoo law;" and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindoo law, free from the control of the Government or its Revenue officers.

Their Lordships are further of opinion that there are no grounds for impeaching the decree of the 12th April 1861, in so far as it found that the appellant Kunjara stood in the relation only of step-mother to Ramasami, and therefore could have no right to inherit his estate. They think that this conclusion is sup-

ported by the document No. 36, which expressly states that Ramasami was adopted by Annasami and Mootoo Verayee unanimously.

Upon the cross appeal their Lordships have only to observe that the *quantum* of maintenance is a question with which the Courts of India, having local knowledge and being conversant with the habits of native families, are peculiarly competent to deal; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of Madras in the present case.

Being, therefore, of opinion that the decrees under appeal are correct and ought to be affirmed, their Lordships will humbly recommend to Her Majesty that the two appeals and the cross appeal be each dismissed with costs.

The 29th June 1868.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, The Lord Chief Baron, and Sir Lawrence Peel.

Deposit of Money into Court under Protest—Voluntary Payment.

*On Appeal from the High Court at Calcutta.**

Fatima Khatoon and another

versus

Mahomed Jan Chowdhry and others.

Where money was deposited in Court by a judgment-debtor under protest, for the purpose of preventing an injurious sale, and the depositor, declaring his intention to bring a regular suit to set aside the summary order rejecting his claim, prayed that the sum might be paid to the decree-holder and the sale stayed, the payment was held not to be a voluntary payment.

This case, when divested of all that which is not material to the question before this Board, may be stated as follows:—The appellants, two sisters, who had married individuals of the same family, became entitled, under what we should in this country call a marriage settlement, to dower in the form of a charge on an estate or property which had belonged to a person of the name of Nyum Chowdhry. He having died in debt, his heirs or representatives were sued by various persons, and among others by the respondents, or those whom the respondents now represent, to recover some very considerable debts alleged to have been due by him: in which suit they obtained judgment. Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. If it were necessary to look into the particulars of these numerous and somewhat complicated proceedings, it would probably appear (and that alone would be a ground upon which these respondents must be held disentitled to retain the money they have received) that this judgment was in effect satisfied; that all that the decrees of the Court had entitled the respondents to take out of the different properties in question had been paid and satisfied in one way or another, and were received by them so as to disentitle them to institute or to continue any further proceedings against these properties in respect of the claim now in question. However, they did in fact obtain an authority, under one of the many proceedings that have taken

* Regular Appeal No. 291 of 1863, decided 10th July 1863 by Raikes and Seton-Karr, *J. J.* (Not published.)

place, to sell the estate or property upon which this dower of the appellants was charged.

In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the new appellants, they upon a proceeding which they instituted, and under the authority of the Court, not voluntarily, but under protest and because they were compelled to take that step in order to prevent the sale of the property, paid the sum of between Rs. 59,000 and Rs. 60,000 into Court; and it appears that that payment into Court having taken place in order to prevent a sale of the property, under which the rights of all parties, and, among others, of these appellants, were expressly reserved, the question arose, and arose in rather a singular form, whether the money should remain in Court, or whether it might not be paid over to the new respondents. Undoubtedly the Counsel for the person who represented the new appellants consented at once that the money should be paid over to them.

The money that had been paid into Court, not voluntarily, but under this species of compulsion, and for the purpose of preventing this injurious sale of the property, was paid over accordingly; the only voluntary act which was done being the consent given by the appellants that the money, instead of remaining in Court, should in the meantime, and until the right of the parties could be settled by the final decree of the Court, be paid over to the respondents. Afterwards, when all these circumstances came before the Zillah Court, and all the questions were raised which either party thought fit to raise, or had the power to raise, on the then state of the suits, the appellants obtained a decree in their favor against the respondents of the date of the 8th June 1860, for the sum of Rs. 59,821 and a fraction, being the amount paid to them out of Court as before-mentioned.

Against this decree an appeal was lodged, which was carried before the High Court of Judicature at Fort William in Bengal. The High Court having heard the parties by their Counsel or Advocates, and having considered the whole case, did not in any way enter into the merits of the case itself or of the decision of the Court below, at least upon the grounds upon which the case had been decided, but took the point for themselves, that by the law this payment to the respondents of the money of the appellants, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and therefore that the money could not be recovered back. If it had been such a payment, no doubt such is the law; but when we look at the circumstances as they appear, we find, in the first place, it was not a payment at all. It was originally a mere deposit in Court of the full amount recoverable by the decree-holder. It was deposited under protest, for the purpose of preventing an injurious sale of the whole property. Then it appears that upon the reading of the petition, the pleader for the petitioners was asked whether his client had any objection to the payment to the decree-holder of the amount which had been so deposited; and the answer was, "I will bring a regular suit for setting aside the summary order rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited: I therefore deposit the amount for the purpose of its being paid to the decree-holder, and pray that the said sum be paid to the decree-holder and the sale be stayed."

Those were the circumstances under which the money was paid, the payment being clearly no voluntary payment; and the suit having been determined on its merits in favor of the appellants, they are clearly entitled to recover this money back again. Therefore, the order that we shall advise Her Majesty to make is, that the decree of the High Court of Judicature, reversing the decree of the Zillah Court, be reversed, and that the decree of the Zillah Court be confirmed; and that the appellants be held entitled to recover Rs. 59,821 and a fraction, as decreed by the judgment of the 8th June 1860. It is satisfactory to feel, as their Lordships

have not entered into the merits of the case on the many points argued in the Zillah Court and in the High Court, that substantial justice is done by the order which they will now advise Her Majesty to pronounce; for it is perfectly clear, on the one hand, that the respondents had no right to this money out of that estate at all, they having been satisfied to the extent that the former decrees of any Court or Courts entitled them to recover out of that property; and, on the other hand, it appears perfectly clear that the appellants paid this money merely for the purpose of preventing a sale of the property, so that they are, in justice as well as in law, entitled to recover. The appellants must also be held entitled to the costs of the appeal and of the reversal of the order, and to the usual interest, at the current Court rate, upon the sum to which they are so entitled.

The 2nd July 1868.

Present :

Sir James W. Colville, Lord Justice Wood, Lord Justice Selwyn,
and Sir Lawrence Peel.

Custom—Succession.

*On Appeal from the High Court at Calcutta.**

Soorendronath Roy

versus

Mussamut Heeromonee Burmonee and others.

The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family; and the custom is capable of attaching and of being destroyed equally whether the property be ancestral or self-acquired.

This is an appeal from a decision of the High Court at Calcutta which reversed the decree of the Judge of the Zillah Court of Nuddea, dismissing the plaintiffs' (the respondents') suit with costs.

The suit which is to determine the right of succession between the representatives of each of two joint owners, Paresnauth and Batooknauth, Hindoos, to the succession of one of them, Batooknauth, was brought to recover a moiety of a family estate consisting of landed and of moveable property which had belonged to one Khoderam Roy, the grandfather of both Paresnauth and Batooknauth. The property of Khoderam descended from him, by inheritance to his two surviving grandsons Paresnauth and Batooknauth, the sons respectively of his two sons Jai Singh Roy and Prag Singh Roy, who had pre-deceased their father. These grandsons, who were first cousins, formed a joint undivided Hindoo family, joint in food, worship, and estate. During their joint lives they resided continually together.

Paresnauth was the manager. He survived Batooknauth about two and a half years. Batooknauth left no children. The plaintiff was his childless widow. She was very young at the time of her husband's death; certainly under fourteen years of age, and perhaps younger. She had however near relations, members of her own family, competent to the protection of her rights, her father and two other persons; and the sister of Batooknauth had a son, a minor, in the line of

* Regular Appeal, No. 24 of 1860, decided 12th September 1862, by Trevor, Seton-Karr, and L. S. Jackson *J. J.*—See 1 Hay's Reports, p. 292.

succession to his deceased uncle under the law of Bengal, and whose father was competent to the protection of his rights also. The widow, if entitled, might have been placed under the protection of the Court of Wards in the case of any probable invasion of her rights.

Paresnauth, on the 18th Bysack 1260, that is, thirteen days after the death of Batooknauth, which took place on the 5th Bysack 1260, corresponding to the 16th April 1853, propounded and proved before the Civil Court of Nuddea, under Act XX of 1841, an alleged will of Batooknauth; the cancellation of which instrument is also sought by the plaintiff's suit. By this will, which bore date the 2nd Bysack 1260, three days before his death, the whole of Batooknauth's property was given to Paresnauth. It contained a provision for maintenance of the widow; but in case of her quitting the family Rs. 25 per month only were to be allowed her for her maintenance. The usual notifications were issued by the Court; no person appeared to oppose, witnesses were examined, the will was proved, and the ordinary certificate obtained, and under that title Paresnauth enjoyed the property unopposed and undisturbed during the remainder of his life, a period of about two and a half years. The will was not registered, but two days only elapsed between the date of it and the death:

Paresnauth left a will, or testamentary trust deed by which he appointed his mother and wife, guardians of his infant son. It contained a provision for adoption by his widow in case the infant died, and some directions as to religious rites and usages.

Shortly after Paresnauth's death, the widow of Batooknauth asserted her title to a moiety of the property jointly owned and enjoyed by her husband and Paresnauth. Upon her application to the proper authorities to be admitted to her share, she was in consequence of the certificate before mentioned having been obtained and being in force, directed or advised to proceed by regular suit, and she instituted the suit accordingly out of which this appeal arises. She was the sole plaintiff, and the defendants were the mother and widow of Paresnauth, as trustees and guardians of the infant son of Paresnauth, who was also named a party. The suit proceeded in that form until the son attained majority, when he applied for leave and was permitted to defend in his own person without guardians. He is the appellant in this appeal. The property being situate wholly in Bengal, and the family having been long resident there, the plaintiff was certainly entitled to rely on her *prima facie* title as heiress under the general Hindoo law as administered in that part of India.

It was incumbent on the defendants to allege and prove a title displacing this *prima facie* title. They accordingly pleaded their title, which embraced two separate answers of the plaintiff's title. They alleged that the title to the property was, by reason of the retention by their family of its ancient law, that of the Mitacshara, to be governed by that authority, under which Paresnauth, and not the widow, was heir to Batooknauth; and besides this, they alleged that Batooknauth had bequeathed his whole property to Paresnauth. If this last title prevail, it displaces equally a descent *ab intestato*, under either system of law, viz., that of the Mitacshara or that of the Dayabhaga.

Some doubt was raised by Mr. Cave in his argument of this case as to the original acquisition of this property, whether the whole was acquired by Khoderam, as a large part certainly was, or whether a part was not ancestral property which had descended to him. It is not necessary to enquire into this subject, because the prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family. It must have had a legal origin and have continuance (see *Abraham v. Abraham*,* 9 Moore's Privy Council cases, Indian, pp. 242 and 243); and whether the pro-

* See 1 W. R. P. C. 1; 1 Suth P. C. R. 501.

perty be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both. A legal foundation for this family usage was laid sufficiently by the evidence. The family came into Bengal from a distant part of India where the Mitacshara prevails. The High Court did not decide more on this issue than that the family had adopted the law of Bengal for some generations: that is consistent with a discontinuance of a former usage. It appears further from the evidence of the Purohit that his was an hereditary office, as it very frequently is, and that his ancestors, officers of the priesthood and of the family, had followed the Mitacshara constantly.

On the evidence, it seems clear that the family came attended by priests of their own persuasion; and since Orientals are commonly tenacious of their usages and customs, and more especially of their family and religious observances, therefore, on the ordinary principles of viewing evidence, a continuance of this state of things is presumable, and the *onus* would then lie on the party alleging an interruption or cessation of it to prove such allegation. In this case, therefore, the *onus* of proving such a cessation seems to have been properly declared by the High Court as incumbent on the plaintiff, in consequence of the admissions in the pleadings.

The plaintiff originally advanced a title which she did not maintain throughout her suit. She alleged originally that her husband had given her authority to adopt a son and had constituted her heiress *ad interim* by a written instrument, of which she alleged the spoliation and destruction by Paresnauth. Such an authority is one not unlikely to be conferred. The will of Paresnauth himself evidences the strong desire of a Hindoo to be succeeded by a son. Why the allegation, if untrue, was made, or why, if true, it was abandoned, it is difficult to say. It is the great misfortune of Hindoo litigants that their cases often fall, in the earlier stages of litigation, into the hands of incompetent advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a true case from some mistaken views of policy or difficulty, create often impediments to its success from which the true story, if revealed, would have been free. If, for instance, it should seem expedient to exaggerate the illness, weakness, or incapacity of an alleged testator, and to tutor witnesses to such proof, it may be thought politic to drop that part of a case which necessarily supposes during the same interval a disposing capacity in the testator; and in Indian cases it is scarcely safe or just to make against the suitor himself the ordinary presumptions from the conduct of a suit which would be made in our own Courts under the like circumstances.

It has, therefore, been very properly urged in the able arguments on behalf of the plaintiff that her youth, ignorance, sex, and dependant state must all be weighed and have due importance given to them when her supposed acquiescence in the title of Paresnauth is urged against her. As respects herself, personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of Paresnauth's proceedings and claim to the whole succession which she alleges cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them.

The plaintiff denied in her replication each title pleaded by the defendants. The will she alleged to be a forgery, and insisted that the Dayabhaga was the authority to be applied to the question of her title to the succession.

The issues of fact comprise these two points, the only ones before their Lordships on appeal:—

First.—Whether Batooknauth executed a will dated 2nd Bysack 1260 in favor of Paresnauth, or not.

Secondly.—Whether the question of inheritance in this suit is determinable by the Shastras of Bengal or of the Western Provinces.

The Judge of the Court at Nuddea found the first issue, that on the will, in favor of the defendants. He expressed no opinion on the second, which, in consequence of his finding on the first, he judged to be then an immaterial issue. On appeal to the High Court, that Court consisting of three Judges, Mr. Trevor, Mr. Seton-Karr, and Mr. Jackson, found unanimously the issue in favor of the plaintiff, the now respondent, and reversed the decree of the Civil Court.

In the view which that Court of appeal took, it was necessary to decide both issues, for a decision on the will alone, unless it had established the will, would not have decided the case. In the view taken of the will in the Civil Court of Nuddea, the contention as to which law, whether the Mitacshara or the Dayabhaga, should prevail was a needless one, except as it tended to disprove the will by showing it to be an inofficious disposition.

If, however, the evidence afford ground enough for believing that the ancient family usage, whether legally obsolete or not, might yet be operative enough in the mind of a male member of his family to lead him to prefer the sole ownership of a male, his conjoint owner and co-heir, with whom he had been associated in the enjoyment and with whom the entire management had been, to what he might consider the risk of female ownership, then no sound argument derived from the mere presumed inofficiousness of the disposition according to the general law could be used to weaken adequate evidence as to the *factum* of the will. In the opinion of their Lordships it would be a rash conclusion on the state of the evidence in this cause to suppose that a preference of the law of Bengal was likely to be operative in the mind of the testator; and without a belief in the probable existence of such a preference, where is the foundation for treating the will as inofficious?

It is not necessary for their Lordships to decide the second issue in the view which they take of this case, which is substantially the same as that taken by the Civil Court of Nuddea. It is, however, necessary for them to review the evidence on this issue, to some extent, in order to support the opinion already expressed by their Lordships as to the probability of a continuing attachment by the testator Batooknauth to his original family usages.

From the admissions in the pleading referred to by the High Court in their judgment and from the evidence, it may be safely concluded that this family came from a part of India where the Mitacshara was and is the prevailing authority; that it came not unattended by ministers of religion; and that it originally continued in Bengal its ancient law. As at the time of that migration the Mahomedan was the governing power, and as the Hindoos were rather connived at than sanctioned by the governing power in the exercise of their religion, their law was in the nature of a personal usage or custom, and it is probable that migratory families or tribes amongst Hindoos would retain their own usages.

There seems to be no reasonable ground for doubting that the office of priest was hereditary, and derived to the existing family priest by successors in the mode stated by the Purohit, whose evidence was rather laid aside by the High Court, on the ground that he might be swayed by interest, than rejected by it as untrustworthy. An adherence to family usages is a strong Oriental habit; it is in most places not a weak one, and since, generally, the love of them increases with their long prevalence, it requires no effort to believe that the retention of religious usages and customs spoken of by the defendant's witnesses did prevail in that particular branch of the family, to which point indeed the Purohit's evidence in a most important particular,—that of the performance of the Shraud of Batooknauth,—is clear and direct, and on that point not contradicted by proof, for though the plaintiff alleges, she does not prove, that she performed her husband's Shraud.

This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rites, and yet acquiesce in a devolution of property in the common course of descent of property in that district, amongst persons of the same race. But still there is in the Hindoo law so close a connection between their religion and their succession to property, that the preferable right to perform the Shraud is commonly viewed as governing also the question of the preferable right to succession of property; and as a general rule they would be expected to be found in union. Now, it is proved by the Purohit, the proper witness to be adduced for the purpose, that Paresnauth performed the Shraud of Batooknauth, and that proof is not opposed by counter proof. It is a fact, which, unexplained, bears strongly on the question of the right to the succession being under the Mitacshara. The High Court considered the evidence to be nearly balanced, so far as the evidence, exclusive of the judicial proceedings hereafter to be referred to, went; but it is to be observed that the High Court, without any sufficient reason assigned, set aside the evidence of the Purohit, which, if it be regarded as the uncontradicted evidence of the appropriate and ordinarily adequate witness to the performance of a Shraud, by establishing the performance of the ceremony by Paresnauth, should have inclined the scale in favor of that side, especially when it is remembered that a presumption existed in favor of the continuance of the ancient family custom.

Their Lordships are relieved from the necessity of considering whether the High Court did, or did not, attach undue weight to the proofs on which they mainly rested their judgment on this point; since the question now to be considered by their Lordships is only, whether the will was inofficious. The High Court proceeded on the ground that the judicial proceedings which they rely on and state in their judgment, and which are set forth in the respondent's case, show that the family had for some generations recognised the law prevalent in Bengal as that of their succession. The High Court had no explanation given to it of these proceedings. It certainly lay on the defendants to give that explanation. Possibly Paresnauth might have been able to show that no actual enjoyment according to such title by record had ever obtained in his branch of his family, and might have shown that he, as a party to the suit, had not advised or suggested that form of procedure and joinder of parties, and was not conscious of the effect of it, as evidence to rebut the continuance of a family custom; but whatever weight may attach to such suggestions when made and established by proofs, it is not the duty of a Court to suppose them. It suffices to say that the decision on this issue of the High Court, on the evidence in the cause, may be correct; yet their Lordships cannot derive from such evidence, viewed in connection with the other evidence in the cause, that belief which would justify them in treating the will as *prima facie* improbable, because inofficious, and inofficious because regardless of the ordinary preferences of Hindoos of the Bengal Schools.

Their Lordships proceed now to the consideration of the evidence as to the *factum* of the will itself. It must be remembered that Paresnauth is dead, and that imputations are cast on him after his death, which he might have been able, and which his representatives in this suit may be unable, to reject, at least with equal success. Therefore a Court of Justice should be careful to see that no inference be raised against the title which he asserted and proved, and under which he obtained and retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants. The evidence as to the *factum* itself in the judgment of both Courts appeared satisfactory. It is declared by the High Court to have been "precise enough on the main points of execution and signature, and to exhibit no signal discrepancies." In an ordinary case, even on proof of an Hindoo will, such evidence would be deemed adequate; and it must be remembered that this will was very soon after its execution publicly exhibited in Court and submitted to some investigation and proof, and was proved; and

that, though proved *ex-parte*, yet such proof followed on the ordinary notifications which ordinarily must be taken to give due notice of a claim under a will.

If, then, no discrepancy of any material character be found between the proof which was given on the application for a certificate in 1853, and that given on the trial of the cause in 1859, the witnesses being native witnesses, and speaking again to the same facts after so long an interval, the absence of such discrepancy, and the precision of the statements as to the execution and signature, are some arguments in themselves in support of the truth of that to which those of the witnesses who were examined on both trials depose. One discrepancy, however, is noticed in the respondent's case at page 3, line 33, on which much stress was laid by Mr. Cave in his able argument for the respondent.

The witnesses at the earlier judicial investigation described the will as having been immediately dictated by the testator to Denonauth, the writer; whereas at the trial of this cause, they depose that Tarucknauth made the draft from the dictation of the testator, and that Denonauth made a fair copy from it. This discrepancy certainly exists, but it is one which might be found in many a case free from suspicion. It may have proceeded from mere inaccuracy of recollection; and sometimes in native statements an intermediate agency is passed over, and an action ascribed to an immediate source, which in truth proceeded from a derivative one. The reason assigned by the respondent's Counsel for this variation of story is little probable. Had the witnesses for the will recollected the evidence which they gave on the first trial, they, if false witnesses, would have adhered to it. They are not likely on the trial to have made intentionally their evidence conformable to that of the respondent's witnesses who were examined before them, for no draft was produced at all; nothing was shown to which they were likely to desire to make their account conformable. The transaction to which they deposed, and that to which the plaintiff's witnesses were deposing, were utterly irreconcilable, and no motive could have existed for injuring their own story by taking up a part of that of the rival witnesses. Their Lordships, therefore, concur in the view taken of the evidence as to the *factum* of the will by both Courts, that it was in itself adequate to the proof of an ordinary will. Was the internal evidence against it, and was the internal improbability of the will sufficient to discredit it?

No inherent improbability can be stated as to this will or its provisions, unless by assuming either that the law of the Mitacshara was known to the testator to be clearly applicable, or that a preference in the female line of descent was likely to be influential in his name. Their Lordships, therefore, put aside these speculations and apply themselves to the consideration of the evidence in the cause. The grounds upon which the judgment of the High Court proceeds as to the will are that the witnesses to it are not such as they would have expected to find attesting his will; that the handwriting of the testator seems too firm for one suffering from such a sickness; that if the Mitacshara prevailed, the will would be needless: that Rs. 25 per month was an absurdly small allowance for the widow; that there was no hint of any disagreement between him and his wife; and they conclude by observations derived from these matters as to the improbability of the case. But to these reasons it may be answered, that the Rs. 25 which are given only in case of the widow leaving the family house, may not have been meant to measure her maintenance whilst resident; that it may have been designed *in penam* to enforce residence in the family house; that there was much conflict of evidence, and may have been room to doubt whether the Mitacshara did or did not prevail in the family as the authoritative exposition of their law; that there had been that compliance with the rules of procedure in the Courts of the district, and such apparent admissions on record, inconsistent with the prevalence of the Mitacshara as an authority, which might, unless explained, altogether destroy a custom by breaking in upon its continuance; and

that these things might suggest to his own mind, or the minds of those about the testator, the wisdom of not relying on the usage alone: that the testator's imputed neglect of the pecuniary interests of his widow is no greater than that which belongs to any follower of the Mitacshara School, who, having the power to separate from an united family and so to qualify his widow as an heiress, prefers to let the law of his class take its course. And as to the strength of the signature; that two days and part of a third intervened between the execution of the will, and the death; that though weakened by illness, the testator may have rallied his strength to the performance of that short act of signature. As to the character of the witnesses; that the family priest was an attesting witness to the will, and that such an attesting witness might well be supposed, by those at least who placed confidence in him, to be sufficient to save the will from the objection of being attested only by persons unconnected with the family, or too low to give support to such an instrument, whilst the known aversion of persons of respectable position to be connected with cases likely to be the subject of litigation may be one reason why attesting witnesses to Hindoo wills are seldom found to be of a class from which it would be most desirable to select them.

The case of the defendants certainly derives some support from the failure of the case made as to the forgery of the will.

Though the youth and dependent state of the plaintiff herself may be admitted to afford very cogent reasons for not pressing against her those presumptions of acquiescence which similar conduct in a competent adult would give rise to, yet presumptions from the conduct of others cannot, as it has been said, be excluded from the consideration of this case, when the probabilities on either side are weighed.

During the whole of Paresnauth's life no attempt was made by any one to question the validity of this will. Is this consistent with a belief in the family that the widow was the heiress of her husband? It is not alleged that he shared the proceeds with the widow. Could it have been unknown generally to the family and inmates of the house, and those most conversant with the family business, that he was dealing with the property as sole beneficial owner? According to the case of the widow, she immediately on her husband's death became entitled to the usufruct for her life of a considerable estate. Could that be a matter of slight moment to her immediate family? Would there not have been a considerable difference in the estimation of her by others as an heiress, instead of being one entitled merely to a moderate maintenance out of the wealth of another? Yet, according to the statement of herself, two and a half years of silence and uncomplaining non-participation in profits ensue, not only on her own part, but also on the part of her and others, who, knowing her youth and incompetence to the management of business, would be naturally expected to be on the alert to watch over her interests, and to share, in some degree it may be, in the fruits of her succession. The will was proved in the ordinary mode; there is no proof of any alteration in the ordinary mode of notification which must be viewed as ordinarily adequate to give knowledge where knowledge is proper to be given. The notification is said to have been on the house and on the property, yet the whole of the plaintiff's own family is connected with herself in ignorance until after the lapse of two and a half years from the date of an ordinarily sufficing notification.

Is it reasonable to suppose that Paresnauth could stifle all enquiry, and keep secret from the family that he had proved a will publicly, inofficious as it is alleged, and disinheriting a wife, an expectant heiress, between whom and her husband the ordinary friendly relations existed? Such an entire state of ignorance, so improbable and of such long duration, it is most difficult to suppose possible. We find it asserted strongly for the plaintiff, but unfortunately her case is not free from statements some of which, as to the violence designed against

her, seem to be most improbable, one of which, the instrument with the power of adoption, has been abandoned, and another, viz., the proof of the forgery, discredited. She herself, young and inexperienced, is probably not in any way answerable for the management of her own case: but the case, as pleaded, relative to the forgery of the will, is discredited by both Courts, and contains such improbable statements as fully to justify their rejection of it. Again the statement of the plaintiff as to the instrument which accompanied the permission to adopt a son which she alleges that she received, though not improbable in itself, bears still the semblance of an invented story. Her conduct in this matter is not in the least degree consistent with probability nor with duty. If that instrument was prepared, why was it suffered to remain unacted on? If destroyed, as she alleges, by Paresnauth, why should that destruction have prevented proofs of its existence and of the spoliation? Was it not her duty to make the adoption, according to her so urgently recommended that the permission provided for five acts of adoption in succession on failure of each preceding one? If then the Court finds itself compelled to discredit these allegations, what rational ground has it for reposing confidence even on the story of her own continued ignorance, during the lifetime of Paresnauth, of any title adverse to her own? In a suit not instituted by Paresnauth, but which was instituted hostilely to him, to set aside a certain putnee tenure, which suit affords not the slightest ground for a supposition that there was any collusion with him in it, he is found pleading the will, and she repeating that title and praying therefore to be dismissed from that suit. *Prima facie* at least, credit must be given to that pleading, that it proceeds from one who was qualified to represent her. Is the contrary proved? Is any one called to show how that answer came to be filed? Paresnauth is dead; and, after his death, is it to be presumed that he put her answer without her authority on record, that is, that he committed a fraud on the Court, and continued a fraud on her? A Court should not impute fraud; and after the death of Paresnauth nothing should be supposed to his prejudice for which there is not a legal foundation.

Their Lordships therefore, on a review of the grounds on which the High Court has held this will not proved, are compelled to say that they think that the Court had no foundation for treating the will as inofficious in itself, for disregarding the evidence of the Purohit, or for ascribing the answer of the widow to the deceased Paresnauth. The will had been proved, though *ex parte*; it had been acted on very recently after the testator's death, and possession held for a considerable time under it. There appears to have been no desire on the part of Paresnauth to escape from the publicity and responsibility attending the proof of such a document. In fact, it was not drawn into question so long as Paresnauth himself lived. That apparent acquiescence is attempted to be ascribed to a general and enduring ignorance, which is in itself eminently improbable. The will is met by distinct allegations of fraud and forgery, the witnesses to which are discredited by both Courts. Besides this, the case of the plaintiff does, in the several parts of it before commented on, bear the appearance not simply of exaggeration, but of conscious untruth. Whatever might have been the result of this case, had these presumptions in support of the case for the will been wanting, the ordinary support which the failure of an opposing case lends to the case which it impeaches, with the presumptions arising against the opposing case from the introduction into it of matters too grossly improbable for belief, and not the subject of innocent mistake, must be applied, on a review of the whole evidence in the cause, to support the *factum* of this will. Their Lordships think, therefore, that the decision of the High Court must be reversed with costs, and that the decision of the Civil Court of Nuddea should be restored and affirmed, and that the appellants should have the costs of this appeal; and they will humbly certify their opinion to Her Majesty to the above effect.

The 2nd July 1868.

Present :

Sir William Erle, Sir James W. Colvile, Sir Edward Vaughan Williams, Lord Justice Page Wood, Lord Justice Selwyn, and Sir Lawrence Peel.

*Falsehood in a deed—Presumption of fraud—Onus probandi—
High Court's powers—Striking a Solicitor off the rolls.*

On Appeal from the High Court at Calcutta.

In the matter of the petition of Augustus Stewart.

The rule that the intentional statement of a falsehood in a solemn deed taken by itself without explanation betokens fraud until the contrary is shown, and that it is the duty of a Solicitor who has made such a statement to show convincingly the absence of fraudulent motive, can scarcely be applied when a fraudulent motive has not been alleged by any complainant, if the explanation offered be not simply incredible.

There is no such special authority in the High Court as would authorise the striking of a Solicitor off the rolls of the Court where such a step would not be sanctioned by the practice of the Courts in England.

The appellant in this case seeks to reverse an order of the High Court of Judicature in Bengal, made on the 6th May 1867, whereby a rule *nisi* of the 18th April 1867, calling upon the appellant to show cause why his name should not be struck off the roll of Attorneys and Proctors of the Court, was made absolute; and it was ordered that his name should be struck off accordingly. The charge alleged against him by the rule *nisi* was that of misbehaviour in inserting in a deed a false recital as to the consideration, knowing the same to be false, and in attesting the execution of the deed with such false recital, and also in signing his name as a witness to the receipt of the consideration-money therein mentioned, knowing that no consideration had passed or was intended to pass.

The deed in question is dated the 16th February 1863, and purports to be an absolute conveyance by William Molloy Stewart to James Augustus Stewart, of a 4-anna or quarter share in an indigo factory, called Begum Serai, the property of William Molloy Stewart, in consideration of Rs. 32,000. A receipt for that sum is endorsed on the deed, and signed by William Molloy Stewart, and stamp affixed, and the covenants for title and further assurance are the same as would be found if the transaction had been that which the deed represents. Its execution and the receipt of the money are both attested by the appellant. It is admitted by the appellant that the real transaction was of a different character, and the circumstances of the case are stated by him and by the parties to the deed to have been as follows:—The parties to the deed and the appellant are brothers. William Molloy Stewart was the owner of the factory, and is alleged to have been in good credit at the time of the transaction. His brother, the appellant, was an attorney in partnership with Mr. Hatch; a share in that partnership had been purchased for him by his elder brother, William Molloy Stewart. James had for some time assisted William in managing the factory. He had, in 1860, been admitted an attorney, and, about the time of the deed being executed, had been offered a partnership in the firm of Messrs. Barrow and Sen, Attorneys at Calcutta. William was desirous of still retaining his brother's services, and induced him to give up the offer of Messrs. Barrow and Sen, by proposing to make over to him one quarter of the Begum Serai factory. The assent of James to William's proposal formed the real consideration for the assignment made to him on the 16th February: no money-consideration whatever was paid by James.

Mr. Barrow, by his evidence, confirms the statement of this offer of partner-

ship having been made by him to James in July 1862, and of James declining it on the ground of "favorable arrangements having been made with his brother."

It does not appear that at the date of the deed there was any charge on the factory beyond a deposit of title-deeds with Messrs. Thomas and Co., the agents to the factory, for the current outlay, and a balance was in fact then due to the factory on this account. The deed was registered immediately upon its execution; and within a day or two afterwards William borrowed of Mr. Hatch the further sum of Rs. 14,000, of which Rs. 6,000 seem to have formed the consideration for the appellant's share in the partnership, bought for him by William, and a mortgage was executed, the draft of which is produced, by which William mortgaged his 12-anna or three-quarter share only, in the factory. The deed of conveyance of the 16th February did not take any notice of the equitable mortgage to Thomas and Co.; the mortgage to Hatch recites its existence.

After these transactions, William purchased another considerable factory, and took shares in an Indigo Company, whither he went to reside; but James continued to superintend the Begum Serai factory. It is not shown that William was embarrassed till after the failure of the Agra Bank in June 1866. Thomas and Sons also failed about that time; and towards the end of the same year William presented his petition in the Insolvent Debtors' Court.

James in the meantime had continued to manage the factory, and to draw a salary of Rs. 300 a month; but he drew no sum as profits, nor was any division of profits made till after the insolvency of William, when James consigned his one-quarter share of produce to separate agents.

On the 25th March 1867, the Official Assignee under the insolvency of William, summoned the appellant, and James and Mr. Hatch, to be examined before the Insolvent Court as to the insolvent's estate; and on the 13th April 1867, they and the insolvent were examined before Mr. Justice Phear and specially interrogated as to the above transaction.

On the 18th April 1867, the appellant was served with the rule *nisi* of the High Court upon which the order now appealed from is based, which was obtained on the motion of the Advocate-General. The rule purported to be drawn up upon reading the affidavit of Mr. Davis, Chief Clerk of the Insolvent Debtors' Court, and two exhibits, marked A and B, and the examination of William Molloy Stewart, Mr. Hatch, and the appellant, and the deed of conveyance of the 16th January 1863.

Mr. Davis's affidavit merely verified the proceedings before the Insolvent Debtors' Court and the exhibits A and B. A appears to have been the deed of conveyance; B the mortgage to Mr. Hatch.

On this rule having been served, the appellant appeared and filed affidavits in opposition to making the rule absolute.

The affidavits were, *first*, an affidavit by Mr. McLeod, an owner of factories in the Tirhoot district, which deposed to his having known for some years past that James was the owner of a quarter share in the factory, and to his having always believed that it had been given to him by his brother William; *secondly* an affidavit of Mr. Barrow verifying his offer of a share in his business to James Stewart, who had assigned, as a reason for declining it, that he had an offer of a favorable arrangement with his brother; 3, 4, and 5 affidavits of the three brothers. Certain accounts of Thomas and Sons were produced showing a balance of 24,544 rupees 6 annas 2 pies due to the factory in February 1863, over and above a sum exceeding Rs. 2,000 paid to William M. Stewart's credit at his bankers. An exhibit B was also produced, being the draft of the mortgage to Hatch, originally prepared as a mortgage by the two brothers William and James, of the whole factory, and afterwards altered to a mortgage of the 12 annas or three-quarter share of William only.

The appellant states in his affidavit that the form in which the deed was

drawn was suggested by William Molloy Stewart, who alleged as his sole motive for desiring it to be drawn as a sale for a money-consideration, his wish to put a value on the factory, the same being then a new one. The appellant states that he was not aware of any other object; that he believed, and believes it to be a fair estimate; that his brother William was not indebted beyond Rs. 20,000, and had, at the date of the deed, property of a value far above the amount of his debts, as to which he states some particulars. He states the immediate registering of the deed—the mortgage to Hatch—and says that, in preparing and attesting the execution of the deed, and attesting the endorsed receipt, he had no fraudulent or dishonest intention of any kind whatever, and that nothing, either directly or indirectly, passed between him and his brother William to lead him to suppose that William contemplated, and he does not believe that he contemplated, any fraud directly or indirectly. James, in his affidavit, says that he was not aware of the form of the deed till after its execution. In his examination before the Insolvent Court he had said he had wrote a letter about it, and that he thought it would have been better if the consideration had appeared; that letter cannot be found. In his affidavit he denies all intention of fraud, and says he is *bond fide* owner of the property. William also, in his affidavit, denies all fraud, and makes a statement as to his estate, which, if true, would show him at the date of the deed to have possessed considerable property; and both agree in stating the real consideration to have been the consent of James to give up the offer of Mr. Barrow, and to attend to the management of the factory.

No evidence whatever was given impugning the statements contained in these affidavits. No evidence has been given of any person having been defrauded by any of the brothers, nor of any improper use of the deed having been attempted. Nor does the Assignee in Insolvency make any complaint, or impugn the actual ownership of the property, to the extent of one-quarter, by James. The deed was registered. McLeod speaks of the notoriety of the claim; at least, of ownership, by James; and Hatch took a mortgage of three-fourths on the footing of James being the owner of the other one-fourth within a day or two of the execution of the deed of conveyance.

Under these circumstances, the Chief Justice and Mr. Justice Phear have thought that the appellant ought to be struck off the list of Attorneys and Proctors of his Court. The Chief Justice, in the reasons which he assigned for this conclusion, states “that the insertion of the recital and statement admitted to be false, and known by all parties to be false, and which might be used for the purpose of misleading others, was a very grave offence on the part of the Attorney. The offence is greatly aggravated if it is proved that the recital was inserted dishonestly, or in order that it might be used for a fraudulent or dishonest purpose if necessity should ever arise.” And at a later part of his reasons the Chief Justice says: “I do not believe that Mr. Augustus Stewart acted honestly or innocently in inserting in the deed the false statements which are contained in it, and in attesting the execution of the deed, when he knew the statements were false, together with the false receipt for the Rs. 32,000.” The Chief Justice cites also s. 428 of the Indian Penal Code, which punishes with fine or imprisonment, or both, any one “who dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or charge property, and which contains any false statements relating to the consideration for such transfer or charge, or relating to the person for whose use it is really intended to operate.”

Mr. Justice Phear in his reasons states “that the intentional statement of a falsehood in a solemn deed taken by itself without explanation must be considered as a badge of fraud;” adding “that it is, of course, possible to conceive cases in which the act should be unconnected with any fraudulent intention; but that if the person who has made such a statement relies on its having been done inno-

cently, it is for him to prove it; that it betokens fraud until the contrary is shown." And in a later passage he says that "it is incumbent upon the officer of the Court who has done such acts as the appellant admits he has done, to show not merely that it is not certain after all that the act was not an innocent one rather than a fraud, but that he is bound to go further, and show convincingly that he was in fact acting innocently in the matter, with no fraudulent motive or motives of misconduct." The learned Judge concludes by observing "that the powers of the High Court could, if they thought it reasonable (even though such a cause might not, according to the reports of cases in England, have seemed as yet to have been judicially recognised by the Superior Courts of Westminster as a cause of punishment), remove or suspend from practice an Attorney of the Court."

Mr. Justice Norman concurred with the other learned Judges in thinking "that the appellant had been guilty of a very great and serious irregularity and impropriety, which, whatever views were taken of the motives which actuated him, would justify the Court in visiting him with severe penalties." He conceived, however, that on a question of striking an Attorney off the roll "the clearest distinction exists between cases where an Attorney misconducts himself for fraudulent purposes, and those where such misconduct or irregularity, however grave, is not committed with the intent of defrauding his client or injuring others." He further says: "I should require the fraud or the crime to be as distinctly proved against him as if he stood upon his trial at the bar of a Criminal Court for the offence." He finally came to the conclusion that the false statement was, in fact, not made with intent to injure or defraud any one, and with still more confidence that on the evidence no such intent had been proved; and he accordingly suggested suspension as an adequate punishment.

Their Lordships feel bound, on the consideration of the whole evidence before them, to come to the conclusion that the order complained of ought to be discharged.

They are of opinion that the preparation of the deed of conveyance containing an untrue statement of the transaction, and the attesting of the deed, and of a receipt for consideration-money which was never paid, would be circumstances of great, perhaps overpowering weight, as evidence of guilty connivance against a Solicitor cognizant of the actual facts, in the event of such a deed, upon or soon after its execution, being used as an instrument of fraud. They are further of opinion that any Solicitor may very properly be called upon by the Court before whom such a deed shall have been produced, to explain the circumstances attending its preparation and execution. But if this explanation be given; if it be supported by evidence; if no counter-evidence be offered; if no fraudulent use of the instrument complained of has ever been made or attempted; and no person has complained of any injury directly or indirectly caused by it,—we think that, however objectionable the practice may be of permitting, for any reason whatever, a deliberate mis-statement of facts upon the face of a deed, yet such practice, unfortunately by no means unfrequent, cannot be considered sufficient in itself to warrant the striking of the practitioner off the rolls.

Even assuming the correctness of the view taken by Mr. Justice Phear of the Solicitor's duty, namely, that of showing convincingly the absence of fraudulent motive, yet when a fraudulent motive has not been alleged by any complainant, such a rule can scarcely be applied if the explanation offered be not simply incredible.

Deeds are constantly prepared, which on the face of them deal with the parties as interested, who are, in effect, only trustees for others; and the knowledge of such a practice probably influenced the framers of the Code in preparing the enactment referred to by the Chief Justice; for they confined its penal provisions to "fraudulent and dishonest" participation in such an instrument.

It appears to their Lordships on the evidence in the present case, that James was intended to become, and did become, the *bonâ fide* owner of the quarter share.

Mr. Barrow confirms the statement as to the circumstances under which he became such owner. Publicity as to the ownership was immediately given. There was no reason for representing him to be such owner with a view to protect William against his creditors. The deed was acted upon at the time of the mortgage to Hatch as if William had parted with a one-quarter share. James was (as is stated by McLeod) in possession not only as manager, but as the recognised owner of a share, and no one up to the present hour disputes the validity of that ownership. It does not seem, therefore, that any suspicion in such a state of circumstances can arise to displace the reality of the transfer made.

The reasons assigned for the false statements, though unsatisfactory, had any fraud whatever followed upon the transaction, are not inconsistent with the possibility of honest motives. Though James gave a consideration for his share in the shape of services only, yet if the share were really worth Rs. 32,000 (and no evidence to the contrary was offered), it exceeded probably the value of his services, and his brother might be desirous to mark the fact of his bounty. Besides this, the condition requiring James to offer his share to his brother before parting with it to a stranger, would afford some ground for stating an estimated value. It is said that the deed contained no covenant by James to continue his management; but if the property were, as it seems to have been, flourishing, such a circumstance alone would afford an adequate motive for his continuing as owner, and the condition as to offering the share to his brother would prevent an immediate sale.

The absence of any mention of the deposit with Thomas and Son to secure the floating debt due to them as agents on the purchase deed, as contrasted with the mention of it in the mortgage, is consistent with honesty. It was necessary to inform the mortgagee of all charges, but it was not necessary to inform the person purchasing the business of that which was really a security usual in the ordinary course of business.

The fact that James received no profits whilst he had a monthly salary as manager seems to their Lordships to throw no doubt on the transaction.

Their Lordships are not aware of such special authority as appears to be referred to by Mr. Justice Phear, as would authorise the striking of the appellant off the rolls of the High Court, where such a step would not be sanctioned by the practice of the Courts in England.

They desire expressly to state that they do not, in recommending to Her Majesty the discharge of this order, in any way sanction the propriety of deeds being prepared which on the face of them are inconsistent with fact, and wish simply to express the opinion that, upon the evidence, the irregularity was wholly unconnected with any intention to defraud, and does not, therefore, justify the penalty inflicted.

The 17th July 1868.

Present :

The Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, the Lord Chief Baron, and Sir Lawrence Peel.

Hiddoo Law—Mitacshara—Viromitrodataya—Bundhoos—Father's maternal uncle—King.

*On Appeal from the High Court at Calcutta.**

* 30th August 1865 (Present : Trevor, Offg. C. J., and Campbell, J.). See 4 W. R., p. 13.

Gridhari Lall Roy
versus
 The Government of Bengal.

HELD, that the list of Bundhoos given in Article 1 s. 6 chap. 2 of the Mitacshara is not exhaustive, but simply illustrative of the proposition that there are three classes of Bundhoos,—and that a person's father's maternal uncle is a Bundhoo, and as such entitled to inherit in preference to the King, who cannot take to the prejudice of a maternal uncle or a maternal grand-uncle.

The Viromitrodataya is properly receivable as an exposition of what may have been left doubtful by the Mitacshara, and is declaratory of the law of the Benares School.

The facts on which the determination of this appeal depends are few and undisputed. Woopendro Chunder Roy, the owner of the zemindary and other property in dispute, died on the 7th August 1860, an infant and unmarried. He was of a family which had formerly come from the Upper Provinces, and, though settled in Lower Bengal, where the zemindary is situated, is admitted to have retained the ceremonial and other law of its original *habitat*. There is, therefore, no dispute that any question touching the succession to Woopendro Roy is determinable by the law of inheritance current at Benares.

On Woopendro's death the appellant, as the nearest male relative surviving him, performed his shroud, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the zemindary on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the brother of his grandmother *ex-parte paternâ*, or, to use the phraseology of the Mitacshara, his father's maternal uncle. And accordingly, at the time of this application for mutation of names, some question whether the appellant was entitled to inherit and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a Pundit which he had procured through the Registrar of the High Court, determined to recognise the title of the appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the zemindary in the Collector's books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863 the Government authorities appear to have changed; for reasons which have not been explained; their view of the appellant's title; and on the 3rd August in that year the suit out of which this appeal has arisen was commenced against him in the name of the Government of Bengal, as representing the Crown, for the recovery of the real and personal property of Woopendro on the allegation that upon his death it had escheated for want of heirs to the Crown.

By a decree dated the 30th September 1864, the Zillah Judge dismissed the suit, holding that the Government was not entitled to oust the appellant. The precise grounds of his judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the present appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were :—

First.—That the Government was not estopped by the acts of its officers in 1861, when the appellant applied for and obtained the mutation of names, from bringing this suit.

Second.—That upon the true construction of the section in the Mitacshara, which will be hereafter considered, the appellant, as the maternal uncle of the father of the deceased, was excluded from the class of "Bundhoos" capable of inheriting; and that consequently, as between him and the Government, he had no title to the property sued for.

Upon these findings the Court decreed that Government should obtain possession of all the real property admittedly in the appellant's possession, with a certain specified exception; but that, for want of proof as to its value, their claim

to the moveable property should be dismissed; and the judgment then proceeded as follows:—

“The decree of Government against Gridhari is final, but it does not become absolute until the claims of Sohun Lall and Mohun Lall, who represent themselves to be maternal grandmother's sister's sons, and that of Harro Bhoja Misser, the spiritual preceptor of the deceased, have been enquired into.

“The last-named person has filed no evidence, but his claim cannot be determined until that of Sohun Lall and Mohun Lall has been set at rest, and they have filed no evidence at all. They, as well as the Acharjee or spiritual preceptor, do not oppose the defendant Gridhari's claim, but only prefer a claim in case his is declared to be invalid; and if they prove themselves to be what they allege they are, they are undoubtedly entitled to succeed as enumerated Bundhoos.

“The case must therefore be remitted to the Judge, with instructions that he will without delay take up the case, and call on these parties and any others who may appear to claim the property of the deceased minor within a reasonable time, to file their evidence. He will then examine it thoroughly, and, guided by his estimate of it, and by Hindoo law, he will either confirm the present order in favor of Government as against them also, or pass in their favor whatever decree the law of the case seems to require.”

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, viz., whether under the law current at Benares the appellant has not a title to inherit the property preferable to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the Mitacshara. The absolute exclusion of the father's maternal uncle from the list of possible heirs, for which the respondents contend, can rest on no other ground.

Mr. Forsyth, indeed, argued strongly against the right of the appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded? There is evidence of the family priest and others that the appellant did, in point of fact, perform the *shraud* of Woopendro; and he seems, in the judgment of the priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Woopendro at the time of his death had been, not the appellant, but a natural-born son of the appellant. It is admitted that, on the strictest interpretation of the Mitacshara, such a person is a Bundhoo; that the three classes of Bundhoos must be exhausted before the King can take for want of heirs; and therefore that the title of the appellant's son would prevail against the Crown. Now, such a Bundhoo either is competent to perform the *shraud* of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows *à fortiori* that his father, who would have been one degree nearer akin to the deceased, would also have been competent: and that *his* exclusion from the line of inheritance, if it exists, depends upon some other principle.

It is impossible to read the second chapter of the Mitacshara without remarking the extreme jealousy with which the Hindoo law regarded the right of the King to take on a failure of heirs. The 7th section refuses altogether to recognise that right where the property was that of a Brahman. Admitting it as to the property of the other castes or classes, it expressly says, “*if there be*

no relations of the deceased, the preceptor, or, on failure of him, the pupil ;” and again, “ if there be no pupil, the fellow student is the successor.” It thus exhausts the relatives, and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards stated affirmatively, thus : “ The King may take the estate of a *Cshatriya* or other person of an inferior tribe, on failure of heirs down to the fellow-student.” So Menu ordains :—“ But the wealth of the other classes on failure of all (heirs), the King may take.” So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal uncle, or a maternal grand-uncle, each of whom is obviously “ a relation ” of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs ? That section begins by stating broadly, “ On failure of gentiles, the Bundhoos (rendered by Mr. Colebrooke ‘ cognates ’) are heirs.” Much has been said about this word “ Bundhoo.” It seems (see note at p. 350 of Mr. Colebrooke’s translation of the *Mitacshara*) to be sometimes used as equivalent to “ kinsmen ” generally. But, in this particular section it may be taken, as defined elsewhere by the *Mitacshara* itself, to import kinsmen springing from a different family (and therefore opposed to “ *gotraya* ” or “ gentiles ”) and connected by funeral oblations. From this class the maternal uncle, or the father’s maternal uncle (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. Such a definition the respondents contend is found in the passage which immediately follows the last citation from the *Mitacshara*. But is that necessarily so ? The author of that treatise goes on to state, “ Cognates (Bundhoo) are of three kinds ; related to the person himself, to his father, or to his mother, as is declared by the following text.” And then follows, as a quotation, a more ancient text (the authorship of which seems, from Mr. Colebrooke’s note, to be uncertain), which says, “ The sons of his own father’s sister, the sons of his own mother’s sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father’s paternal aunt, the sons of his father’s maternal aunt, and the sons of his father’s maternal uncle, must be deemed his father’s cognate kindred. The sons of his mother’s paternal aunt, the sons of his mother’s maternal aunt, and the sons of his mother’s maternal uncle, must be reckoned amongst his mother’s cognate kindred.”

This subdivision of Bundhoos into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be that the Bundhoos of the parent, though connected with him by funeral oblations, would, by reason of remoteness of kinship, not be so connected with the son.

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the *Mitacshara*, they would feel great difficulty in inferring, from the omission of “ the maternal uncle ” and “ the father’s maternal uncle ” from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindoo in preference of the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all Bundhoos who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the *Mitacshara*—it is used simply as a proof or illustration of his proposition that there are three kinds or classes of Bundhoos ; and all that he states further upon it is the order in which the three classes take, viz., that the Bundhoos of the deceased himself must be exhausted before any of his father’s Bundhoos can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the *Mitacshara*, which is not found in that portion of the treatise

which was translated by Mr. Colebrooke, but has been translated for the purposes of this suit, and is stated at page 97 of the record. The general effect of that passage is to introduce, in the case of a trader dying abroad, a new class of remote heirs, viz., his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes among Bundhoos the maternal uncle. Here, then, is a passage, written by the author of the Mitacshara himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitacshara the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitacshara alone. Adhering to the principles which this Board lately laid down in the Ramnad case,* their Lordships have no doubt that the Viromitrodaya, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitacshara, and declaratory of the law of the Benares School.

The passage cited from that commentary at page 15 of the record, and more fully in 9 Sevestre's Reports of cases in the High Court, page 552,† is explicit. After stating that the term "*Sakulya*," or distant kinsman, found in the text of Menu, comprehends the three kinds of cognates, the commentator goes on to say, "The term cognates (Bundhoos) in the text of *Jogishwara* must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity, a doctrine highly objectionable." The passage as translated at page 15 of the Record, has "*then they themselves*" in place of "*not they themselves*." If this be the correct reading, it would follow that even if the exclusion of the maternal uncle and others not mentioned in the text relied upon by the respondents from the list of Bundhoos were established, they would still, as relations, be heirs whose title would be preferable to that of the King. But the passage on either view of it declares that they are not so excluded: and it is therefore unnecessary to consider whether the title of any remote relation who could not be brought within the category of Bundhoos, or other class of heirs specified by the Mitacshara would prevail against that of the Crown. The learned Counsel for the respondents remarked that this passage of the Viromitrodaya goes no further than to affirm the right of a maternal uncle, and that it says nothing of a maternal grand-uncle. But to say nothing of the use of the term "and the rest," the text is at least an authority for the proposition that a maternal uncle is a Bundhoo. The maternal uncle of the father is therefore a Bundhoo of the father, and it is admitted that, failing the Bundhoos of the deceased, the Bundhoos of the father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted Pundits. It seems also to make the law of the Benares School consistent on the point in question with that of Bengal; and the concurrence of opinions of Mitra-misra, the author of the Viromitrodaya with Jimuta Vahana, the author of the *Dayabhaga*, is not unimportant, since they are stated by Mr. Colebrooke (Preface, p. 8) to differ on almost every disputed point of Hindoo law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of Bundhoo in the text quoted

* See 10 W. R. P. C. 17, and p. 135 *ante*.

† Case of *Amrito Kumari v. Luckynarian Chuckerbutty*, cited lower down in this judgment, and reported in 10 W. R. F. B. 76.

in the Mitacshara is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of *Amrito Kumari v. Luckynarain Chuckerbutty*.* The question under consideration must therefore be held to be an open one even in the Courts of India.

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the appellant was capable of inheriting the property in dispute; and that his title thereto is preferable to that of the Crown; and therefore, without adopting the reasons given for his judgment, they think that the Zillah Judge did right in dismissing the suit. This conclusion necessarily disposes of this appeal. Their Lordships, however, deem it right to add that, even had they agreed with the learned Judges of the High Court in their view of the Law of Inheritance, they could not have concurred in the decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question whether the proceedings in 1861 estopped the Government from bringing this suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The respondents, therefore, were in the position of plaintiffs in an ordinary suit in the nature of an ejectment. They could only recover by the strength of their own title. Accordingly, it lay upon them to prove at least *prima facie* that Woopendro died without heirs; and, on the other hand, the appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the respondents' suit; and the title of those persons who, he says, are, failing himself, the heirs to Woopendro, has never yet been determined. The decree under appeal would remit the cause to the Judge in order to allow those persons who, according to the practice in India, have intervened as objectors, to litigate their title with Government, casting apparently the burden of proof on them. But it seems to deprive the appellant of his right to defend his possession on the ground of an existing *jus tertii*.

It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the appellant's own title obliges them humbly to recommend to Her Majesty that the decree of the High Court be reversed, and that in lieu thereof it be ordered that the appeal to the High Court from the decree of the Zillah Judge be dismissed with costs. The respondents must pay the costs of this appeal.

The 17th July 1868.

Present :

The Master of the Rolls, Sir James W. Colvile, Sir E. Vaughan Williams, the Lord Chief Baron, and Sir Lawrence Peel.

Arbitration—Submission to award—Revocation of authority.

On Appeal from the High Court at Madras.

Pestonjee Nesserwanjee

versus

D. Manockjee and Co.

According to the proper construction of the Code of Civil Procedure (that is to say, construing it with reference to the constitution of the Civil Courts of India and the abiding direction to them to proceed in all cases according to equity and good conscience), when persons have agreed to submit the

* See *ante*.

matter in difference between them to the arbitration of one or more specified persons, no party to the agreement can revoke the submission to arbitration unless for good cause, and a mere arbitrary revocation of the authority is not permitted.

Where no time was originally fixed within which the award was to be made, it is open to either party to hasten the proceeding by giving notice to the arbitrators that the award must be made, and an umpire appointed within a reasonable time; but where the time elapsing after the notice has been actively employed by the arbitrators, and the delay has been owing to necessity which they could not control, the parties cannot recede from their submission by reason of the notice.

This is an appeal from three orders of the High Court of Judicature at Madras. The question in substance is, whether the award of Mr. Schlunk settling matters in difference between the appellant and the respondent is valid and binding on the parties. The facts which raise the question may be stated very shortly.

On the 29th October 1863, the appellant and respondent entered into a partnership in certain farms of taxes imposed on spirituous liquors within certain districts in the Presidency of Madras. The appellant was to supply the capital required, and the respondent was to manage the business. Certain differences arose between them; and on the 10th January 1864, they agreed that arbitrators should be appointed to settle these differences. Accordingly this was done by an agreement in writing for submission to arbitration, bearing date the 10th March 1864. Originally Mr. Pierce and Mr. Bates were appointed arbitrators, but Mr. Pierce refusing to act, Mr. Punnett was appointed in his place. The terms of the agreement are to this effect:—

“Know all men by these present, that we the undersigned, Pestonjee Nesserwanjee, of the firm of Framjee Nesserwanjee and Co., and D. Manockjee and Co., do make, constitute, and appoint R. H. Pierce, Esquire, and W. Bates, Esquire, gentlemen, as arbitrators, chosen by our mutual consent, to inquire into certain controversies and differences existing between us in regard to our copartnership in the transactions of the Abkary Farms of the Calicut, Kurumbranad, Palghat, and Ponany Taluqs, and Mannur and Payenjanur Amshoons, of the Ernad Talug, rented from Government, giving, and by these presents granting unto the abovesaid R. H. Pierce, Esquire, and W. Bates, Esquire, full power to substitute or appoint one or more arbitrator or arbitrators, as well as, if necessary, an umpire; and further, to call for and examine the books and papers of the said copartnership, as also any party or parties connected with the farms, and others, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely.”

It contains the following memorandum at the foot:—

“N.B.—We the undersigned, P. N., of the firm of Framjee Nesserwanjee and Co., and D. Manockjee and Co., have executed this power made in conformity with the provisions of s. 327 of Act VIII of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within mentioned duly empowered arbitrators may give under the aforesaid Act.”

On the 15th July 1864, the arbitrators made an intermediate award, dissolving the partnership, and giving the business to the appellant.

On the same day a notice signed by both parties was publicly given of this fact, and which stated that all debts due to them by the Abkary farm were to be received and paid by Framjee Nusserwanjee and Co., and that the respondent had no longer any interest therein.

On the 3rd October 1864, the appellant wrote to the arbitrators, complaining of the conduct of the respondent relative to the making up of the accounts.

On the 13th May 1865, the arbitrators came to a resolution, which was a second intermediate award, directing that the farm outstandings due from the Ponany, Chowghaut, and Betatanad divisions should be taken by the defendant at 50 per cent. discount; it is in these words:—

“Resolved, that the farm outstandings due from the Ponany, Chowghaut, and Betatanad divisions, as they stood in the farm books on the 30th June 1864, as per balance sheet, be taken over by Messrs. Dhunjeebhoy Manockjee and Co., or their nominee, at 50 per cent. discount, they receiving credit for all sums since recovered, less any regular expenses, and paying the amount as may be hereafter decided by us.”

On the 6th July 1865, Mr. Punnett, one of the arbitrators, published a long written opinion on the subject of the remaining points that remained to be disposed of by the arbitrators under the submission to arbitration.

On the 24th July, the appellant wrote to the arbitrators and requested them to make their award in ten days, or that if they were unable to do so, they would nominate an umpire.

This was not done, and on the 5th August 1865, the Solicitor of the appellant wrote a letter to the Solicitor of the respondents purporting to cancel the award, and he also sent in similar letters to the arbitrators. On the same day Mr. Bates, the other arbitrator, gave his written opinion on the remaining points referred to therein, stating in substance his differences from Mr. Punnett.

On the 12th August 1865, a further notice was given by the appellant requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett and another by Mr. Bates, the last on the 7th September 1865; and Mr. Schlunk (who was afterwards appointed umpire, but who seems to have been already selected for that purpose by the arbitrators), on the 12th September 1865 made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two arbitrators.

On the 22nd September 1865, the Civil Court ordered the submission to arbitration to be filed under the provision of the 326th Section of the Civil Procedure Code of India.

The appellant insists that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under s. 326 of the Code of Civil Procedure, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd September, the day on which this decision was pronounced, Mr. Schlunk was appointed umpire by the arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th October 1868, and on the 17th October Mr. Schlunk made his final award in favor of the respondents. The order of the 22nd September of the Civil Judge was appealed from and confirmed by the order of the High Court of Judicature on the 15th January 1866. The appellant then presented a petition to set aside the award on five grounds, which was dismissed on the ground of being too late; and the final award of Mr. Schlunk was confirmed and carried into execution by the decree of the Civil Judge on 9th October 1866. The appellant petitioned for leave to appeal from the decision, which petition was dismissed by order of the High Court on the 7th January 1867. On the same day the High Court of Judicature at Madras affirmed the decision of the Civil Judge of the 6th October 1865, confirming the appointment of Mr. Schlunk as umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is whether the Court had jurisdiction under s. 326 of the Code of Civil Procedure in India, to direct the submission to arbitration to be filed. Their Lordships are of opinion that, upon a proper construction of the sections of that Code relating to this subject, they had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of these Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience.

The 326th section is to this effect:—

“ When any person shall by an instrument in writing agree that any differences between them or any of them shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested, or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been

presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed, and an order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court, and to the award of arbitration, and to the enforcement of such award."

Although this section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion that this submission to arbitration was entered into subject to the provisions of this Code, and that the memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was to be subject to the Act, and that this special notice of s. 327 as to the enforcement of the decision of the arbitrators was introduced only *ex majori cautela* for the purpose of expressing what without such expression would nevertheless have been implied.

Their Lordships are of opinion that, according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to this agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration on the same footing as all other lawful agreements by which the parties to it are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are therefore of opinion that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred.

It remains to be considered whether the circumstances of this case justified him in doing so, and sending the letter of the 5th August 1865.

This is founded solely on the delay.

On the 24th July 1865, the appellant wrote to the arbitrators, and required that in ten days from that date they would make their award and appoint an umpire, and this not being done, after waiting for ten clear days, he sent the notice of the 5th August 1865. If nothing whatever had occurred since the appointment of the arbitrators in June 1864, and all matters between the appellant and the respondent had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think that this delay of the arbitrators would have justified the course which the appellant adopted. But in truth the facts disclose a very different course of proceeding. In July 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th July 1865.

A second decision of the arbitrators relative to the Ponany farms was made in May 1865, and acquiesced in by both parties, appellant and respondent.

A notice to the arbitrators to make their award and to appoint an umpire in

On the 24th July, the appellant wrote to the arbitrators and requested them to make their award in ten days, or that if they were unable to do so, they would nominate an umpire.

This was not done, and on the 5th August 1865, the Solicitor of the appellant wrote a letter to the Solicitor of the respondents purporting to cancel the award, and he also sent in similar letters to the arbitrators. On the same day Mr. Bates, the other arbitrator, gave his written opinion on the remaining points referred to therein, stating in substance his differences from Mr. Punnett.

On the 12th August 1865, a further notice was given by the appellant requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett and another by Mr. Bates, the last on the 7th September 1865; and Mr. Schlunk (who was afterwards appointed umpire, but who seems to have been already selected for that purpose by the arbitrators), on the 12th September 1865 made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two arbitrators.

On the 22nd September 1865, the Civil Court ordered the submission to arbitration to be filed under the provision of the 326th Section of the Civil Procedure Code of India.

The appellant insists that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under s. 326 of the Code of Civil Procedure, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd September, the day on which this decision was pronounced, Mr. Schlunk was appointed umpire by the arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th October 1868, and on the 17th October Mr. Schlunk made his final award in favor of the respondents. The order of the 22nd September of the Civil Judge was appealed from and confirmed by the order of the High Court of Judicature on the 15th January 1866. The appellant then presented a petition to set aside the award on five grounds, which was dismissed on the ground of being too late; and the final award of Mr. Schlunk was confirmed and carried into execution by the decree of the Civil Judge on 9th October 1866. The appellant petitioned for leave to appeal from the decision, which petition was dismissed by order of the High Court on the 7th January 1867. On the same day the High Court of Judicature at Madras affirmed the decision of the Civil Judge of the 6th October 1865, confirming the appointment of Mr. Schlunk as umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is whether the Court had jurisdiction under s. 326 of the Code of Civil Procedure in India, to direct the submission to arbitration to be filed. Their Lordships are of opinion that, upon a proper construction of the sections of that Code relating to this subject, they had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of these Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience.

The 326th section is to this effect:—

“ When any person shall by an instrument in writing agree that any differences between them or any of them shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested, or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been

presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed, and an order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court, and to the award of arbitration, and to the enforcement of such award."

Although this section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion that this submission to arbitration was entered into subject to the provisions of this Code, and that the memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was to be subject to the Act, and that this special notice of s. 327 as to the enforcement of the decision of the arbitrators was introduced only *ex majori cautela* for the purpose of expressing what without such expression would nevertheless have been implied.

Their Lordships are of opinion that, according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to this agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration on the same footing as all other lawful agreements by which the parties to it are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are therefore of opinion that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred.

It remains to be considered whether the circumstances of this case justified him in doing so, and sending the letter of the 5th August 1865.

This is founded solely on the delay.

On the 24th July 1865, the appellant wrote to the arbitrators, and required that in ten days from that date they would make their award and appoint an umpire, and this not being done, after waiting for ten clear days, he sent the notice of the 5th August 1865. If nothing whatever had occurred since the appointment of the arbitrators in June 1864, and all matters between the appellant and the respondent had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think that this delay of the arbitrators would have justified the course which the appellant adopted. But in truth the facts disclose a very different course of proceeding. In July 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th July 1865.

A second decision of the arbitrators relative to the Ponany farms was made in May 1865, and acquiesced in by both parties, appellant and respondent.

A notice to the arbitrators to make their award and to appoint an umpire in

On the 24th July, the appellant wrote to the arbitrators and requested them to make their award in ten days, or that if they were unable to do so, they would nominate an umpire.

This was not done, and on the 5th August 1865, the Solicitor of the appellant wrote a letter to the Solicitor of the respondents purporting to cancel the award, and he also sent in similar letters to the arbitrators. On the same day Mr. Bates, the other arbitrator, gave his written opinion on the remaining points referred to therein, stating in substance his differences from Mr. Punnett.

On the 12th August 1865, a further notice was given by the appellant requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett and another by Mr. Bates, the last on the 7th September 1865; and Mr. Schlunk (who was afterwards appointed umpire, but who seems to have been already selected for that purpose by the arbitrators), on the 12th September 1865 made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two arbitrators.

On the 22nd September 1865, the Civil Court ordered the submission to arbitration to be filed under the provision of the 326th Section of the Civil Procedure Code of India.

The appellant insists that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under s. 326 of the Code of Civil Procedure, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd September, the day on which this decision was pronounced, Mr. Schlunk was appointed umpire by the arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th October 1866, and on the 17th October Mr. Schlunk made his final award in favor of the respondents. The order of the 22nd September of the Civil Judge was appealed from and confirmed by the order of the High Court of Judicature on the 15th January 1866. The appellant then presented a petition to set aside the award on five grounds, which was dismissed on the ground of being too late; and the final award of Mr. Schlunk was confirmed and carried into execution by the decree of the Civil Judge on 9th October 1866. The appellant petitioned for leave to appeal from the decision, which petition was dismissed by order of the High Court on the 7th January 1867. On the same day the High Court of Judicature at Madras affirmed the decision of the Civil Judge of the 6th October 1865, confirming the appointment of Mr. Schlunk as umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is whether the Court had jurisdiction under s. 326 of the Code of Civil Procedure in India, to direct the submission to arbitration to be filed. Their Lordships are of opinion that, upon a proper construction of the sections of that Code relating to this subject, they had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of these Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience.

The 326th section is to this effect:—

“ When any person shall by an instrument in writing agree that any differences between them or any of them shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested, or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been

presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed, and an order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court, and to the award of arbitration, and to the enforcement of such award."

Although this section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion that this submission to arbitration was entered into subject to the provisions of this Code, and that the memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was to be subject to the Act, and that this special notice of s. 327 as to the enforcement of the decision of the arbitrators was introduced only *ex majori cautela* for the purpose of expressing what without such expression would nevertheless have been implied.

Their Lordships are of opinion that, according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to this agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration on the same footing as all other lawful agreements by which the parties to it are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are therefore of opinion that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred.

It remains to be considered whether the circumstances of this case justified him in doing so, and sending the letter of the 5th August 1865.

This is founded solely on the delay.

On the 24th July 1865, the appellant wrote to the arbitrators, and required that in ten days from that date they would make their award and appoint an umpire, and this not being done, after waiting for ten clear days, he sent the notice of the 5th August 1865. If nothing whatever had occurred since the appointment of the arbitrators in June 1864, and all matters between the appellant and the respondent had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think that this delay of the arbitrators would have justified the course which the appellant adopted. But in truth the facts disclose a very different course of proceeding. In July 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th July 1865.

A second decision of the arbitrators relative to the Ponany farms was made in May 1865, and acquiesced in by both parties, appellant and respondent.

A notice to the arbitrators to make their award and to appoint an umpire in

On the 24th July, the appellant wrote to the arbitrators and requested them to make their award in ten days, or that if they were unable to do so, they would nominate an umpire.

This was not done, and on the 5th August 1865, the Solicitor of the appellant wrote a letter to the Solicitor of the respondents purporting to cancel the award, and he also sent in similar letters to the arbitrators. On the same day Mr. Bates, the other arbitrator, gave his written opinion on the remaining points referred to therein, stating in substance his differences from Mr. Punnett.

On the 12th August 1865, a further notice was given by the appellant requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett and another by Mr. Bates, the last on the 7th September 1865; and Mr. Schlunk (who was afterwards appointed umpire, but who seems to have been already selected for that purpose by the arbitrators), on the 12th September 1865 made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two arbitrators.

On the 22nd September 1865, the Civil Court ordered the submission to arbitration to be filed under the provision of the 326th Section of the Civil Procedure Code of India.

The appellant insists that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under s. 326 of the Code of Civil Procedure, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd September, the day on which this decision was pronounced, Mr. Schlunk was appointed umpire by the arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th October 1868, and on the 17th October Mr. Schlunk made his final award in favor of the respondents. The order of the 22nd September of the Civil Judge was appealed from and confirmed by the order of the High Court of Judicature on the 15th January 1866. The appellant then presented a petition to set aside the award on five grounds, which was dismissed on the ground of being too late; and the final award of Mr. Schlunk was confirmed and carried into execution by the decree of the Civil Judge on 9th October 1866. The appellant petitioned for leave to appeal from the decision, which petition was dismissed by order of the High Court on the 7th January 1867. On the same day the High Court of Judicature at Madras affirmed the decision of the Civil Judge of the 6th October 1865, confirming the appointment of Mr. Schlunk as umpire. The present appeal is brought from all these three decisions of the High Court of Judicature.

The first question is whether the Court had jurisdiction under s. 326 of the Code of Civil Procedure in India, to direct the submission to arbitration to be filed. Their Lordships are of opinion that, upon a proper construction of the sections of that Code relating to this subject, they had that jurisdiction. The Code, which is one of procedure, and the Act enacting it, must be construed with reference to the constitution of these Courts, and the abiding direction to them to proceed in all cases according to equity and good conscience.

The 326th section is to this effect:—

“ When any person shall by an instrument in writing agree that any differences between them or any of them shall be referred to the arbitration of any person or persons named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which it relates, application may be made by the parties thereto, or any of them, that the agreement be filed in such Court. On such application being made, the Court shall direct such notice to be given to any of the parties to the agreement, other than the applicants, as it may think necessary, requiring such parties to show cause, within a time to be specified, why the agreement should not be filed. The application shall be written on a stamp paper of one-fourth of the value prescribed for plaints in suits, and shall be numbered and registered as a suit between some or one of the parties interested, or claiming to be interested as plaintiffs or plaintiff, and the others or other of them as defendants or defendant, if the application have been

presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants. If no sufficient cause be shown against the agreement, the agreement shall be filed, and an order of reference to arbitration shall be made thereon. The several provisions of this chapter, so far as they are not inconsistent with the terms of any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court, and to the award of arbitration, and to the enforcement of such award."

Although this section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion that the submission to arbitration was under and subject to the sections contained in the Code relative to this subject. Their Lordships are of opinion that this submission to arbitration was entered into subject to the provisions of this Code, and that the memorandum at the foot thereof is introduced for that purpose, and that unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was to be subject to the Act, and that this special notice of s. 327 as to the enforcement of the decision of the arbitrators was introduced only *ex majori cautela* for the purpose of expressing what without such expression would nevertheless have been implied.

Their Lordships are of opinion that, according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or more certain specified persons, no party to this agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted.

Their Lordships do not think it necessary to refer to the English law on this subject further than to point out that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing to put an end to the agreement for submission to arbitration on the same footing as all other lawful agreements by which the parties to it are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract.

Their Lordships are therefore of opinion that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred.

It remains to be considered whether the circumstances of this case justified him in doing so, and sending the letter of the 5th August 1865.

This is founded solely on the delay.

On the 24th July 1865, the appellant wrote to the arbitrators, and required that in ten days from that date they would make their award and appoint an umpire, and this not being done, after waiting for ten clear days, he sent the notice of the 5th August 1865. If nothing whatever had occurred since the appointment of the arbitrators in June 1864, and all matters between the appellant and the respondent had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think that this delay of the arbitrators would have justified the course which the appellant adopted. But in truth the facts disclose a very different course of proceeding. In July 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th July 1865.

A second decision of the arbitrators relative to the Ponany farms was made in May 1865, and acquiesced in by both parties, appellant and respondent.

A notice to the arbitrators to make their award and to appoint an umpire in

ten days, does not appear to their Lordships to be sufficient time given to entitle the appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the arbitrators, there appears to have been little that remained to be done except to determine matters of account between the parties. What was the intricacy or difficulty of settling them does not appear, and on a question of time this is a matter of importance. It might well be that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be that ten days might be usefully and properly employed by the arbitrator in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible that it would become necessary to refer the matter to an umpire. On the 6th July 1865, Mr. Punnett stated his views in a long written opinion. Mr. Bates stated his in a similar document on the 5th August. This was answered by Mr. Punnett on the 25th August; and on the 7th September Mr. Bates replied. Before this Mr. Schlunk had been selected, though not appointed, to act as umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd August 1865. Mr. Schlunk took and considered the expressed opinion of the two arbitrators, and made observation thereon on the 12th September 1865. The decision of the Civil Court asserting the jurisdiction of the Code of Civil Procedure over this matter was pronounced on the 22nd September 1865. On the same day Mr. Schlunk was appointed umpire, and he made his award between the parties on the 17th October following.

No error is pointed out in the award itself; complaint is made that Mr. Schlunk did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no Counsel, that he took no evidence. Their Lordships are of opinion that it was not necessary for him to do so. The parties had agreed to the arbitration of Mr. Punnett and Mr. Bates, subject to the decisions of an umpire on the points where they differed. They agreed on some important points; they expressed their decision in the first award of the 15th July 1864, and in the second award of the 13th May 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. Schlunk to be the umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced by both the arbitrators in the documents laid before him.

Their Lordships are of opinion that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the umpire. Their Lordships do not mean to lay down that in cases of this description, where no time is originally fixed within which the award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made and an umpire appointed within a reasonable time. But it is to be observed that here the time which elapsed from the period when the appellant gave the notice of the 24th July 1865, was actively employed. It was obviously of no use to appoint an umpire until the points on which the arbitrators differed were clearly defined. This was done by four papers:—1st, the opinion of Mr. Punnett; 2nd, the opinion of Mr. Bates, delivered on the same day that the notice to cancel the submission was given; 3rd, the further opinion of Mr. Punnett of the 25th August 1865; and 4th, the final opinion of Mr. Bates on the 7th September 1865; and these were adjudicated upon by Mr. Schlunk, the umpire, in his award made on the 17th October, but delayed apparently by reason of the suit and the necessity of obtaining the sanction of the Court to the confirmation of the order appointing him umpire.

If the object of the appellant was to accelerate the proceedings by his notice

of the 24th July 1865, he certainly succeeded in doing so; but their Lordships are of opinion that he cannot recede from the submission by reason of that notice, followed by the notice of the 5th August 1865, when, in fact, he has for above a year enjoyed the fruits of the award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the arbitrators were to be considered null and void.

On the whole, therefore, their Lordships, without thinking it necessary to relate in detail the proceedings in the Courts in India, approve of the decisions there pronounced, viz., the order of the 22nd September 1865 of the Civil Court, directing the submission to be filed; the order of the Civil Judge of the 6th October 1865, confirming the appointment of the umpire; the order of the High Court of the 15th January 1866, dismissing the appeal of the present appellant from these orders; and the final decree of the Civil Judge of the 8th February 1866, confirming the award of Mr. Schlunk, and directing the same to be carried into execution; and also the order of the High Court of Judicature of Madras of the 7th January 1867, dismissing the petition of the appellant: and consequently they shall humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 10th December 1868.

Present :

Lord Chelmsford, Sir James William Colville, Sir Robert Phillimore, Judge of the High Court of Admiralty, and Sir Lawrence Peel.

Onus probandi—Julkur lands—Magistrate's award.

*On Appeal from the High Court at Calcutta.**

Burodacant Roy, *Plaintiff,*
versus

Chunder Coomar Roy and others, *Defendants,*

Plaintiffs sued for possession of certain julkur lands as belonging to their estate. Plaintiffs and defendants were respectively the proprietors of two adjacent estates which originally formed one talook in the occupation of the defendants' ancestors, and which talook was severed into two estates at a sale for arrears of revenue. It was found as a fact that the defendants were in possession under a Magistrate's order under Act IV of 1840, and that they and their ancestors exercised the julkur and other rights when the land was covered with water: HELD, that plaintiffs could succeed only by establishing a better title than the defendants to the julkur lands and by proving that the effect of the revenue sale was to transfer to them, as part of the talook which belonged to them, any soil which might be recovered from the bheel.

Their Lordships would not have departed from their usual course of not disturbing the concurrent judgments of the Courts below on a question of fact, if the facts as found were in truth decisive of the real issue between the parties.

That issue is whether the lands in dispute belong to the zemindary of the appellant, or to the estate of the respondents.

The appellant is in possession under the Magistrate's order, and it therefore lay upon the respondents, who were the plaintiffs in the suit, to oust him from that possession by showing a better title to the property claimed. It is an admitted fact, that at the date of the perpetual settlement, both estates were settled for with the defendant's ancestor either as one zemindary or as two

* From the decision of Bayley and Campbell, *J. J.*, in Regular Appeal No. 380 of 1868, decided 23rd April 1863; not reported.

ten days, does not appear to their Lordships to be sufficient time given to entitle the appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the arbitrators, there appears to have been little that remained to be done except to determine matters of account between the parties. What was the intricacy or difficulty of settling them does not appear, and on a question of time this is a matter of importance. It might well be that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be that ten days might be usefully and properly employed by the arbitrator in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible that it would become necessary to refer the matter to an umpire. On the 6th July 1865, Mr. Punnett stated his views in a long written opinion. Mr. Bates stated his in a similar document on the 5th August. This was answered by Mr. Punnett on the 25th August; and on the 7th September Mr. Bates replied. Before this Mr. Schlunk had been selected, though not appointed, to act as umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd August 1865. Mr Schlunk took and considered the expressed opinion of the two arbitrators, and made observation thereon on the 12th September 1865. The decision of the Civil Court asserting the jurisdiction of the Code of Civil Procedure over this matter was pronounced on the 22nd September 1865. On the same day Mr. Schlunk was appointed umpire, and he made his award between the parties on the 17th October following.

No error is pointed out in the award itself; complaint is made that Mr. Schlunk did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no Counsel, that he took no evidence. Their Lordships are of opinion that it was not necessary for him to do so. The parties had agreed to the arbitration of Mr. Punnett and Mr. Bates, subject to the decisions of an umpire on the points where they differed. They agreed on some important points; they expressed their decision in the first award of the 15th July 1864, and in the second award of the 13th May 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. Schlunk to be the umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced by both the arbitrators in the documents laid before him.

Their Lordships are of opinion that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the umpire. Their Lordships do not mean to lay down that in cases of this description, where no time is originally fixed within which the award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made and an umpire appointed within a reasonable time. But it is to be observed that here the time which elapsed from the period when the appellant gave the notice of the 24th July 1865, was actively employed. It was obviously of no use to appoint an umpire until the points on which the arbitrators differed were clearly defined. This was done by four papers:—1st, the opinion of Mr. Punnett; 2nd, the opinion of Mr. Bates, delivered on the same day that the notice to cancel the submission was given; 3rd, the further opinion of Mr. Punnett of the 25th August 1865; and 4th, the final opinion of Mr. Bates on the 7th September 1865; and these were adjudicated upon by Mr. Schlunk, the umpire, in his award made on the 17th October, but delayed apparently by reason of the suit and the necessity of obtaining the sanction of the Court to the confirmation of the order appointing him umpire.

If the object of the appellant was to accelerate the proceedings by his notice

of the 24th July 1865, he certainly succeeded in doing so; but their Lordships are of opinion that he cannot recede from the submission by reason of that notice, followed by the notice of the 5th August 1865, when, in fact, he has for above a year enjoyed the fruits of the award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the arbitrators were to be considered null and void.

On the whole, therefore, their Lordships, without thinking it necessary to relate in detail the proceedings in the Courts in India, approve of the decisions there pronounced, viz., the order of the 22nd September 1865 of the Civil Court, directing the submission to be filed; the order of the Civil Judge of the 6th October 1865, confirming the appointment of the umpire; the order of the High Court of the 15th January 1866, dismissing the appeal of the present appellant from these orders; and the final decree of the Civil Judge of the 8th February 1866, confirming the award of Mr. Schlunk, and directing the same to be carried into execution; and also the order of the High Court of Judicature of Madras of the 7th January 1867, dismissing the petition of the appellant: and consequently they shall humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 10th December 1868.

Present:

Lord Chelmsford, Sir James William Colville, Sir Robert Phillimore, Judge of the High Court of Admiralty, and Sir Lawrence Peel.

Onus probandi—Julkur lands—Magistrate's award.

*On Appeal from the High Court at Calcutta.**

Burodacant Roy, *Plaintiff,*
versus

Chunder Coomar Roy and others, *Defendants.*

Plaintiffs sued for possession of certain julkur lands as belonging to their estate. Plaintiffs and defendants were respectively the proprietors of two adjacent estates which originally formed one talook in the occupation of the defendants' ancestors, and which talook was severed into two estates at a sale for arrears of revenue. It was found as a fact that the defendants were in possession under a Magistrate's order under Act IV of 1840, and that they and their ancestors exercised the julkur and other rights when the land was covered with water: HELD, that plaintiffs could succeed only by establishing a better title than the defendants to the julkur lands and by proving that the effect of the revenue sale was to transfer to them, as part of the talook which belonged to them, any soil which might be recovered from the bheel.

Their Lordships would not have departed from their usual course of not disturbing the concurrent judgments of the Courts below on a question of fact, if the facts as found were in truth decisive of the real issue between the parties.

That issue is whether the lands in dispute belong to the zemindary of the appellant, or to the estate of the respondents.

The appellant is in possession under the Magistrate's order, and it therefore lay upon the respondents, who were the plaintiffs in the suit, to oust him from that possession by showing a better title to the property claimed. It is an admitted fact, that at the date of the perpetual settlement, both estates were settled for with the defendant's ancestor either as one zemindary or as two

* From the decision of Bayley and Campbell, *J. J.*, in Regular Appeal No. 380 of 1868, decided 23rd April 1863; not reported.

separate revenue-paying estates. It is also clear that the bheel from which these lands have been gained was part of that zemindary. The resumption suit proves that no right to re-assess lands which might be gained from the bheel remained in the Government.

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue; and Pergunnah Dattia, which includes the village of Jhanpagram, was acquired by the Paul Choudhrys through whom the plaintiffs claim.

It is also an admitted fact that the julkur and every right which could be exercised by the zemindar while the land was covered with water (what the Judge calls the aqueous assets) remained in the appellant or those whom he represents. In these circumstances it lay upon the respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of Jhanpagram, any soil which might be recovered from the bheel. It has been argued at the bar that this alleged title of the plaintiffs must be inferred from the conformation of the ground or the name of the village. But if any presumptions, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact, that after the sale the julkur of the bheel remained in the appellant's ancestor. It has been argued that the right in the julkur may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the appellant's ancestor, and it lay upon the plaintiffs, the respondents, to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue settled in the cause, viz., whether the plaintiffs were in possession of the lands through their tenants, and had been ousted by the order in the Act IV case. That finding does not touch the material part of the issue, viz., whether the land in dispute appertains to the plaintiffs' Mouzah Jhanpa. Even if it were proved that some jolibila land was annexed to the village and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the bheel (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the bar went the full length of contending that the whole site of the bheel, if cleared of water and made capable of cultivation, would fall into and become part of the respondents' village Jhanpagram, though, whilst it was covered with water, it remained under the dominion of the appellant. For such a contention their Lordships can see no ground. The decision of the Fouzdary Courts as to the point of possession was final. The question in this suit was whether the plaintiffs, by showing a better title than the defendant, could recover possession from him. In their Lordships' judgment the original title to this land was in the appellant's ancestors, and it has not been shown that they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original settlement of those properties, and of what passed by the revenue sale, this might have been done. Their Lordships, therefore, in the peculiar circumstances of this case, though they think that the appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly, will also recommend that Her Majesty's order be made without prejudice to the right of the respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the Paul Choudhrys, from whom the respondents derive their title by the revenue sale.

The 14th December 1868,

Present:

Lord Chelmsford, Sir James W. Colville, Sir Robert Phillimore, and
Sir Lawrence Peel.

Alluvial lands—Title—Practice—Suit—Different case in appeal,

*On Appeal from the High Court at Calcutta.**

Eckowrie Singh and others

versus

Heeralall Seal and others.

The title by accretion to a new formation considered.

In a suit to recover possession of alluvial land in the enjoyment of innocent purchasers for value, plaintiff must give strict legal proof of an adverse title to the land as alluvial, and he must show the nature of the original formation of the *chur*, where it first appeared, and to what it first adhered.

Where plaintiff went to trial below, alleging that the land claimed was attached to his estate as alluvial, he was not allowed to raise in appeal a different case,—one simply of original ownership of the site of the lands re-formed.

This suit is brought to recover about 1,000 beegahs of land, claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of the Regulations of 1825, would admit of variation with varying circumstances of inundations, identification, and accretion. The cause was tried before the Principal Sudder Ameen, who decided in the plaintiff's favor. On appeal to the High Court, that decision was reversed; and from that decree of reversal, the present appeal has been preferred. The High Court simply decided that the proofs adduced by the plaintiffs were insufficient to justify a decree in their favor.

Had this been a case of ordinary claim to lands, wherein a plaintiff might advance, prove, and recover on a *primâ facie* title calling for some answer of title in a defendant, and entitling him to a decree in default of such answer being made and proved, the propriety of the decision of the High Court might have been assailed with more prospect of success. But this is a case of a claim to land washed away and re-formed in the bed of a navigable river, the ownership of the soil of which is not commonly in the riparian proprietors of its banks, and which is not proved in this case to have belonged to the predecessor in title of either disputant. The reforming of land in such a stream, after a considerable interval and frequent floods, is not *primâ facie* to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable unless the circumstances supply evidence of identity, which is wanting in the case before us. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the plaintiffs' land and the appearance of this *chur*. The title by accretion to a new formation generally is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will

* From the decision of Bayley and E. Jackson, *J. J.*, in Regular Appeal No. 418 of 1861, decided 8th December 1863; reported in *Sev.* 770.

separate revenue-paying estates. It is also clear that the bheel from which these lands have been gained was part of that zemindary. The resumption suit proves that no right to re-assess lands which might be gained from the bheel remained in the Government.

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue; and Pergunnah Dattia, which includes the village of Jhanpagram, was acquired by the Paul Choudhrys through whom the plaintiffs claim.

It is also an admitted fact that the julkur and every right which could be exercised by the zemindar while the land was covered with water (what the Judge calls the aqueous assets) remained in the appellant or those whom he represents. In these circumstances it lay upon the respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of Jhanpagram, any soil which might be recovered from the bheel. It has been argued at the bar that this alleged title of the plaintiffs must be inferred from the conformation of the ground or the name of the village. But if any presumptions, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact, that after the sale the julkur of the bheel remained in the appellant's ancestor. It has been argued that the right in the julkur may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the appellant's ancestor, and it lay upon the plaintiffs, the respondents, to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue settled in the cause, viz., whether the plaintiffs were in possession of the lands through their tenants, and had been ousted by the order in the Act IV case. That finding does not touch the material part of the issue, viz., whether the land in dispute appertains to the plaintiffs' Mouzah Jhanpa. Even if it were proved that some jolibila land was annexed to the village and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the bheel (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the bar went the full length of contending that the whole site of the bheel, if cleared of water and made capable of cultivation, would fall into and become part of the respondents' village Jhanpagram, though, whilst it was covered with water, it remained under the dominion of the appellant. For such a contention their Lordships can see no ground. The decision of the Fouzdary Courts as to the point of possession was final. The question in this suit was whether the plaintiffs, by showing a better title than the defendant, could recover possession from him. In their Lordships' judgment the original title to this land was in the appellant's ancestors, and it has not been shown that they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original settlement of those properties, and of what passed by the revenue sale, this might have been done. Their Lordships, therefore, in the peculiar circumstances of this case, though they think that the appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly, will also recommend that Her Majesty's order be made without prejudice to the right of the respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the Paul Choudhrys, from whom the respondents derive their title by the revenue sale.

The 14th December 1868,

Present :

Lord Chelmsford, Sir James W. Colville, Sir Robert Phillimore, and
Sir Lawrence Peel.

Alluvial lands—Title—Practice—Suit—Different case in appeal,

*On Appeal from the High Court at Calcutta.**

Eckowris Singh and others

versus

Heeralall Seal and others.

The title by accretion to a new formation considered.

In a suit to recover possession of alluvial land in the enjoyment of innocent purchasers for value, plaintiff must give strict legal proof of an adverse title to the land as alluvial, and he must show the nature of the original formation of the *chur*, where it first appeared, and to what it first adhered.

Where plaintiff went to trial below, alleging that the land claimed was attached to his estate as alluvial, he was not allowed to raise in appeal a different case,—one simply of original ownership of the site of the lands re-formed.

This suit is brought to recover about 1,000 beegahs of land, claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of the Regulations of 1825, would admit of variation with varying circumstances of inundations, identification, and accretion. The cause was tried before the Principal Sudder Ameen, who decided in the plaintiff's favor. On appeal to the High Court, that decision was reversed; and from that decree of reversal, the present appeal has been preferred. The High Court simply decided that the proofs adduced by the plaintiffs were insufficient to justify a decree in their favor.

Had this been a case of ordinary claim to lands, wherein a plaintiff might advance, prove, and recover on a *primâ facie* title calling for some answer of title in a defendant, and entitling him to a decree in default of such answer being made and proved, the propriety of the decision of the High Court might have been assailed with more prospect of success. But this is a case of a claim to land washed away and re-formed in the bed of a navigable river, the ownership of the soil of which is not commonly in the riparian proprietors of its banks, and which is not proved in this case to have belonged to the predecessor in title of either disputant. The reforming of land in such a stream, after a considerable interval and frequent floods, is not *primâ facie* to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable unless the circumstances supply evidence of identity, which is wanting in the case before us. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the plaintiffs' land and the appearance of this *chur*. The title by accretion to a new formation generally is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will

* From the decision of Bayley and E. Jackson, *J. J.*, in Regular Appeal No. 418 of 1861, decided 8th December 1863; reported in *Sev.* 770.

separate revenue-paying estates. It is also clear that the bheel from which these lands have been gained was part of that zemindary. The resumption suit proves that no right to re-assess lands which might be gained from the bheel remained in the Government.

In 1796 the two properties were severed by means, as it is said, of a sale for arrears of revenue; and Pergunnah Dattia, which includes the village of Jhanpagram, was acquired by the Paul Choudhrys through whom the plaintiffs claim.

It is also an admitted fact that the julkur and every right which could be exercised by the zemindar while the land was covered with water (what the Judge calls the aqueous assets) remained in the appellant or those whom he represents. In these circumstances it lay upon the respondents to show that the effect of the revenue sale was to transfer to them, as part of the village of Jhanpagram, any soil which might be recovered from the bheel. It has been argued at the bar that this alleged title of the plaintiffs must be inferred from the conformation of the ground or the name of the village. But if any presumptions, however slight, can be drawn from these circumstances, they seem to their Lordships to be more than rebutted by the admitted fact, that after the sale the julkur of the bheel remained in the appellant's ancestor. It has been argued that the right in the julkur may be distinct from the right in the soil, and this no doubt is true. But here both had been admittedly in the appellant's ancestor, and it lay upon the plaintiffs, the respondents, to show when and how they were severed.

The facts found by the two Courts below bear only upon the latter part of the first issue settled in the cause, viz., whether the plaintiffs were in possession of the lands through their tenants, and had been ousted by the order in the Act IV case. That finding does not touch the material part of the issue, viz., whether the land in dispute appertains to the plaintiffs' Mouzah Jhanpa. Even if it were proved that some jolibila land was annexed to the village and passed as part of it at the time of the sale, it does not follow that the land which has since been recovered from the bheel (and great part of the land in question has been admitted to have been so reclaimed since the date of the sale) would so pass. Yet the argument at the bar went the full length of contending that the whole site of the bheel, if cleared of water and made capable of cultivation, would fall into and become part of the respondents' village Jhanpagram, though, whilst it was covered with water, it remained under the dominion of the appellant. For such a contention their Lordships can see no ground. The decision of the Fouzdary Courts as to the point of possession was final. The question in this suit was whether the plaintiffs, by showing a better title than the defendant, could recover possession from him. In their Lordships' judgment the original title to this land was in the appellant's ancestors, and it has not been shown that they ever lost it. It is possible, though not very probable, that if there had been fuller evidence of the original settlement of those properties, and of what passed by the revenue sale, this might have been done. Their Lordships, therefore, in the peculiar circumstances of this case, though they think that the appeal ought to be allowed and the present suit dismissed with costs, and will make their humble recommendation to Her Majesty accordingly, will also recommend that Her Majesty's order be made without prejudice to the right of the respondents to bring, if they shall be so advised, a new suit for the recovery of the lands in question, upon the ground that the title to these lands passed to the Paul Choudhrys, from whom the respondents derive their title by the revenue sale.

The 14th December 1868,

Present :

Lord Chelmsford, Sir James W. Colville, Sir Robert Phillimore, and
Sir Lawrence Peel.

Alluvial lands—Title—Practice—Suit—Different case in appeal,

*On Appeal from the High Court at Calcutta.**

Eckowris Singh and others

versus

Heeralall Seal and others.

The title by accretion to a new formation considered.

In a suit to recover possession of alluvial land in the enjoyment of innocent purchasers for value, plaintiff must give strict legal proof of an adverse title to the land as alluvial, and he must show the nature of the original formation of the *chur*, where it first appeared, and to what it first adhered.

Where plaintiff went to trial below, alleging that the land claimed was attached to his estate as alluvial, he was not allowed to raise in appeal a different case,—one simply of original ownership of the site of the lands re-formed.

This suit is brought to recover about 1,000 beegahs of land, claimed as alluvial, and contained within the boundaries given in a map annexed to the plaint. The plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual, of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil; which defence, as is apparent from the frame of the Regulations of 1825, would admit of variation with varying circumstances of inundations, identification, and accretion. The cause was tried before the Principal Sudder Ameen, who decided in the plaintiff's favor. On appeal to the High Court, that decision was reversed; and from that decree of reversal, the present appeal has been preferred. The High Court simply decided that the proofs adduced by the plaintiffs were insufficient to justify a decree in their favor.

Had this been a case of ordinary claim to lands, wherein a plaintiff might advance, prove, and recover on a *primâ facie* title calling for some answer of title in a defendant, and entitling him to a decree in default of such answer being made and proved, the propriety of the decision of the High Court might have been assailed with more prospect of success. But this is a case of a claim to land washed away and re-formed in the bed of a navigable river, the ownership of the soil of which is not commonly in the riparian proprietors of its banks, and which is not proved in this case to have belonged to the predecessor in title of either disputant. The reforming of land in such a stream, after a considerable interval and frequent floods, is not *primâ facie* to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable unless the circumstances supply evidence of identity, which is wanting in the case before us. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the plaintiffs' land and the appearance of this *chur*. The title by accretion to a new formation generally is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will

* From the decision of Bayley and E. Jackson, *J. J.*, in Regular Appeal No. 418 of 1861, decided 8th December 1863; reported in *Sev.* 770.

then follow the title to that parcel to which it adheres. It is obvious, therefore, that such a title is not established by mere proof of general inclusive boundaries of land, at a time long preceding the actual formation of the chur, since the lands that have such a fluctuating boundary as a tidal river, and which are themselves subject to loss and gain of quantity by acts independent of the owners' concurrence, and which may pass from side to side of the river boundary, have not the ordinary element of fixedness which belongs to immoveable estate, in the common course of things. A detached chur, independent of usage, in such a stream would belong to neither riparian proprietor; and the circumstance that it was subtended by the land of one would not be enough to entitle him to it. The decision of this case in the Court below seems to have proceeded on the mere presumptions which would have regulated the decision of a question of parcel or no parcel in an ordinary boundary dispute; for no evidence whatever was given by the plaintiffs of the nature of the original formation of the chur, where it first appeared, to what it first adhered; and the case even now affords no ground for concluding anything with reasonable certainty as to the original title to it.

The defendants, it was conceded by their able Counsel, might be unable to sustain a title to the chur as plaintiffs; but it was urged with force and reason that, by reason of their long enjoyment, and being innocent purchasers for value, they were entitled to put every claimant to strict proof of title. They are purchasers for value without notice of any prior or superior claim. Acquisitions of the nature of this chur are often doubtful in their origin; they must depend much on oral testimony, which time is constantly destroying or impairing, and it is often hard to say who is the person to whom the law would ascribe the legal ownership of them. The mere cultivation of them, like that of waste or jungle lands, carries with it no *prima facie* character of usurpation or wrong. An undisputed possession and cultivation, even though for a few years only, would the more readily induce a purchase; and a purchaser *bona fide* and without notice might with perfect honesty, and even with the favorable construction by a Court of Justice of his acts, defend his possession by insisting on strict legal proof of an adverse title.

The High Court appears to have acted upon this principle, though the Judges have ascribed too long a possession to the defendants, and may have erred in their view of portions of the evidence. The grounds of their decision seem to their Lordships correct; the *ratio decidendi* is not a mistaken one, though it is supported in part by mistaken reasons. They have acted, in requiring adequate documentary proof in a conflict of oral proof, in accordance with the course adopted by the Judicial Committee itself on this point, in a somewhat similar case,* reported in 4 Moore's Indian Appeals, p. 403. They were dissatisfied with the documentary proof exhibited; they have said that better might have been brought forward had the case of the plaintiffs been well founded. Their Lordships are not prepared to dissent from either expression of opinion. To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the chittahs which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents not legally admissible in proof against them. The document on page 19 appears to be only a copy, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the chittahs in general in questions between the zemindar and his tenants or ryots, to receive them as evidence of boundary against a rival proprietor, without

* Mussummat Imam Baudi and another v. Hur Gobind Ghose. See 7 W. R. P. C. 67; and 1 Suth. P. C. R. 208.

further account, introduction, or verification, would, if it obtained as a practice, and each relaxation is apt to become a precedent for another, tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it. Their Lordships, therefore, are unable to ascribe any error to the way in which the High Court has dealt with the documentary evidence in this cause.

It has not unfrequently happened that their Lordships, in a conflict of decisions on questions of fact between the Judge who heard the evidence and the Court which reviewed it, have followed the finding of him who saw the witnesses and heard them give their evidence; but in this case the Judge below appears not to have sufficiently regarded the nature of the claim and the proof it should receive. He appears further to have acted mainly on the report of the Ameen; and that report, like the judgment which was founded upon it, appears to their Lordships to proceed upon a mistaken view of the issue between the parties and of the burden of proof which the plaintiffs in this suit had to support. The conclusions of both are founded more upon the want of proof to support the title alleged by the defendants than upon proof of that title which it was necessary for the plaintiffs to establish in order to disturb the possession of the defendants.

The map of the Ameen itself shows that there were lands of other owners than the plaintiffs so situated; that they might have been, in the course of things, a nucleus to the increment, and therefore an enquiry into its origin and direction was one that ought not to have been neglected. The case itself is one turning on views of evidence on which their Lordships would be reluctant to differ from the opinion of a Court more likely to know than their Lordships can be what weight of proof would satisfy there the just expectations of a Court of Justice.

Their Lordships, therefore, agreeing with the High Court in their disregard of the chittahs, and with their conclusion that the case was not sufficiently proved, will humbly recommend to Her Majesty that the appeal be dismissed with costs.

The 17th December 1868.

Present :

Lord Chelmsford, Sir James W. Colvile, The Lord Chief Baron,
and Sir Lawrence Peel.

*Arrears of rent—Suit—Limitation—Trespass—Reg. VIII of 1819—S. 32
Act X of 1859.*

*On Appeal from the High Court at Calcutta.**

Ranee Surnomoyee

versus

Shooshee Mokhee Burmonia and others.

The sale of a putnee for an arrear of rent under Reg. VIII of 1819 was set aside in a subsequent suit by the putneedars on the ground of irregularity. The putneedars were put into possession, and the purchaser at the sale had his purchase-money returned to him by the zemindar. The zemindar sued the putneedars to recover the arrears of rent for which the putnee had been sold, and was met by the defence that the suit was barred by s. 32 Act X of 1859. The High Court held that plaintiff ought to have sued under that Section within three years from the last day of the year for which the rents constituting the arrears had accrued, and that not having done so he was barred.

* From the judgment of Bayley and Phear, *J. J.*, in Regular Appeal No. 95 of 1864, decided 19th August 1864. See 3 Revenue, Judicial, and Police Journal, p. 147.

HELD, that the putneedars, upon the setting aside of the sale and their restoration to possession, took back the estate subject to the obligation to pay the rent; that the particular arrears claimed in the present action must be taken to have become due in the year in which that restoration to possession took place; that the zemindar could not have sued for the arrears during the time that the proceedings to set aside the sale of the putnee were pending; and that the suit was not barred by s. 32.

The inadvertent omission by a zemindar of one of the formalities prescribed by Reg. VIII of 1819 does not render all the proceedings taken by him inoperative, or constitute his act of selling the tenure into an act of trespass.

The facts of this case are simply these:—The appellant is a zemindar. Those whom she represents had granted a putnee talook, and the putneedars had fallen into arrear. The zemindar (the appellant) pursued her remedy under Reg. VIII of 1819, and brought the talook to sale. It sold for a sum greatly in excess of the rent in arrear. The purchaser was put in possession of the talook. Out of the purchase-money the arrears were paid, and the balance in the ordinary course remained in the Collector's hands for the benefit of those who were entitled to it. A suit was then brought to set aside the sale of this putnee talook on the ground of irregularity; and we must assume that it was correctly set aside by the judgment of the Court below. The first judgment on the case was on the 26th December 1860. The appellant brought her appeal in the High Court; and the final judgment dismissing her appeal was on the 30th June 1863. The effect of the judgment was that she had to pay back the purchase-money to the purchaser with interest, that the putneedars were again put into possession of the talook, and that they recovered the mesne profits during the period in which they were out of possession from the purchaser. The appellant then brought the present suit for recovery of the arrears of rent. She brought it in the Collector's Court as in an ordinary case, and must therefore, we apprehend, be taken to have brought it under Act X of 1859. She was then met by the defence that the suit was out of time, that it was barred by the 32nd Section of that Statute, the construction put on that enactment being that the suit should have been brought within three years from the time on which these arrears first became due, viz., the last day of the year for which the rents constituting them had accrued. The result of the decision is that she not only lost the remedy which Reg. VIII of 1819 gave her, but that she has no other remedy for those arrears of rent. If that decision is founded upon grounds which cannot be shaken, it certainly is a very unfortunate result, and a result which obviously works a great injustice; for the putneedars have got back their putnee, and have, at the same time, relieved themselves from the obligation of paying, for that period, the very rent upon which they held it.

The case of the appellant has been argued on various grounds. Mr. Cave has argued that this clause is to be qualified by introducing certain clauses of the old Regulation of Limitation of 1793. He has also argued that if those clauses can no longer be imported into the consideration of the case, it falls within one of the exceptions imported into the existing Act of Limitation, the Act XIV of 1859.

Their Lordships are of opinion that if this case had arisen in an ordinary Court of Law, and that the Statute of Limitations to be applied was Act XIV of 1859, there could be no doubt at all upon the question; and that it would not be necessary to fall back upon the exception referred to by Mr. Cave, because it seems to their Lordships to be perfectly clear that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived; and whether that time be taken to be the date of the first decree, or the date of the final decree, the present suit would, in either case, have been brought in time. They do not, however, think it necessary to decide that either that Act, or the particular exception in it, is to be brought in to qualify the peculiar and special Law of Limitations introduced by the Act of 1859, because they think that upon the fair construction of the 32nd section of

that Statute, the time had really not run. Their Lordships' view of the case is this : that, upon the setting aside of this sale and the restoration of the parties to possession, they took back the estate subject to the obligation to pay the rent ; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place. It follows that upon the language of s. 32 Act X of 1859, the appellant was not barred from her remedy. Their Lordships further authorise me to say that they do not concur in the position of the High Court, that the appellant can be said to have committed an act of trespass because, when she pursued the remedy which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, and that her proceedings, therefore, became inoperative. Their Lordships cannot treat this as an act of trespass, or hold with the High Court that in bringing this suit she is a person seeking to take advantage of her own wrong. They must also respectfully dissent from another statement of the learned Judges of the High Court to the effect that the appellant might have sued for these arrears pending the proceedings to set aside the sale of the putnee. It is clear that until the sale had been finally set aside, she was in the position of a person whose claim had been satisfied ; and that her suit might have been successfully met by a plea to that effect.

On these grounds their Lordships are prepared to recommend to Her Majesty that the appeal be allowed with costs, that the judgment of the High Court be reversed, and that, in lieu thereof, the appeal to that Court be dismissed, and the judgment of the Court below affirmed with costs.

The 23rd December 1868.

Present :

Lord Chelmsford, Sir James W. Colville, Lord Justice Page Wood, Lord Justice Selwyn, and Sir Lawrence Peel.

Natural son—Hindoo law—Maintenance—Decree.

On Appeal from the High Court at Madras.

Muttusawmy Jagavera Yettappa Naicken

versus

Vencataswara Yetteya.

Where *A* is proved to be the natural son of his deceased father *B*, a Hindoo gentleman, and to have been recognised by *B* as such, it is not essential to *A*'s title to maintenance out of *B*'s estate that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar status therein.

Where plaintiff sued for maintenance out of the income of a zemindaree left by his father, which devolved on defendant, and the decree of the original Court directed that the maintenance should be paid from the private property of the defendant, it was held that the High Court on appeal should have decided whether the defendant held any private property which descended to the defendant from the plaintiff's father, and the case was remanded for determination by the High Court on that point.

The suit out of which this appeal has arisen was brought by the respondent claiming to be an illegitimate son of a former zemindar of Yettiapooram against the appellant, the present zemindar, for maintenance out of the income of the zemindary.

The suit was brought in the Court of the Principal Sudder Ameen of Tinnevely, although that Court has no jurisdiction where the matter in dispute is

of a value exceeding Rs. 10,000. The appellant, however, did not plead to the jurisdiction; and the parties proceeded to try the right in that Court, treating the suit as one for the sum of Rs. 8,400, the amount claimed for one year's maintenance. The consequences of this procedure were that an appeal lay from the Court of the Principal Sudder Ameen to the Zillah Judge; that the judgment of the latter upon any issue of fact was final in India, and could only be brought before the High Court at Madras, by special appeal, on some alleged error upon a point of law or procedure.

The issues in the cause were:—first, whether the plaintiff's mother was in the exclusive and permanent keeping of the former zemindar of Yettiapooram as his mistress; and, secondly, whether or not the plaintiff was the illegitimate issue of the said zemindar by that woman, and, as such, entitled to maintenance.

The Principal Sudder Ameen held that the plaintiff (the respondent) had failed to prove his title, and dismissed the suit with costs. The Civil Judge, on appeal, by his decree of the 31st March 1864, determined both the above issues in the respondent's favor, declared him entitled to maintenance at the rate of Rs. 2,500 per annum, and decreed that this amount should be paid annually by the appellant "from the villages forming the private property of the present zemindar's (the appellant's) family." This decree was brought by special appeal, upon grounds, some of which will be hereafter considered, before the High Court of Madras, which, on the 3rd January 1865, dismissed that appeal, and, on the 27th March in the same year, rejected an application for review of judgment with costs. The appellant having obtained Her Majesty's special leave to appeal, has brought this appeal against the decree of the High Court and that of the Zillah Court of Tinnevely; and all questions in the cause, whether of fact or of law, are of course open to him upon it.

Their Lordships, at the close of the argument for the appellant, intimated that in their opinion the second issue had been properly found in favor of the respondent. They will now state their reasons for coming to that conclusion, and, in so doing, will briefly recapitulate the facts of the case.

The appellant's father, the then zemindar of Yettiapooram, died in 1840, leaving three sons, viz., Kumara, the alleged father of the respondent, Vencataswara, and the appellant. The zemindary, which is impartible, descended in the first instance to Kumara alone; and he shortly afterwards, but certainly before the 25th December 1840, brought into his zenana as his concubine Avudai Jangam, the mother of the respondent. She was the daughter of a Dasi, or Nautch girl, attached to a pagoda, which seems to be one of the appurtenances of the zemindary, and if she had not then begun to follow, would, no doubt, but for her introduction into the zemindar's zenana, have followed her mother's profession with its ordinary incident, prostitution. On the 25th December 1840, the zemindar executed in her favor an instrument which will be afterwards considered. He built her a house within the precincts of his palace, and up to the time of his death, which took place in May 1853, she continued to be his favorite mistress. So far the parties were agreed; but whilst the respondent contends that he is the son of the zemindar by Avudai, and born after her introduction into the zenana, the appellant insists that at that time, and when her connection with the zemindar began, she had for some years been a public dancing girl attached to the pagoda, and that she brought with her into the place the respondent, who was then at least twelve months old, and her child by an uncertain father.

On the death of Kumara, his next brother Vencataswara succeeded to this zemindary. He lost little time in turning out Avudai and her son; for in November 1854 we find that the latter had brought a criminal charge in the Magistrate's Court against the zemindar and his retainers for an alleged forcible entry, and the abstraction of jewels of considerable value. This charge ended in

the razeenamah or instrument of compromise, and the Magistrate's order thereon both bearing date the 6th November 1854. In this razeenamah, the respondent is described as the son of the late zemindar of Yettiapooram, and in the body of the instrument Vencataswara is spoken of as "the paternal junior uncle of the complainant;" and in the Magistrate's order the fact of the complainant being "the natural son of the first defendant's elder brother," is expressly assigned as a reason for admitting the compromise.

Three years after this, and in November 1857, the respondent commenced a suit for the recovery of the property which was the subject of the Poruppu grant of the 25th December 1840, from which, with his mother, he had been ejected by Vencataswara. In his plaint he described himself as the son of Kumara, the late zemindar of Yettiapooram. The answer of the zemindar impeached the validity of the grant by his predecessor of a village forming part of the zemindary. The reply of the respondent on this point was in effect that his mother, being of parallel grade with the wife of his father, the zemindar, he, as the illegitimate son of a Sudra by a Sudra woman, was in the class capable of inheriting the zemindary, and therefore that the grant was good. In this rejoinder, Vencataswara said that "the mere allegation that the second plaintiff was of parallel grade with the wife was sufficient to show that she was not a legal wife, but a woman as represented in the answer; and that no one would think the plaintiffs were heirs to the zemindary." But he did not then controvert the respondent's title by a direct denial that he was the son of Kumara, the course which, though the fact was not necessarily in issue in that suit, we should have expected the zemindar to take had the case touching the respondent's birth, which is now set up by the appellant, been that which was then received by the family. The earliest assertion of that case of which there is any evidence, is to be found in the answer made in this suit by Vencataswara some time in or about the year 1859, to the ground of appeal filed by the respondent on his appeal to the Zillah Court against the decree of the Principal Sudder Ameen dismissing his claim to this village. In one paragraph of that answer it is stated that "the records show that the first plaintiff was born before the second plaintiff was kept by the late zemindar; and the statement that they are blood relations is incorrect." In these proceedings, therefore, their Lordships find strong grounds for coming to the conclusion that the respondent, for several years after the death of Kumara, continued to be reputed and admitted to be the natural son of that zemindar.

The decision of the suit for the village which in the Zillah Court, as well as in that of the Principal Sudder Ameen, and on a special appeal to the Sudder Dewanny Adawlut, was adverse to the respondent, did not touch the question of his birth. It proceeded entirely on the ground that the grant having been made without the previous consent of Government and not having been registered in the Collector's office, was not valid as against the successor to the zemindary.

The final decision in the last-mentioned suit was in September 1860, and the present suit was brought in September 1863 against the appellant, who, on the death of his brother during the interval, had succeeded to the zemindary. The oral evidence upon the issue whether the respondent was the illegitimate son of Kumara, was certainly not very strong on either side. But if the case of the appellant were true, we should have expected that he, a powerful zemindar, in possession of the estate, with all the family records, and influencing the family dependents, would have been able to produce better evidence in support of his case than that which he has produced. The testimony of the Brahmins and women attached to the pagoda seems to their Lordships to be especially unworthy of credit. It has been argued that the non-mention of the respondent in the Poruppu grant of the 25th December 1840 affords an inference that he was not the son of the zemindar, nor at that time so recognised by him. This may be

true if it be assumed that the child was then in existence; whilst, on the other hand, the mere fact that the respondent is not mentioned in the deed, taken by itself, might afford an inference in support of the theory that he was not then born. But if it be assumed that he was, as the appellant alleges, then in existence, and known not to be the child of the zemindar, it is highly improbable that the deed should have provided for her male issue generally without at least postponing the respondent to any male issue to be thereafter born to the zemindar. And, again, if the deed were, as it has been argued, to have been a gift to the woman in the nature of a settlement made upon taking her from the pagoda into the exclusive keeping of the zemindar, there was no absolute necessity for the mention of her son, if then in existence, whether he was or was not then the son of the zemindar. Upon the whole case, their Lordships think that the evidence for the respondent, confirmed as it was by the razeenamah, and other evidence of recognition by the family after the death of Kumara, outweighed that on the appellant's side, and justified the finding of the Zillah Judge of the second issue in his favor. They are satisfied that Kumara in his lifetime recognised the appellant as his son; and they see no sufficient grounds for doubting that the appellant was in fact his natural son. They would have felt greater difficulty in coming, upon the evidence before them, to a conclusion upon the question whether the appellant was born after or before the introduction of his mother into the zenana. The admission, in his reply, as to his mother's age, is of more weight than any of the evidence to the contrary, and that is consistent with the theory of his birth at least a year before she became an inmate of the zemindar's zenana; and the receipts for rent in his name, which are dated as early as February 1841, also tend to support the theory. It appears, however, to their Lordships that if it be established that the appellant was the natural son of this Hindoo father, and recognised by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar *status* therein. They concur in the judgment of the High Court upon this point, against which little, if anything, has been urged at the Bar.

Their Lordships further think that, subject to the observations hereafter to be made, the amount of maintenance awarded by the Zillah Judge is reasonable. And this being so, they would have recommended Her Majesty to dismiss the appeal and confirm the decree below *simpliciter*, but for the point which remains to be considered.

The decree of the Zillah Court directed that the amount awarded as maintenance be paid annually to the plaintiff (the present respondent) by the defendant (the present appellant) from the villages forming the private property of the present zemindar's (the appellant's) family. The first ground of appeal insisted upon by the Counsel for the appellant on the special appeal to the High Court of Madras is stated to have been "that there was no appearance of any other property than that of the zemindary, and the fastening of a life-rent on that was illegal."

The High Court has sought to dispose of this objection by saying, "The fact that the judgment of the Civil Judge indicates the possession of private property by the zemindar in possession, who has inherited the whole property of the plaintiff's father, renders this objection, even if tenable, wholly inapplicable." And it proceeds to remark that the question whether maintenance in such a case could be charged on a zemindary, was still an open one.

The objection involved two distinct propositions, viz. :—first, that there was no proof of the property other than the zemindary; and secondly, that the maintenance could not be charged on the zemindary. And the High Court has avoided the decision of the latter question by assuming that there was a conclusive finding on the other. It may have thought that it was bound to make that

assumption by the rule which excludes questions of fact from the province of a special appeal. Their Lordships, however, are disposed to think that the question, which is more pointedly raised by the first of the points stated in the application for a review at page 35 of the Appendix, was one which, on the strictest construction of that rule, the High Court was competent to entertain on a special appeal. But be that as it may, their Lordships, who are not subject to the rule, are bound to see whether that part of the decree of the Zillah Judge, which directed the payment of the maintenance from the villages forming the private property of the zemindar, was warranted by the pleadings and evidence before him. They are of opinion that it was not. The plaintiff sought for payment of maintenance "out of the income of the zemindary." There is no trace in the printed record of any evidence of the existence of property other than the zemindary, or of the nature of such property, supposing that any does exist. It is obvious that the nature, as well as the existence of any such property, is a material question. The respondent may have a right to be maintained out of private property which descended from his father to the present zemindar; yet he may have none to be maintained out of private property which the zemindar has acquired in any other way.

If the decree be erroneous as it stands, there remains the question whether it ought not to be simply varied by directing payment of the maintenance out of the income of the zemindary. But the High Court has failed to determine the question whether the zemindary is so chargeable; and the parties have declined, in the present state of the record, to argue that question before their Lordships. In this state of things their Lordships, however unwilling to prolong this litigation, can but remit the cause to India with a declaration of the respondent's *status* as an illegitimate son of the zemindar Kumara, and of his consequent right to maintenance.

It will be for the High Court to determine whether the decree should be varied by directing the maintenance to be paid out of the income of the zemindary, or whether it shall direct any further enquiry in order to ascertain whether there is any other property upon which it can be charged. If that Court shall find that it can be properly charged on the income of the zemindary, their Lordships are of opinion that the amount awarded by the Zillah Judge, having regard to the respondent's *status*, is reasonable and ought to be decreed. But if it cannot be so charged, then, in the absence of information as to the other property on which it may be chargeable, their Lordships cannot pronounce an opinion as to the reasonableness of its amount, and they must leave that question also to be determined by the High Court on further inquiry. They trust, however, that the respondent's title to maintenance being now conclusively ascertained, the parties will be wise enough to settle the questions that remain open by private arrangement and without further litigation.

The order which their Lordships will humbly recommend Her Majesty to make is, to reverse the decree of the Zillah Court of the 31st March 1864 and the decree of the High Court of the 31st March 1865, and in lieu thereof to declare that the respondent is the illegitimate son of the former zemindar, Kumara Naiker, and as such is entitled to maintenance; and to remit the cause to the High Court of Madras, in order that such Court may determine whether, regard being had to the above declaration, the respondent is entitled to receive maintenance out of the income of the zemindary (in which case such maintenance is to be decreed at the rate of Rs. 2,500 per annum); and if not so entitled, whether he is entitled, as against the appellant, to any and what amount of maintenance, and if so, out of what property and fund; and that for the purposes aforesaid the said High Court shall be at liberty to make and direct any further enquiry that to them may seem just. Their Lordships will give no costs of this appeal.

The 18th January 1869.

Present :

Lord Chelmsford, Sir James W. Colvile, the Lord Chief Baron,
and Sir Lawrence Peel.

*Powers of a purchaser at a sale for arrears of Revenue—Reg. XI of 1822—
Limitation.*

*On Appeal from the High Court at Calcutta.**

Rajah Suttosurrun Ghosal

versus

Mohesh Chunder Mitter ;

and

Rajah Suttosurrun Ghosal

versus

Tarinee Churn Ghose.

Two suits were brought against the same defendant to enhance the rent payable by him in respect of a parcel of land forming part of a zemindaree which belonged to the two plaintiffs in different shares. One of the plaintiffs claimed title as representative in estate of a purchaser at a sale for arrears of revenue in 1837 ; the other plaintiff derived his title through successive alienations from a purchaser at a similar sale in 1839. Defendant pleaded that one part of the land had been held by him and his ancestors under a pottah dated in 1786 at a fixed rent ; that another part was lakheraj ; and that the remainder was held by him as a part of a different talook from another zemindar. He also insisted that the suits were barred by lapse of time, 12 years having in each case elapsed since the date of the purchase at the auction sales.

HELD, that as both the Courts below had affirmed the genuineness of the pottah pleaded by defendant, and as it is in terms a grant of the lands at a fixed rent, and as the hereditary character of the tenure may be legally presumed by the evidence of long and uninterrupted enjoyment and descent from father to son, it follows that plaintiffs' right to enhance the rent must, if it existed at all, depend upon the peculiar and statutory powers by a purchaser at a sale for arrears of revenue which are put forward by them as the foundation of their right.

HELD, both upon principle and the authority of the Privy Council decision in 1 Suth. P. C. R. 548. that the respondents (plaintiffs) could not now for the first time exercise powers which, if they ever existed, existed only by virtue of the repealed Sections of Reg. XI of 1822 ; justice and sound policy alike requiring that they should be exercised within a reasonable time.

The question raised on these appeals is whether the respondents (being plaintiffs in two different suits) have established, as against the appellant, their right to enhance the rent payable by him in respect of 134 beegahs and 2½ cottahs of land situate in the 24-Pergunnahs.

This parcel of land is alleged in both suits to form part of a zemindary, of which somewhat more than ten undivided sixteenths belong to Mohesh Chunder Mitter, the respondent on the first appeal, and the remainder, being somewhat less than six-sixteenths, belong to the respondent in the second appeal, or rather, his master, Degumber Mitter.

Mohesh Chunder Mitter claims title to his portion of the zemindary as the nephew *ex parte maternâ* and representative in estate of one Gunganarain Ghosal, who purchased it at a sale for arrears of Government revenue in 1839, and died in 1851. Degumber Mitter's title to his portion is derived through several successive alienations from some person who purchased that portion at a similar sale in 1837. From the fact that these undivided portions of the zemindary were thus sold at different Government sales, it is to be inferred that, before those sales, they were held by different parties, each of whom was separately liable for his share of Government revenue.

In these circumstances, the two Mitters have brought separate suits for the enhancement of the rent of the lands in question ; and for the purposes of these

* From judgment of Kemp and Seton-Karr, *J.J.*, dated August 3rd 1865. See 3 W. R., 179.

appeals, their Lordships will assume that in the Courts below they have been properly held entitled so to do, though there certainly appears to have been a well-grounded objection to the form in which the plaints were originally framed.

In each case the plaintiff rests his claim to enhance on the statutory rights of a purchaser at an auction-sale, meaning thereby a sale for arrears of Government revenue ; and the statute under which each of the sales in question took place was Reg. XI of 1822.

The defence in two suits was very much the same. The appellant insisted that of the land in question, 67 beegahs and 3 cottahs had been held by him and his ancestors under a pottah dated in 1786, at a fixed rent of Sicca Rs. 163-13-10 ; that of the rest of the lands, 42 beegahs and 14 cottahs were lakheraj ; and the remainder, either including, or perhaps with the exception of a very small portion which had been resumed by Government as a towing path, was held by him as part of a different talook, under one Ramtonoo Dutt. He further insisted that the suits were barred by lapse of time, twelve years having in each case elapsed since the date of the purchase at the auction-sales. And in Degumber Mitter's suit he further questioned the right of one who was a mere purchaser by private contract from one who had bought at a Government sale, to institute such a suit. He also raised the question whether the suit ought not, under s. 23 Act X of 1859, to have been brought in the Collector's instead of the Zillah Court.

Their Lordships think it will be convenient, in the first instance, to consider the respondent's claim to enhance, as if all the lands in question were covered by the pottah of 1786.

Both the Courts below which dealt with the questions of fact have affirmed the genuineness of that pottah, and their Lordships see no reason for impeaching it.

Again, though the document is not in the form of the ordinary instruments which create an *istemrari* tenure, it is in terms a grant of the lands on a fixed rent, for it specifies the sum. And upon the principle laid down by this Committee in the case of *Gopal Lall Thakoor v. Teluck Chunder Rai* * (10 Moore, 191), the absence of words importing the hereditary character of the tenure is here, as in that case, supplied by the evidence of long and uninterrupted enjoyment, and of the descent of the tenure from father to son, whence that hereditary character may be legally presumed.

Upon the evidence their Lordships have no doubt that at the date of the earliest of the Government sales, those whom the present appellant represents were, by virtue of the pottah, in possession of the land which it covers at a fixed rent under a sub-tenure binding upon the then zemindars.

It follows that the respondent's right to enhance the rent, which implies a right to vary the terms of the sub-tenure, and to set it aside if that title to enhance be disputed on grounds inconsistent with the obligations of such a dependent tenure, must, if it exists at all, depend upon the peculiar and statutory powers acquired by a purchaser at a sale for arrears of revenue. And accordingly, both in the plaints and in the notices given in pursuance of Reg. V of 1812, s. 9, those powers are put forward as the foundation of the right.

The first question, then, is—are the respondents, or is either of them, entitled to exercise those powers ? That neither is so entitled has been strongly argued by the learned Counsel for the appellant upon the following among other grounds. The sales took place under Reg. XI of 1822 ; and the rights of the purchasers through whom the respondents claim were defined by the 30th and three following Sections of that Regulation. Those enactments were repealed by s. 1 Act XII of 1841 ; and all the provisions of that Act, with the exception of the first and second Sections, were again repealed by Act I of 1845, which, as modified by some subsequent Acts, is the existing Sale Law. Neither of the two last mentioned Statutes contains any saving of rights acquired under the

* 3 W. R. P. C., 1 ; 1 Suth. P. C. R., 558,

Statutes which it repealed ; and though each gave to purchasers at sales for arrears of Government revenue powers equal to, or even larger than, those given by the repealed Statutes, it expressly limited those powers to purchasers at future sales, *i.e.* "sales under this Act." The respondents, therefore, cannot invoke Reg. XI of 1822 as the foundation of their alleged rights, because that has been absolutely repealed ; and they cannot call in aid the subsequent Statutes, because they have given no power to purchasers at sales which took place before they were passed.

This point, though it seems to have been overlooked in many cases in India, is not now adjudged here for the first time. It was fully considered and determined by this Committee in the case of the Rancee Surnomoye v. Maharajah Sutteeschunder Rai * (10 Moore, p. 123). The Judges of the High Court have attempted to distinguish that case from the present, on the ground that in the former the sale relied upon was made under Reg. XLIV of 1793. But the statement proceeds upon a misapprehension of the facts of the earlier case. In that, as in these, the sale on which the power to enhance depended had taken place under Reg. XI of 1822 ; and it was not until they found that they could not support their case, either on that repealed Regulation or on the subsequent Acts, that the learned Counsel for the respondent, the Maharajah, fell back on s. 5 Reg. XLIV of 1793, which, though suspended by the subsequent legislation on the subject, had never been expressly repealed.

Their Lordships must also observe that, in the judgment delivered in that case, it was carefully considered whether a sale for arrears of revenue of itself merely, and without any act, proceeding, or demonstration of will on the part of the purchaser, altered the character of the tenure. And it was decided that the Sale Law had not "that hard and rigid character." It is true that the judgment, assuming that the powers given by Reg. XI of 1822 had been swept away by the repeal of that Statute, dealt only with the effect of a sale under Reg. XLIV of 1793. But what it laid down concerning such a sale may, even *à fortiori*, be predicated of a sale under any of the subsequent Sale Laws, and, in particular, of one under Reg. XI of 1822. For the words of the Regulation of 1793 (s. 5) are, that all engagements of the former proprietor, and all undertenures granted by him, shall "stand cancelled from the day of sale ;" whereas the Regulation of 1822 (s. 30) enacts that "all tenures which may have been created by the defaulter or his predecessors, being representatives or assignees of the original engager, as well as all tenures which the first engager was competent to set aside, alter, or renew, shall be *liable* to be avoided and annulled by the purchaser," &c.,—expressions which, far more strongly than those of the earlier Regulation, import that the estate is not, upon a sale for arrears of revenue, necessarily and *ipso facto* changed in its nature and incidents. And, if this be so, the repeal of the Regulation which destroys the power to change the estate, must leave its freedom from change, independent of mutual will, unimpaired.

Their Lordships, then, being clearly of opinion both upon principle and the authority of the decision in the 10th Moore's Indian Appeals, that the respondents cannot now for the first time exercise powers which, if they ever existed, existed only by virtue of the repealed Sections of Reg. XI of 1822, do not deem it necessary to consider whether the stringent powers given by those enactments to purchasers, *eo nomine*, could in any case be exercised by the heirs or assignees of such purchasers. Justice and sound policy alike require that, inasmuch as the law has given them for the particular purpose only of enabling the purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of them cannot but occasion great hardship to undertenants, and insecurity to property, they should be exercised within a reasonable

* 2 W. R. P. C., 13 ; 1 Suth. P. C. R., 518.

time. And their Lordships believe that that object has now been in some measure secured by Acts X and XIV of 1859.

Their Lordships have further to remark that in the case of the Ranees Surnomoye, to which they have already referred, this Committee, whilst it carefully abstained from determining whether, upon the true construction of all the Regulations taken together, s. 5 Reg. XLIV of 1793 ought to be taken to have been repealed, nevertheless proceeded to consider whether that enactment, if assumed to be still in force, would support the respondent's case. And after putting upon the Clause the construction stated at page 147 of the Report,* the judgment ruled that the purchaser had an option to confirm the existing rate of rent, and must, upon the evidence in the particular case, be taken to have exercised that option in favor of the dependent talookdar.

Their Lordships must reiterate the doubts expressed by those who decided the case of the Ranees Surnomoye whether the Clause in question can be held to be in force for any purpose but that of declaring the general principles upon which all the subsequent legislation has proceeded, viz., that of putting a purchaser at a sale for arrears of revenue in the position of the party with whom the perpetual settlement of the estate was made. They do not think that a party who has lost the particular rights which were given to him, or to the purchaser whom he represents, by any of the subsequent Statutes, can fall back upon the old law which has been so repeatedly modified.

It is to be observed, however, that, even if the Section be in force, the tenure here in question is not one which, upon the strictest interpretation of that Clause, could stand cancelled. It existed at the time of the Decennial Settlement; and their Lordships apprehended that the only right which the zemindar with whom that settlement was made could have exercised over it was that conferred by s. 51 Reg. VIII of 1793. No attempt has been made to bring the present cases within that Section, which seems to cast upon the zemindar the burden of proving the particular grounds for enhancement of rent.

Upon the whole, then, their Lordships are of opinion that the Court of the Principal Sudder Ameen and the High Court of Calcutta were in error in holding that the respondents had established their right to enhance the rent of the lands covered by the pottah of 1786.

It may be said that this does not dispose of the question as to the other parcels of land; but the foundation of the suits is that the respondents have the powers of purchasers at sales for arrears of revenue; and if that foundation fails, the failure is fatal to the whole suit. Their Lordships, however, are of opinion that there are further objections to the maintenance of the present suits in respect of these parcels of land. There is no evidence that the appellant has ever paid to the respondents any rent except the sum of Sicca Rupees 136-13-10, being the rent reserved by the pottah in respect of the 67 beegahs and 3 cottahs. He disputes the title to rent in respect of the other parcels, treating one parcel as lakheraj, the other as held of a different landlord. A suit for enhancement implies such a privity of title or tenure existing between the parties that a claim to some rent is legally inferrible from it, and there is here proof that that relation is denied to have existed at any time between the parties in respect of these two parcels of land. As to the latter portion, where the respondents' title is denied and the right of another zemindar set up, the proper remedy seems to be by a suit in the nature of an ejectment. Again, if the lands alleged to be lakheraj lie within the respondents' zemindary, the law has given them an appropriate remedy in a suit for resumption and re-assessment.

The present decision will not deprive them of either remedy, if sought by them in the character of ordinary zemindars. But it is to be observed that a suit of either kind is now subject to a particular law of limitation, and that consider-

* Page 16 of the report in 2 W. R. ; and page 551 in 1 Suth. P. C. R.

ation is a strong ground for not allowing such rights to be irregularly litigated in a suit like the present, which is subject to a different, if it is subject to any, rule of limitation. Upon the whole, therefore, their Lordships have come to the conclusion that they must recommend to Her Majesty to allow these appeals, to reverse the decrees of the Court below, and in lieu thereof to order that both suits be dismissed with costs. The appellant will be entitled to the costs of these appeals; but it will be for the registrar, in taxing those costs, to consider whether the costs of more than one case should be allowed.

The 18th January 1869.

Present :

Lord Chelmsford, Sir James W. Colville, The Lord Chief Baron,
and Sir Lawrence Peel.

Suit—Soonderbunds—Reg. III of 1828.

Rajah Burodacant Roy

versus

The Commissioner of the Soonderbunds.

*On Appeal from the High Court at Calcutta.**

Reg. III of 1828 made provision for the immediate settlement of the limits of the Soonderbunds, by fixing peremptorily a period at which the demarcation of those limits should be final. Any person objecting to the line of demarcation could not be heard unless he declared and offered proof that, at the time of the survey by the Commissioner appointed under the said law, he was in occupation of a definite quantity of land cleared and under cultivation within that time. A person in occupation of cultivated land might within three months either pray for further investigation or put forward his claim to hold particular lands free from assessment.

HELD, accordingly, that, as the line on the expiration of three months became final, no party could be heard to say that even cultivated lands within it were part of his settled boundary.

The appellant in this case (the plaintiff in the suit) is the Rajah of Jessore. The respondent is the Commissioner of the Soonderbunds, representing the Government of Bengal. The real object of the suit is to obtain a judicial declaration that the lands, which are the subject of it, form part of Pergunnah Shahosh, the revenue on which was permanently assessed by the Decennial Settlement with the appellant's ancestor; and on that ground to set aside certain instruments which have been executed by or on behalf of appellant to Government for the payment of the revenue lately assessed on the same lands, on the assumption that they were not part of his settled estate; and to recover back the payments which have been made to Government under that engagement.

The persons who are in actual possession of the lands are not parties to the suit, which is erroneously stated to be one for the recovery of possession,—an error which has led to some confusion in the argument. The true nature of the suit is shown by the issues which have been settled in it. These were:—

1. Whether the boundaries of Lot No. 221 fixed by Mr. Dampier, the former Commissioner of the Soonderbunds, in 1829, in accordance with rule, not having been set aside up to this date by any Court, and the plaintiff not having filed objections in reference to such boundaries for thirty-one years, his claim was barred by cl. 2 s. 13 Reg. III of 1828.

* From the judgments of Trevor, Seton-Karr, and L. S. Jackson, *J. J.*, in Regular Appeal No. 295 of 1863, dated 31st December 1862,—not reported.

2. Whether the land claimed formed part of the decennially settled Pergunnah Shahosh, or the right of Government as being part of the Soonderbunds; and whether the plaintiff's former proprietor had ever been in possession of the land.

3. When the disputed land with its boundaries had been released from the claims of Government on proof of its being rent-paying or *māl* land, and subsequently, by means of survey, dowl was unjustly taken for it on the allegation that it was the right of the Soonderbunds,—whether the plaintiff is entitled to have the said dowl set aside and obtain possession of the land as his *māl* right, together with *wassilat*.

The history of the Pergunnah is briefly this. After the perpetual settlement, the then Rajah, the appellant's grandfather, mortgaged it to one Bissonath Bose. He is said fraudulently to have allowed the revenue to fall in arrear, and to have purchased the estate when put up for sale by Government *benamée* some time in 1804. This transaction was afterwards impeached, and the Government (we must assume regularly) declared the estate to be forfeited, but in 1825 re-granted it to the appellant, then an infant. It is alleged, and not disputed, that the effect of this re-grant was to remit the appellant to the precise rights of his ancestor under the perpetual settlement. The estate between 1825 and the date at which the appellant attained his majority was administered by the Collector and other revenue officers acting as the Court of Wards, but their acts are material only as bearing upon one or other of the issues in the suit, and particularly upon that which affirms that the lands in question formed part of Pergunnah Shahosh in 1792.

This Pergunnah, whatever were its precise boundaries, unquestionably abutted upon, and, at least on one side of it, was bounded by that large tract of waste and jungle land which forms the seaboard of the delta of the Ganges, and is known as the Soonderbunds. And it is certain that the Soonderbunds, whatever were then their precise limits, were neither included, nor intended to be included, in the Decennial Settlement of 1792, but remained the property of Government as the general owners of the soil.

From the quinquennial register of 1795, it appears that two of the component parts of Pergunnah Shahosh were the mouzahs or chucks of Tildangah and Komarhkola. There is however no evidence to show what the areas of these mouzahs, when settled, were. They were situated at two of the points at which Pergunnah Shahosh touched the Soonderbunds. And the broad question of fact between the parties is, whether these settled mouzahs or chucks comprehended the whole of the areas marked Lots 221 and 224 in the colored map, which is part of the record, or whether they were limited to the two smaller areas which are colored yellow and lie within those lots or in immediate juxtaposition to them.

In 1828 the Bengal Government appears to have been active in taking measures for extending cultivation in the Soonderbunds, and for ascertaining and asserting the rights of the State therein. As a step thereto, it determined to fix and lay down the boundaries of that tract of unsettled land; and for that purpose (amongst others) Reg. III of 1828, the effect of which will be afterwards considered, was passed. In 1829 Mr. Dampier, the then Commissioner of the Soonderbunds, under the 13th Section of that Regulation, proceeded to fix and lay down the boundaries of the Soonderbunds in the immediate neighbourhood of Tildangah and Komarhkola. His proceeding is at page 82 of the record; and the map, called Captain Hodge's map, was made pursuant to the Regulation in accordance with that proceeding. The boundary line, as defined by Mr. Dampier's proceeding, seems to have included within the limits of the Soonderbunds the whole of Lots 221 and 224, together with the two areas marked yellow on the colored map which have before been mentioned; or, in other words, all the land now in question, and also the lands represented by those two colored portions of

the map, and now admitted to belong to the settled mouzahs of Tildangah and Komarhkola.

At the time of Mr. Dampier's survey, certain proceedings were pending between the Government and the Rajah, or his guardians on his behalf, which must now be considered,

There is some trace of a claim on the part of Government as early as 1812, but the proceedings in question were not actually commenced until the 12th November 1825, when the Collector of Jessore instituted a suit under Reg. II of 1819, as amended by Reg. IX of 1825, for the assessment of revenue upon 8,000 beegahs of land. The ground of his claim was that this parcel of land, though in possession of Rajah Burodacant Roy under the names of chucks Tildangah and Komarhkola, was in fact part of the Soonderbunds, and as such subject to the claim of Government. This suit was in the first instance defended (the Rajah being then a minor) by the surbarakur appointed by the Court of Wards, and was, therefore, in this peculiar condition, that the plaintiff was the Collector asserting the proprietary or fiscal rights of Government, and the defendant was an officer appointed by that same Collector acting as a Court of Wards. And this may be one reason why for some years the suit appears to have been conducted very languidly. In 1829 Mr. Dampier fixed his boundary line, which included the lands in dispute with the other lands in that locality within the limits of the Soonderbunds. Some proceedings in this pending suit seem afterwards to have been had before him as Commissioner of the Soonderbunds; but the suit was not decided until November 1834, when the then Commissioner, Mr. Grant, gave judgment in favor of Government.

His decision was grounded partly upon Mr. Dampier's map, partly on the absence of proof on the part of the Rajah that the lands formed part of his settled estate; and it seems to have treated the whole of chucks Tildangah and Komarhkola as "newly cultivated lands of the Soonderbunds' jungle." From this decision the surbarakur appealed. A new trial was directed. The case was then tried by Mr. Kemp, whose decision on the 20th September 1839 was to the effect that the 8,000 beegahs were lands belonging to chucks Tildangah and Komarhkola, which formed part of the Rajah's zemindary of Pergunnah Shahosh, and that the Government had no right to assess them. This decision was, on the 19th August 1842, confirmed on appeal by the Special Commissioner, Mr. D'Oyley, who, however, intimated a doubt whether some portion of the land in question might not have been acquired from the Soonderbunds by gradual encroachment and added to the settled mouzahs.

The so-called 8,000 beegahs appear to have been, according to ordinary measurement, 12,000, and in the course of the argument, there was much discussion as to their precise locality. Mr. Field insisted that they were situated at the southern extremity of Lot 224; but from the proceedings which will be next mentioned and other evidence in the cause, their Lordships are satisfied that, of the 12,000 beegahs, 6,476 form the whole or part of the two before-mentioned yellow areas in the colored map, which are now admitted to represent the settled mouzahs of Tildangah and Komarhkola; and that the remaining 5,524 beegahs were probably contiguous to them.

From the proceedings at pp. 49 and 51, their Lordships gather the following facts:—

Some time between 1849 and 1851, Mr. Smith, a Deputy Collector deputed for that purpose, made a survey of Lots 221 and 224, and a settlement of part of them. His instructions were to leave out the land which had been released by the decision of Mr. Kemp; to specify and define the other land belonging to the two lots on which the claim of Government attached, and to bring it under assessment. He seems to have satisfied himself that within the admitted boundaries of Tildangah there were 3,193-12-3 beegahs, and within the admitted boundaries of

Komarhkola 3,282-7-2 beegahs of land ; and it is impossible to read the proceeding at pages 49 and 50 without coming to the conclusion that these 6,476 beegahs have been exempted from the Government claim, and are now held by the appellant as part of mouzahs Tildangah and Komarhkola within his settled zemindary of Pergunnah Shahosh. As to the remaining 5,524 beegahs, there is considerable confusion. At page 49, it appears that Mr. Smith took two parcels of land aggregating that number of beegahs from Lots 221 and 224 in order to make up the 12,000 beegahs, the whole of which he could not find within what, according to his view, were the boundaries of the zemindary. But from the statement of his proceedings at page 31, it would seem that after excepting and setting apart the 6,476 beegahs, he found that Lot 221 consisted of 26,277-13-4 beegahs, of which 14,679-16-12 were cultivated and 11,597-16-4 were jungle ; and that Lot 224 consisted of 57,000 beegahs, of which 14,119-12-4 were cultivated, and 42,880-7-12 were jungle ; and that after deducting the last-mentioned quantity of jungle, which he left unsettled, he made a settlement for Lot 221 with Ramruttun Roy and another, as the representatives of one Brijokissore Roy, and a settlement for the cultivated lands in Lot 224 with one Nobokant Roy. These parties were in occupation of the land in question under junglebooree pottahs, which had been granted by the Court of Wards during the minority of the Rajah on his behalf.

The Rajah appealed against these settlements, insisting that the lands so settled were part of his settled zemindary Pergunnah Shahosh. The Government threatened resumption proceedings, but gave the Rajah the option of settling for the lands on favorable terms.

Those terms were ultimately accepted ; a settlement was made with him for both Lots 221 and 224 for 99 years, and he signed by his mookhtar the usual Dowls Ikrarnamahs on the 26th November 1856. These are the instruments which the present suit is brought to set aside. One term in the arrangement was that he should respect the possession and rights of the pottahdars, in the proceedings called Gantidars, viz., Nobokant Roy and the representatives of Brijokissore Roy.

From the above facts, their Lordships have come to the conclusion that these settlements included the 5,524 beegahs, part of the 12,000 beegahs which had been released by Mr. Kemp's decision from the claims of Government ; but that they did not include the 6,476 beegahs.

This settlement with the appellant was complicated by the fact that settlements had previously been made with the Gantidars as occupiers at less favorable rates ; and part of the arrangement contemplated was that the appellant should receive from them the revenue assessed on them, paying that for which he was liable under the dowls and retaining the difference. The representatives of Brijokissore Roy afterwards resisted this arrangement ; and in a suit between them and the appellant, the Judge held that he could not enforce his claim against them, and made observations on the settlements which probably led to the institution of the present suit.

The result, however, of the last-mentioned litigation can have no effect on the determination of the present suit. The appellant is not seeking to be relieved from the settlement, because it cannot be carried out as contemplated, nor does he sue for the performance of any agreement that may have been made. He seeks to avoid the settlement on the broad ground that the whole of the lands included in it are part of the settled zemindary of Pergunnah Shahosh. The Zillah Judge has held that this contention is well founded, and has decided in favor of the appellant. The High Court, proceeding entirely on the consideration that the appellant is, by force of Reg. III of 1828, bound by Mr. Dampier's demarcation of the boundary line of the Soonderbunds, has dismissed his suit.

The first question which their Lordships will consider, is what is the effect

the 5,524 beegahs. Their Lordships, as they have before stated, believe them to be included in the settlement; and they consider that, rightly or wrongly, this parcel of land has been finally decided to be part of the settled zemindary. They conceive, however, that no decree can be made respecting it in this suit. The settlement in which it is included was entered into with full knowledge that it was so included, and by way of compromise. It may be that its inclusion in the settlement was part of the compromise, and a consideration for more favorable terms of settlement. For these reasons, their Lordships think that it is impossible to give in this suit any particular relief concerning it. Upon the whole, then, their Lordships have come to the conclusion that the decree of the High Court dismissing the appellant's suit should be affirmed; and they will humbly recommend Her Majesty to dismiss this appeal with costs.

The 18th January 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, the Judge of the High Court of Admiralty, and Sir Lawrence Peel.

Mortgage—Redemption—Accounts—Reg. XV of 1793.

*On Appeal from the late Sudder Court at Calcutta.**

Shah Mukhun Lall and others

versus

Sreekishen Sing and others.

In this case the original plaintiffs, the mortgagors (Sings), sued the representative of the original mortgagees (Lalls) to cancel, on redemption, a mortgage deed, lease, and agreement, alleged to be one mortgage security. All the defendants asserted, as to the lease and agreement, a different title and interest, conferring a separate interest on their gomastah. The lease bore date 16th May 1837, was for twenty years, and reserved a rent of 24,858 sicca rupees payable to the gomastah, who granted sub-leases to certain nominees of the mortgagors at rents aggregating 35,067 sicca rupees, yielding an annual profit to him of 10,200 sicca rupees. The agreement was executed by the Sings to the gomastah on 29th August 1836, as security to cover certain losses for the due payments of their rents, by the sub-lessees and for a further advance of 7,000 sicca rupees at 12 per cent. interest. The mortgage deed, dated 5th June 1836, pledged the same property for twenty years to the Lalls for a loan of 1½ lakhs of sicca rupees to the Sings. The interest reserved was 9 per cent., i.e. 13,500, which was exactly covered by the surplus rent after deducting Government revenue. The plaintiffs sought to recover possession, alleging the Lalls to be satisfied from the usufruct, and claiming a surplus. The claim of the plaintiffs to redeem before expiration of twenty years was denied.

Held that s. 10 is the only section of Reg. XV of 1793 at all applicable to the present suit, which is brought to set aside plaintiff's contract and have restitution of the pledge on terms of redemption, and that interest should be calculated at the higher rate of 12 per cent.

A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise: therefore an estimate of a preceding rental does not suffice to show actual receipts.

The duty to which mortgagees are bound by s. 11 Reg. XV of 1793 is to keep an account of gross receipts from the property mortgaged, and also the expenses of management and *preservation*. The gross receipts must be such as the mortgagor himself would have been entitled to; and if he could not, by reason of an intervening lease, call for an account of the collections, neither can his mortgagee; and if a valid engagement is made, qualifying the usufructuary possession, the account of the receipts must be subject to that modification.

The verification required by s. 11, of the mortgagee's accounts, need not be by his personal oath in all cases. The Legislature never intended that a man should swear positively to knowledge of that of which he can have no personal knowledge.

This is an appeal in a mortgage suit instituted more than twenty years ago. The original plaintiffs, the mortgagors, named Sing, sued in the Court of the Sudder Ameen of the Zillah Sarun the representatives of the original mortgagees,

* From the judgment of Trevor, Kemp, and Seton-Karr, J. J., in Regular Appeal No. 416 of 1859, dated the 28th June 1862.

named Lall, who were eminent bankers, having kooties in various parts of India, and also one Ramkissen, the gomastah of the firm, to cancel, on redemption, three several instruments, viz., the mortgage-deed, lease, and agreement named in the plaint, and which will be more particularly described. These instruments the plaintiff alleged to constitute one mortgage security of the bankers, the Lall defendants. All the defendants asserted, however, as to two of these instruments, viz., the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the bankers, on their gomastah, the last defendant. The lease bore date the 16th May 1837. It was for twenty years, and reserved a rent of 24,858 sicca rupees 10 annas, payable to the Sings by the gomastah. The mortgage-deed bore date the 15th June in the same year, and pledged the same property also for twenty years to the bankers, to secure a loan of 150,000 sicca rupees from them to the Sings. The interest reserved was 9 per cent. Ostensibly, the mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of Rs. 13,500, exactly the sum calculable as interest on the loan at 9 per cent. Ramkissen granted as apparently a subsidiary arrangement sub-leases to certain kutkinadars, nominees of the mortgagors, at rents aggregating 35,067 sicca rupees; and the mortgagors guaranteed to him those receipts of rents. Ostensibly, therefore, the several instruments evidenced a mortgage transaction providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the gomastah yielding an annual profit of Rs. 13,200. All the defendants insisted that the ostensible was also the real character of the instruments.

The ikrarnamah was executed by the mortgagors, the Sings, to the gomastah on the 29th August in the same year, as a security to cover certain losses incurred or anticipated from adverse claims, for the due payments of their rents by the sub-lessees, the kutkinadars, and for a further advance of 7,000 sicca rupees bearing an interest of 12 per cent. The plaintiffs sought also to recover possession, alleging the mortgagees, the Lall defendants, whom they treated as mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source.

This claim, then, of the mortgagors to redeem before the twenty years were past was denied in respect of all that the lease covered, which was the whole that the mortgage deed included. The suit further raised these questions: at what rate of interest, whether 9 per cent. or a higher rate, the plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several instruments were a device or means within s. 9 Reg. XV of 1793 to conceal usury, and so evade the usury laws.

The suit therefore involved issues of title, and not simply one of payment on an admitted title to redeem under a contract raising no question as to the terms of redemption.

The suit was heard in the Sudder Ameen's Court, which decided in the defendants' favor on all the issues. From that decision there was an appeal to the Sudder Dewanny Adawlut, which decided that the three instruments formed one mortgage security, as alleged in the plaint, and were a device to conceal usury; that the contract was usurious, but that as the plaint was for redemption the mortgage was redeemable on payment of the principal and 9 per cent, the interest expressed to be payable in the mortgage-deed; and the Court, reversing the finding, sent the case back to be tried in the Court below on the enquiries which it directed and which were limited in effect to satisfaction of the mortgage at the date of suit. The cause was then transferred from the Ameen's Court to that of the Zillah Judge, who, before he proceeded to try the question submitted to him, called for the accounts of the gross receipts and disbursements directed by Reg. XV of 1793 s. 11. The defendants, who subsequently renewed the dispute as to the unity of the title, declared themselves unable to give the accounts

the 5,524 beegahs. Their Lordships, as they have before stated, believe them to be included in the settlement; and they consider that, rightly or wrongly, this parcel of land has been finally decided to be part of the settled zemindary. They conceive, however, that no decree can be made respecting it in this suit. The settlement in which it is included was entered into with full knowledge that it was so included, and by way of compromise. It may be that its inclusion in the settlement was part of the compromise, and a consideration for more favorable terms of settlement. For these reasons, their Lordships think that it is impossible to give in this suit any particular relief concerning it. Upon the whole, then, their Lordships have come to the conclusion that the decree of the High Court dismissing the appellant's suit should be affirmed; and they will humbly recommend Her Majesty to dismiss this appeal with costs.

The 18th January 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, the Judge of the High Court of Admiralty, and Sir Lawrence Peel.

Mortgage—Redemption—Accounts—Reg. XV of 1793.

*On Appeal from the late Sudder Court at Calcutta.**

Shah Mukhun Lall and others

versus

Sreekishen Sing and others.

In this case the original plaintiffs, the mortgagors (Sings), sued the representative of the original mortgagees (Lalls) to cancel, on redemption, a mortgage deed, lease, and agreement, alleged to be one mortgage security. All the defendants asserted, as to the lease and agreement, a different title and interest, conferring a separate interest on their gomastah. The lease bore date 16th May 1837, was for twenty years, and reserved a rent of 24,858 sicca rupees payable to the gomastah, who granted sub-leases to certain nominees of the mortgagors at rents aggregating 35,067 sicca rupees, yielding an annual profit to him of 10,200 sicca rupees. The agreement was executed by the Sings to the gomastah on 29th August 1836, as security to cover certain losses for the due payments of their rents, by the sub-lessees and for a further advance of 7,000 sicca rupees at 12 per cent. interest. The mortgage deed, dated 5th June 1836, pledged the same property for twenty years to the Lalls for a loan of 1½ lakhs of sicca rupees to the Sings. The interest reserved was 9 per cent., i.e. 13,500, which was exactly covered by the surplus rent after deducting Government revenue. The plaintiffs sought to recover possession, alleging the Lalls to be satisfied from the usufruct, and claiming a surplus. The claim of the plaintiffs to redeem before expiration of twenty years was denied.

HELD that s. 10 is the only section of Reg. XV of 1793 at all applicable to the present suit, which is brought to set aside plaintiff's contract and have restitution of the pledge on terms of redemption, and that interest should be calculated at the higher rate of 12 per cent.

A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise: therefore an estimate of a preceding rental does not suffice to show actual receipts.

The duty to which mortgagees are bound by s. 11 Reg. XV of 1793 is to keep an account of gross receipts from the property mortgaged, and also the expenses of management and *preservation*. The gross receipts must be such as the mortgagor himself would have been entitled to; and if he could not, by reason of an intervening lease, call for an account of the collections, neither can his mortgagee; and if a valid engagement is made, qualifying the usufructuary possession, the account of the receipts must be subject to that modification.

The verification required by s. 11, of the mortgagee's accounts, need not be by his personal oath in all cases. The Legislature never intended that a man should swear positively to knowledge of that of which he can have no personal knowledge.

This is an appeal in a mortgage suit instituted more than twenty years ago. The original plaintiffs, the mortgagors, named Sing, sued in the Court of the Sudder Ameen of the Zillah Sarun the representatives of the original mortgagees,

* From the judgment of Trevor, Kemp, and Seton-Karr, *J. J.*, in Regular Appeal No. 416 of 1859, dated the 28th June 1862.

named Lall, who were eminent bankers, having kooties in various parts of India, and also one Ramkissen, the gomastah of the firm, to cancel, on redemption, three several instruments, viz., the mortgage-deed, lease, and agreement named in the plaint, and which will be more particularly described. These instruments the plaintiff alleged to constitute one mortgage security of the bankers, the Lall defendants. All the defendants asserted, however, as to two of these instruments, viz., the lease and the agreement, a different title and interest, conferring a separate interest, as distinct from the bankers, on their gomastah, the last defendant. The lease bore date the 16th May 1837. It was for twenty years, and reserved a rent of 24,858 sicca rupees 10 annas, payable to the Sings by the gomastah. The mortgage-deed bore date the 15th June in the same year, and pledged the same property also for twenty years to the bankers, to secure a loan of 150,000 sicca rupees from them to the Sings. The interest reserved was 9 per cent. Ostensibly, the mortgagees were entitled to the rent alone, the surplus of which, after deducting the Government revenue, left a balance of Rs. 13,500, exactly the sum calculable as interest on the loan at 9 per cent. Ramkissen granted as apparently a subsidiary arrangement sub-leases to certain kutkinadars, nominees of the mortgagors, at rents aggregating 35,067 sicca rupees; and the mortgagors guaranteed to him those receipts of rents. Ostensibly, therefore, the several instruments evidenced a mortgage transaction providing only for interest alone from the usufruct, leaving the principal debt to be paid otherwise in full, and a beneficial lease in the gomastah yielding an annual profit of Rs. 13,200. All the defendants insisted that the ostensible was also the real character of the instruments.

The ikrarnamah was executed by the mortgagors, the Sings, to the gomastah on the 29th August in the same year, as a security to cover certain losses incurred or anticipated from adverse claims, for the due payments of their rents by the sub-lessees, the kutkinadars, and for a further advance of 7,000 sicca rupees bearing an interest of 12 per cent. The plaintiffs sought also to recover possession, alleging the mortgagees, the Lall defendants, whom they treated as mortgagees in possession, to be satisfied from the usufruct, and further claimed as mesne profits a small alleged surplus from the same source.

This claim, then, of the mortgagors to redeem before the twenty years were past was denied in respect of all that the lease covered, which was the whole that the mortgage deed included. The suit further raised these questions: at what rate of interest, whether 9 per cent. or a higher rate, the plaintiffs were entitled at any time to redeem; whether the loan was at usurious interest; and whether the several instruments were a device or means within s. 9 Reg. XV of 1793 to conceal usury, and so evade the usury laws.

The suit therefore involved issues of title, and not simply one of payment on an admitted title to redeem under a contract raising no question as to the terms of redemption.

The suit was heard in the Sudder Ameen's Court, which decided in the defendants' favor on all the issues. From that decision there was an appeal to the Sudder Dewanny Adawlut, which decided that the three instruments formed one mortgage security, as alleged in the plaint, and were a device to conceal usury; that the contract was usurious, but that as the plaint was for redemption the mortgage was redeemable on payment of the principal and 9 per cent., the interest expressed to be payable in the mortgage-deed; and the Court, reversing the finding, sent the case back to be tried in the Court below on the enquiries which it directed and which were limited in effect to satisfaction of the mortgage at the date of suit. The cause was then transferred from the Ameen's Court to that of the Zillah Judge, who, before he proceeded to try the question submitted to him, called for the accounts of the gross receipts and disbursements directed by Reg. XV of 1793 s. 11. The defendants, who subsequently renewed the dispute as to the unity of the title, declared themselves unable to give the accounts.

demand of them. The Judge then deputed an Ameen to take an account of and report as to the receipts. The Ameen reported and found that the defendants were overpaid to a much larger amount than the plaintiffs' own case declared them to be. The Court rejected that report, went itself into the enquiry, found the plaintiffs still indebted on the account, and dismissed the suit. From that decision there was again an appeal to the Sudder Court, which reversed the decision, directed that accounts should be produced, and further directed certain additional enquiries to be made, the precise character of which need not here be stated. The cause was again heard after much preliminary litigation as to the nature of the accounts required, and the proper mode of verifying them.

The Court again decreed in favor of the defendants, declaring a considerable sum, exceeding Rs. 50,000, to be still due, and on that ground dismissed the plaintiffs' suit with costs without any declaration as to title. From this decision the plaintiffs, and also the defendants, appealed to the Sudder, the defendants raising anew their contention as to the rate of interest, that 12 per cent. should be declared to be the due rate. The Sudder decided the case in favor of the plaintiffs, and decreed their claim in full, except as to the wassilat, and from that last decision the present appeal is brought.

The accounts received in the Court below were declared by the Sudder Court not to be the proper accounts, and that Court considered itself entitled to presume, from the non-production of the right accounts, that they, if produced, would show the mortgage satisfied. The statement of the rental and the accounts annexed to the plaint formed the basis of the decision, the correctness of which as to the amount of income in the time of the mortgagor's possession they considered to be *prima facie* established. The accounts actually rendered were the banking books of the defendants' banking firm, containing a statement of their receipts; and the accounts of the gomastah of the bankers, who was in truth the person, as manager, best acquainted with the transactions, and a trustee, as it was found in effect, for the mortgagees. He was examined under a commission, and deposed to the correctness of the accounts which he gave in. The existence of any other accounts did not appear.

As the Regulation required the mortgagees to swear to the accounts, the Court considered the attestation by the gomastah insufficient. On this last appeal to the Sudder, the question of the rate of interest was again raised by the defendants in their objection to the appeal. The Judges said they had already decided the question, and again declared that they abided by their decision, thinking it correct. They expressed no opinion whether they were excluded by their procedure from reconsidering the matter on a new appeal to them. It is not at all material to the decision of this case to determine whether they could or could not have entered into that question in any way, had they thought their previous opinion on the point erroneous. Their Lordships think that the question as to the interest is open on this appeal, though the plaintiffs might have appealed, and did not, from the interlocutory decree on the point. This point is governed and settled by the cases of *Forbes v. Ameroonissa Begum** (10 Moore I. A., p. 340), and *Moheshur Sing v. The Bengal Government*† (7 Moore's Indian Appeals).

The first question to be determined by their Lordships is, whether the decision of the Sudder Dewanny Adawlut, that the interest must be calculated at 9 per cent. only, is correct. It is clear that if the mortgagees had been suing the mortgagor on the mortgage-deed for the debt, they could have recovered no higher rate of interest than 9 per cent., the contract being in writing and incapable of being varied by parol evidence; but this is by no means decisive of the question; for, supposing that the extra profits on the several engagements forming one mortgage security had amounted only in the whole to 3 per cent., making up 12 per cent. only in all, precisely the same consequence would have ensued; the

* 5 W. R. P. C. 47; 1 Suth. P. C. R. 621.

† 3 W. R. P. C. 45; 1 Suth. P. C. R. 325.

reserved interest would have been correctly viewed as constituting part only of the profit, and as such would have been all that the parties stipulated for as to that part of the transaction ; but it would not have measured the stipulated return for the loan annually. The rules of evidence and the law of estoppel forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protections ; one of which is, when one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies that a man cannot both affirm and disaffirm the same transaction to show its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals as one applicable also in the Courts of that country which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law, as on the broad and universally applicable principles of justice. The case of *Forbes v. Ameroonissa Begum* (10 Moore's I. A., p. 356), furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships :—"The respondent cannot both repudiate the obligations of the lease and claim the benefit of it." Unless, therefore, some positive law has said that in cases similar to the present the written engagement, though not extending to the whole profit stipulated, must be adhered to against the defendant, though the plaintiff may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract, their Lordships must hold that the bargain disclosed should be performed so far as the law allows ; in other words, that 12 per cent. was in this instance the interest to be computed.

The decision of the Judges of the Sudder Dewanny Adawlut on this point was founded not on any grounds of equity, but upon their construction of the law. They considered that they were bound by the terms of s. 5 of Reg. XV of 1793 to give no more than the interest stipulated, and that 9 per cent. was that rate of interest, thus in reality begging the question in dispute. Their Lordships have, therefore, to consider the real meaning of the words used in that section, which meaning will be best ascertained by an examination of other parts of that Regulation. In India, amongst the Hindoos, the restriction as to interest by their law was that interest stopped when it equalled the loan. The interference with the rate of interest is therefore a thing of positive law, and cannot be extended beyond the provisions of the Regulation. By the second section of the Regulation in question, a minimum rate of interest, and that a high one, much in excess of 12 per cent., was directed to be decreed ; and by the third, the maximum rate of interest was reduced to 12 per cent. in the case only of debts exceeding 100 sicca rupees. The rates prescribed by the Regulation in the several cases enumerated, were fixed rates, constituting both a maximum and minimum in the cases aforesaid, which were limited to contracts between and prior to named dates. Then, by the fourth section, *in causes of action* arising after the 1st January 1793, the Courts were not to decree any interest on any sum whatever above the rate of 12 per cent. per annum. From that time this was the limit beyond which no claim to interest could be enforced in respect to contracts entered into after that date ; and it practically governed other cases where interest could be decreed, irrespective of contract. But inasmuch as the words of the earlier sections standing alone might seem to prescribe a rate of interest, irrespective of agreement, and so lead to misapprehension of the meaning of the law, the framers of it, by the fifth section, declared further that if a lower rate of interest than any of the rates authorised to be awarded shall have been *stipulated* between the parties, no higher rate of interest than the rate so stipulated is to be decreed. This plainly

relates to the real agreement between the parties, constituting an actual legal stipulation; for it constitutes a limitation of the fourth section, as well as of the others. It does not extend to the cases comprised within the ninth section where a device or means is used to disguise the real contract as to interest, for the provisions are inconsistent. The language of the fifth section would be violated by a construction of the word "stipulated," which would confine it to "expressed." Such a construction would be an extension of a penal enactment to a case not within its language and obvious objects, and that where another section did provide for the case before the Court.

The sixth, seventh, and ninth sections apply in terms to remedies, to suits brought to enforce, not to suits brought for relief against a contract. To bring a case within the eighth section, the excess must be *specified* in the contract itself. The ninth section does not declare the contract itself void, nor direct any pledge to be returned, without redemption. The tenth section furnishes an argument that such was not the design. But even if this did not appear, a penal law, and especially one of so peculiar a character as that contained in the ninth section of this Regulation, is not one to be extended by construction. This section is one *in pœnam* against the concealment of the usury; for the open violation of the Regulation entails, under s. 8, only a forfeiture of interest. If the ninth section were so extended by construction as to invalidate the contract itself and make it, and the conveyance also obtained under it, null and void, then, inasmuch as there are no saving words, an innocent purchaser without notice from the mortgagee, by assignment of the pledge, would be unable to retain it, even for the just debt and legal interest. Their Lordships, therefore, think that the only section of the Regulation at all applicable to the present suit brought by a plaintiff to set aside his contract, and have restitution of the pledge on terms of redemption, is the tenth section. If any case were needed to enforce so plain a rule (which however has been questioned), that of *Eshanchunder Sing v. Samachurn Bhuttoo*, in 11 Moore's Indian Appeals, p. 20, emphatically points out, in the language of Lord Westbury, "the absolute necessity that the determinations in a cause should be founded on a case either to be found in the pleadings, or involved in, or consistent with, the case thereby made." The present suit is one for redemption, not for declaring a forfeiture, and must be decided according to the rules applicable to the former suit. If the transaction were simply void, and no estate at all passed, it is obvious that the remedy to recover the land would be a possessory suit, against which limitation would run from the moment of entry. It cannot be treated as a voidable or redeemable estate between mortgagor and mortgagee, for one purpose, viz., to escape the Limitation Law, and as a void estate for another. If the estate in the lands created by the lease can be determined before the expiration of the twenty years, that can only be effected by coming to the Court for equitable relief, and submitting to the usual terms on which such relief is granted. What, then, are these terms? The Court will not, in the interests of justice, permit inconsistency and untruth of statement; will not permit a plaintiff to say, I promised to give the defendant 14 per cent. on his loan to me, and seek relief against him on that allegation; and permit him also the next instant to say the contract is expressed for 9 per cent., and I will tie my opponent down to that term, that lower rate must be deemed to have been stipulated, and so to form the measure of his right to interest. The reply to this will be, you have told us what the real bargain was, and on this statement you have made your application for relief, which you can obtain only on equitable grounds. Their Lordships find in the Regulations no positive law forbidding the application of these principles of justice to the case.

The 10th Section rather leads to a contrary conclusion, viz., that in a case circumstanced like the present, the mortgagee may retain his pledge until he has

received out of it his debt with interest at 12 per cent. At the time when this Regulation was passed, the receipt of profits in lieu of interest under a simple usufruct mortgage was common, as indeed appears by the introductory words of the Clause. As to mortgages executed before the 28th March 1780, the usufruct might be allowed even after the Regulation, in lieu of interest up to that date. Then after that date, that dividing point of time, and subsequently to it, the character of these mortgages suffered a change. The mortgage possession, instead of enduring by title for the stipulated time, was made liable to abridgment by satisfaction from the usufruct, and a claim to interest arose in some cases where it did not exist before. The reception of the profits in many cases did not constitute receipt of interest, but was in lieu of any. Then, as to all usufructuary mortgages to be made after the dividing time which was before the Regulation, it makes also provision and subjects alike all the enumerated mortgages to cancellation and redemption whenever the principal sum, "with the simple interest due upon it," shall have been realized from the usufruct of the property subsequent to the 28th day of March 1780, or otherwise liquidated by the mortgagor. It applies, then, to all alike, though the circumstances of them all were not originally similar, subjects them to one provision, and imposes interest in some cases where there was no contract for it before. This Section, having so provided, drops designedly the words "stipulated" and "specified," which would have been inappropriate in many of the cases, and uses, in more correct language, this expression, "the simple interest due upon it." This simple interest would, of course, in all cases where no interest was named, be 12 per cent.; but where a higher rate was named against which the usufruct was to be a set-off, that is, a receipt "in lieu" of it, the reduced rate would be 12 per cent., and all the interest alike would be "due" by force of the enactment, even where interest did not exist before; therefore, as this is the case of an usufructuary mortgage, by means of which a profit higher than the return of 12 per cent. was to be made, and as relief is sought, viz., to have the pledge restored as cancelled or redeemed by satisfaction of the usufruct, the Clause which is most closely applicable to the claim is the 10th, the terms of which are large enough to embrace, and were designed in fact to embrace, some cases where the law itself made the interest "due." The Regulation, then, rather seems to favor than prohibit the restoration of the pledge on the Court terms, that is, on reduced terms of interest imposed by the law. The real transaction appearing, and no prohibitory law intervening, the Court is left free to do justice in the particular case; and if the spirit of the 10th Section regulate the case, it will sanction a redemption at the higher rate, allowing the actual contract so far as the law allows it. For the above reasons their Lordships think the interest should have been calculated at the higher rate of 12 per cent.

This view of the case would suffice to show, on the plaintiff's own estimate, that the decree appealed from cannot be maintained, since the allowance of 12 per cent. would on the account annexed to the plaint show that the mortgage was not fully satisfied at the date of the institution of the suit. Their Lordships, however, must proceed to consider the other objections urged to the decree, and to view the conduct of the parties through this long protracted litigation with a view to their decision on the subject of costs.

The suit was brought to establish the title to redeem, for cancellation of the instruments, for possession of the lands, and payment of a small estimated surplus. It lay on the plaintiffs to show that the mortgagees were paid in full out of their receipts. It was not also a suit to make the mortgagees chargeable for non-receipts of profits, which they might have received with common care and attention. A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise. Much depends in India on personal qualities. The very charge of management and possession may cause

a falling-off of receipts. Therefore an estimate of a preceding rental does not suffice to show actual receipts, yet it is on this fallacious estimate at the outset that the calculation of the plaintiffs which they annexed to their plaint proceeds. Again, the plaintiffs make no deduction for those parts of the pledged property which turned out to be subject to prior charges, and the calculation of interest proceeded also on a wrong basis. Had these defects, apparent on the face of the plaint, been duly dealt with at the inception of the case, this long litigation might have been, if not ended, limited at least at an earlier stage. It is, on the other hand, to be remembered that the plaintiffs claim in their suit to have the character of the mortgage itself ascertained and decreed. In this they have succeeded against a long, vain, and unfounded opposition, for the case of the defendants on this part of the case, when closely investigated, is found inconsistent. It is not credible that the bankers would take, for so large a loan, a security which on their present statement has left them always losers, even of some part of the interest. The property was in the neighbourhood; the gomastah was a man of business not likely to err so greatly in the valuation of the pledge: therefore to this part of the claim a groundless defence was made, which has failed, and the suit has established a very important right in the plaintiffs' favor, though they have proved to be wrong in their estimates of the receipts and the rate of interest. The conduct of the mortgagees in not giving in the accounts at an earlier stage may be ascribed to the nature of their defence, and in no greater degree exposes them, than that defence itself does, to suspicion. If they meant to insist on that right, of course they would not have prepared and kept their accounts on an inconsistent principle. A great part, therefore, of the obstruction on this subject must be ascribed to this, that they viewed the transaction in its actual, whilst their opponents and the Court viewed it in its legal, aspect. The case does not afford room for supposing that any extortionate interest was in view, though interest exceeding the legal rate has been stipulated for. The mortgagees were bankers, traders probably, realizing in their business a profit beyond the legal rate of interest, and they may have meant no more than to realize a profit proportionate to the risk, in the calculation of which the danger of loss by litigation cannot be excluded.

The judgment now appealed from mainly proceeds on the non-production of the right accounts under Reg. XV of 1793. Their Lordships incline to think that provision must, as regards this suit, be taken to be still in force and unrepealed by Act XXVIII of 1855. It is unnecessary to decide the point, as their Lordships think that, assuming it to be in full force, it has received in the judgment under review too strict an interpretation. Assuming it to be in force, what was the duty which it imposed on the appellants? The duty to which they were bound by law, in the character ascribed to them by the decree, which was not questioned by the appellants on this point, was to keep an account of gross receipts from the property mortgaged, and also the expenses of management and *preservation*. Some difficulties might attend a very rigid compliance with this Regulation. Their Lordships desire to enforce by everything which may fall from them on the subject, the duty as well as the policy and prudence of keeping as full, complete, and plain an account of the transactions attending the management and receipts of an estate mortgaged as the nature of the case will admit. It is obvious, however, that the language of the Section which applies to the common cases must receive a construction such as may suffice to accommodate its strict salutary provisions to the variable and different natures of estates and possession. The gross receipts must be such as the mortgagor himself, previous to the mortgage, would have been entitled to; and if he could not by reason of an intervening lease call for the account of the collections, neither can his mortgagee; and also, if at the time of the mortgage, a valid engagement, not designed to exclude accounting, is made by common consent qualifying the nature of the

usufructuary possession, the account of the receipts must be subject to that modification. The terms of the law are evidently not inflexible terms; and in like manner must be construed the provision as to the attestation of the truth of the accounts, which provision must necessarily be flexible like the former; for the mortgagee is to verify only *his gross receipts and his expenditure*, not the rents nor the extent of arrears, nor the causes of such arrears; he is not, in fact, directed then to make out and verify such an account as might be established against him in a hostile suit, but only his gross receipts and his expenditure. The common rule, *qui facit per alium facit per se*, would apply to him. What is done by his agent is done by himself, and the accounts of the property managed by the agent, though prepared by the agent, are the principal's accounts. He, though by delegation, must deliver in the accounts, and he must in some mode swear or depose that they are true and authentic. Must it necessarily be by his own personal oath in all cases? How can he do that if he knows nothing at all about them? He may have no belief, and may even suspect them to be false; for he may suppose himself to have been deceived by his agent. Can the Legislature seriously be supposed to have contemplated anything so immoral as that a man should swear positively to knowledge of that of which he has and can have no personal knowledge? If it be urged that he may swear to his knowledge and belief, still that rational permission is a modification and expansion of the terms of the law. The words are without any exception, and in terms apply to women, infants, lunatics, persons out of the country, and others managing necessarily remote possessions by agents whom they must employ and in whom they may confide. Can the Indian Legislature, which recognized gomastahs by legislation, be supposed ignorant of their large authority and responsibility? And can it have resolved to make this direction to take an oath imperatively obligatory on every mortgagee alike in every conceivable case? Their Lordships think otherwise. They think that the language which, like other provisions of the earlier Regulations, is curt and applied to the more common cases, must, to preserve even the spirit of the enactment itself, be construed reasonably, as admitting in case of necessity, of some delegation also in the person deputed to perform the duty of attesting the accounts. If the general manager who did all, and knows all; with whom the mortgagors, with that knowledge, contracted; whose name is used; whose accounts in one sense they are; and who far more than mere representatives knowing nothing of their own knowledge of the transactions, satisfies the spirit of the law, swears to the truth of them, it is such a reasonable compliance with the spirit of the law at least, that its performance, in a case circumstanced like the present, by a substitute, furnishes no ground whatever, for suspecting mal-practice or designed evasion of the law; and with that alone their Lordships are concerned in this case, since the mere mode of the verification has no other importance in this case than as it raises a case of suspicion against the accounts themselves. The mere mode of their verification under the circumstances of this case does not raise, in their Lordships' minds, any distrust. The contents of the accounts themselves, however, furnish more ground for doubting their accuracy. They show the interest alone not covered by the receipts. The bankers and their gomastah were experienced men of business. The loan is large. The property was not likely to be unknown to the lenders as to its general productiveness.

No change of circumstances accounting for so great a decline is disclosed, and the decision below of the Judge of the Zillah Court does not justify the conclusion that the whole debt, and some arrears of interest, still remain unsatisfied. Some explanation of this may be afforded by the circumstance that the mortgagees long insisted on a state of accountability very different from that adjudged; and there does appear to their Lordships reason for thinking the accounts rendered to be so far unsatisfactory as to have justified the Court had it directed a further enquiry;

ave taken a right view of the question. He overruled the objections to the execution, which had been repeated by the appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which I have just alluded to as being, in their Lordships' opinion, erroneous, saying that she could not stand in her husband's shoes; that it lay upon her to prove that Shurbeshur had actually expended his own moneys in performance of the ceremonies, and they therefore, in the first instance, overruled the order and judgment of the Principal Sudder Ameen. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to that decree in the other suit, they came to the conclusion that the widow must be taken to have established, chiefly, if not wholly, by that decree that of which they had required proof from her, viz., that Shurbeshur had expended his own moneys in the performance of the ceremonies; that therefore their former order was wrong; and that the final order to be made was, that she should be entitled to issue execution,—in fact, to affirm the Principal Sudder Ameen's order. A subsequent order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the reasoning of the learned Judges of the High Court. They think, for the reasons given, that the original order, reversing the Principal Sudder Ameen's order, was wrong; but if that order had been properly made, they would have been unable to adopt the reasoning of the learned Judges as to the effect of the decree in the suit of the appellant, which certainly does not prove that Shurbeshur expended his own moneys in the performance of ceremonies. The utmost which that decree can be taken to prove is that the appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit, in respect of those ceremonies.

The effect, however, of the final orders of the High Court is to give to the widow that to which their Lordships consider she is entitled; and therefore the order which they will humbly recommend Her Majesty to make is that both these appeals be dismissed, and that the orders of the Courts below, which are the subjects of them, be affirmed.

The 24th February 1869.

Present :

Sir James W. Colvile, Lord Justice Selwyn, and Lord Justice Giffard.

High Court—Remand—Issues—Rejection of evidence—Appeal.

On Appeal from the High Court at Madras.

Katchekaleyana Rungappa Kalakka Tola Oodiar

versus

Kachivijaya Rungappa Kalakka Tola Oodiar.

A High Court should record the grounds of its decision in a case which is appealed to the Privy Council.

In a case as to the amount of maintenance to be awarded out of an estate, which was remanded by the Privy Council for the purpose of ascertaining and fixing the amount of such maintenance and for decision under s. 351 of the Code of Civil Procedure, it was held that it could not be objected that no issues were directed in the manner prescribed by the practice of the Courts in India.

Held, further, that during the enquiry in question either party could have produced evidence in support of his case, and where in his grounds of appeal from the judgment of the Zillah Judge passed on such enquiry, the defendant did not urge that the Judge improperly rejected evidence tendered by the defendant, he could not in appeal to the Privy Council raise that objection.

Their Lordships have considered this case, and they must in the first place express their great regret that the record contains no statement of the grounds of the decision of the High Court which is now under appeal. The charter of the High Court of Judicature expressly requires that the reasons of its decisions should be recorded by the Judges and transmitted for the information of this Court, and it is the subject of great regret, especially in the case which comes before their Lordships *ex-parte*, that the grounds of the judgment appealed from should be wanting on the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in this present suit.

The first objection which is taken is, that in this case no issues were directed in the manner which has been prescribed by the practice of the Courts in India. But the order of the 19th December 1862, which directs that the matter shall be referred to ascertain the amount of maintenance which may appear to be justly and properly payable with reference to the means of the defendant, and the other facts of the case, and to proceed to decision in the manner indicated in s. 351 of the Code of Civil Procedure, invalidates any such objection, because that is in substance an order for enquiry, and an order for enquiry raising the very points upon which the appellant has relied in the arguments before this Court; for it is a direction to ascertain the amount of the maintenance which may appear to be justly and properly payable with reference to the very point which it was urged ought to have been taken into consideration, viz., the means of the defendant, in connection with the other facts of the case. It appears to their Lordships to be impossible to object to such an enquiry as that, upon the ground of its not being sufficient. It is therefore equivalent to issues, and rendered any further issues entirely unnecessary. The first ground of objection, therefore, fails.

We proceed, then, to the second ground, viz., that there was in this case an improper rejection of evidence. Now it appears to their Lordships that, under an enquiry such as that to which I have alluded, it was obviously competent to either party to produce evidence in support of his case during the conduct of that enquiry; and if evidence had been properly tendered on the part of the appellant, and had been improperly rejected by the Judge, such improper rejection of evidence would have constituted a valid ground for appeal. But we find that, in fact, there was an appeal from the decision of the Judge,—a decision arrived at in the prosecution of that enquiry,—and at page 10 of the record the eleven grounds for the appeal from that judgment are stated. In considering these eleven grounds, we find, in the first place, that the appellant raised the case that the plaintiff's case was barred by the Statute of Limitation; and secondly, the plaintiff not having produced, nor given notice to the defendant to produce, the *istimrari sunnud* of the zemindar, no judgment could be passed as to the nature of the property. Now, that appears to be again raising the same question which had been decided before, viz., as to whether this property was acquired property, or whether it had been inherited? It appears to have been originally acquired by one zemindar, but it had descended to the then zemindar, and therefore it could not then be properly considered as acquired property. That had been already decided, and that point, once before decided, seems to be intended to be raised again by the second ground of appeal. The third ground proceeds to raise the objection as to the plaintiff's mother being entitled to maintenance, and then the fourth is "The Civil Judge's estimate of the income of the zemindary is erroneous, and even opposed to the plaintiff's own allegation." The fifth is "The Civil Court has not correctly estimated the wants of the plaintiff." We need not

at length go into the other grounds, but it is to be observed that these grounds proceed mainly upon an insufficiency of the evidence produced by the plaintiff, and that they do not in the least degree point to any evidence having been tendered by the appellant, or having been improperly rejected by the Judge; and under these circumstances, even if the appellant had any such ground of appeal, if he did not think fit to produce it before the Court, where such an appeal might regularly have been prosecuted, and where such a ground would have afforded a sufficient ground for such an appeal, in the opinion of their Lordships it is not competent for him to maintain it now; and it appears to have been raised for the first time in the petition of the 6th August 1864, No. 16, where it is said, "Because your petitioner was not permitted to prove what the net income of the zemindary was." Their Lordships, therefore, are of opinion that that second ground of complaint also fails.

Then it is said that the decision is erroneous, inasmuch as it is based upon an assumption that the income of the zemindary was Rs. 50,000, which is more than has been alleged in the original plaint, which only claimed maintenance as against an income of Rs. 40,000. But in the opinion of their Lordships this is a misconception of the terms of the judgment. The judgment appears to have proceeded upon this. The claimant alleges that the income of the zemindary is Rs. 40,000, but the Judge finds that upon a former occasion, many years ago, it is true, the appellant had admitted the income to be Rs. 50,000; and that on a former occasion, also many years ago, in the year 1831, a sum of Rs. 250 *per mensem*, or Rs. 3,000 a year, had been awarded to another brother of the zemindar for maintenance. The Judge, proceeding upon that, says, "I find an allegation of Rs. 40,000 on the one side, an admission of Rs. 50,000 on the other, and a former order allotting for maintenance Rs. 3,000; and, in the absence of any evidence to the contrary, the fair inference to be drawn from these documents is that Rs. 2,000 is a reasonable sum for maintenance, with the addition of a house." Under the circumstances, their Lordships are of opinion that it cannot with justice be said that the Judge has proceeded upon the foundation of the income being Rs. 50,000, and therefore in excess of the allegation made by the claimant.

It remains only to notice the other point with respect to the residence. It may, we think, be fairly assumed that this question was taken into consideration by the Judge in fixing the amount of the maintenance. It was a matter for the discretion of the Judge, and a matter with which this Board would be very reluctant to interfere, unless it could be shown that that Judge had miscarried in some very gross and striking manner. Now, in the opinion of their Lordships, there is no such miscarriage in this judgment, having regard to the documents which were proved and to the absence of any other evidence. It appears to their Lordships not to be unreasonable to award the sum which has been awarded by the Judge, with the addition of the residence, and therefore their Lordships will feel it their duty humbly to advise Her Majesty that this decree should be affirmed, and the appeal dismissed.

The 1st March 1869.

Present :

Sir James W. Colville, Lord Justice Selwyn, and Lord Justice Giffard.

Questions of fact—Registry in Government books—Evidence.

On Appeal from the High Court at Bombay.

Devaji Goyaji and others
versus
 Godubhai Godbhai and another.

The Privy Council followed in this case the usual course of confirming the concurrent judgments of the Courts below on questions of fact, and stated that even if they had felt some doubts in it they would have hesitated long when they were asked to continue the litigation and send the matter again for trial in India.

Where the name of a person or his ancestor has always been entered in the Government books, and it is found that he has always paid the Government assessment in respect of certain villages, though that may not be evidence of title, it is very strong evidence of possession.

Their Lordships having had very full opportunity of considering the facts in this case, and the arguments which have been addressed to them, are now prepared to dispose of it.

The matter has been conveniently divided into three stages. The first litigation is that which commenced in the year 1836 by a suit by the present appellants before the Assistant Collector, the proceedings in which, to a certain extent, are printed at page 134 of the record. That appears by those proceedings to have been a suit instituted by them for the recovery of the villages in question. On that occasion, it appears that the defendants did not enter into any evidence, and accordingly, upon the evidence which then existed, which was entirely on one side, in August 1838 a judgment was given by the Assistant Collector in favor of the present appellants.

That judgment was appealed against to the District Judge, who remanded the case for re-trial before the Principal Sudder Ameen. The trial proceeded, and, in the course of this, which was the first litigation in which the respondents entered into any evidence, the bond of the 24th February 1792, was put forward by the respondents in support of their case. By that bond, after mortgaging the share in the village for the sum of money which is there mentioned, it is stipulated that the money shall be paid with interest; and if the mortgagors do not pay it with interest within ten years, "the said villages shall become 'aghat,'—an absolute transfer in your favor." This bond was filed and deposited in Court on the 23rd January 1841, and it has ever since remained there. With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships' opinion, sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it, and who therefore were entitled to the possession of it; so that the bond must be held to have come from the proper custody. On the 14th July 1841, the evidence of the witness which is stated at page 168, was given in support of that bond. The witness No. 11 states that the "bond was written out by me. I do not remember by whose hands the signatures were made." He says, "I do not know whether I made them or caused to make them. The names of the persons who made the signatures are written in the said signatures. I do not know who attested the writing."

That suit proceeded until the 14th December 1841, when it was dismissed on the application of the plaintiffs, and on that occasion the razeenamah, upon which so much discussion has since arisen, was recorded as the foundation of that dismissal. Whether the practice of the Indian Courts be exactly in accordance with the practice of our own Courts, by which a plaintiff may, up to a certain stage, dismiss his own suit upon obtaining an order for its dismissal with costs, it is unnecessary to enquire, because we think it is quite sufficient to say that, on the face of these proceedings, it is apparent that the razeenamah was entered upon the record as the ground for the withdrawal of the suit; but at the same time it is equally clear that it was stated expressly upon the record itself that the defendants' vakeel represented that they were not aware of the razeenamah, but, as the plaintiffs' vakeel admits the razeenamah, the Court removes the suit from

the file, and orders that the plaintiff should bear all the costs; in other words, the Court says the defendants do not in the least degree admit any of the statements contained in the razeenamah, for they state they were not at all aware of the razeenamah; but as the plaintiff admits that he desires to withdraw his suit and to pay the costs, with that precautionary recital in favor of the defendants, the justice of the case was obviously met by allowing the plaintiffs to withdraw their suit, and ordering them to pay the costs of the suit thus withdrawn. But, at the same time, with reference to the questions of fact with which their Lordships have now to deal, it is very material to see what were the terms which, by this razeenamah, were alleged to have been entered into and agreed to by the parties. The razeenamah states—"The said case is pending in this Court, but we plaintiffs and defendants appointed arbitrators in regard to this case, and got the case decided by the arbitrators as follows: that the defendants should make over to the plaintiffs possession of the two villages of Waodi and Tugdi, in Pergunah Gogo; that the plaintiffs should pay to the defendants Rs. 7,150 of Sicca currency; that until the payment of the said money the defendants do enjoy in lieu of interest half of the income of the villages, after deducting the assessment, and the plaintiffs do enjoy the other half, and that the defendants being the descendants of Devaji Sutaji their shares in the villages be upheld." Therefore, that is in plain terms a statement of an agreement of reference to arbitration and a subsequent award, and that under that award the plaintiffs were to be put in possession of the whole; consequently, that the plaintiffs being in possession were to bear the burdens incident to that position; that is, they were to pay the assessment, and that then the defendants, in lieu of interest, should enjoy half of the income of the villages after deducting the assessment. It is material also to observe that the evidence in the case certainly does not come up to anything like the performance during any period of time of that agreement or award, so stated in the razeenamah; but by that razeenamah, and by the consequent dismissal of the suit, the first litigation is put an end to.

This brings us to the second litigation, which commenced in 1850; and, although we have not the claim which was then filed, the substance of it appears from the judgment which is set out at page 27 of the record; and from that it appears that the second suit, the suit of 1850, which was instituted by the then plaintiffs, was a suit mainly relying upon this alleged award. The defendants appeared to that suit, and again set up as a defence the bond of 1792. The suit having been heard by the Moonsiff, he, by his judgment, considered that the plaintiffs' case, so far as it depended on the submission and the award, failed. He enters into a long statement, into the details of which it is not necessary now to go, showing the manner in which the submission to the arbitration had been signed, so as not to bind the defendants in that suit, and also into the question as to how the alleged award was signed, ending with the conclusion that those documents were not proved. He says, "Under the above circumstances the Court finds the writing sued on is not properly proved; and, therefore, the Court throws out the claim of the plaintiff with costs." That suit was, therefore, so dismissed by the Moonsiff on the 23rd March 1852.

From that decision and dismissal there was an appeal to the District Judge, and his decision was given on the 27th March 1856, and is set out at page 31 of the record. He says, "The plaintiffs' claim is to recover half of the said villages under the award of the arbitrators, but they have not proved their claim. The Court therefore orders that the decree of the Moonsiff of Gogo, dated 23rd March 1852, be affirmed, and that this decree be no bar to the plaintiffs' filing a suit to establish their right of inheritance, if they have any." And then the costs are thrown on the appellants. That decree terminates the second litigation; and it is only material to observe that from that decision of the Moonsiff, so affirmed by the decision to which I have just referred, there has been no appeal.

The present litigation, then, commenced by a plaint in the Court of the Moonsiff, filed on the 16th June 1859. It is material to observe that that plaint prefers a claim on behalf of the present appellants to be let into possession of the whole of the two villages. After stating the proceedings in the former suit, they state "That the half of the said two villages was in our occupation, possession, and enjoyment up to 1852—1853, as above stated; but after the passing of the said decree by the Moonsiff of Gogo, the defendants forcibly took the said half share into their possession. The other half share has also been forcibly retained by them, although the debt due to them has been liquidated. We therefore pray that the whole of the said two villages of Waodi and Tugdi, together with the lands, trees, &c., may be awarded into our possession." That suit proceeded; and in that suit the defendants again set up as a defence the bond of 1792. The time for producing evidence was frequently enlarged; but on the 25th February 1860, an order was made that the cause should be brought on on the 10th March 1860. On that day the hearing of the cause was again postponed; and on the 16th April 1860, an application was made on the part of the appellants for leave to adduce evidence, the principal object of such evidence being to show that the bond of 1792 was a forgery. On the 19th April 1860, that application was formally refused by the Judge upon the ground that the parties had already had quite sufficient time for entering into evidence, and that it was then too late to ask the Court to allow further evidence to be gone into. He says: "The application for witnesses and papers now made ought to have been made previously, but it has not been done so. Now at this stage, that of giving judgment, this application cannot be admitted. It is therefore rejected and recorded in the case." It is material to observe upon that rejection, because in the course of the argument before their Lordships this application of the 16th April 1860 has been repeatedly referred to as being a pending application, whereas it appears that there was a formal judgment refusing that application on the 19th April 1860.

Under these circumstances, the matter came on to be heard before the Moonsiff, and he made his decree on the 19th April 1860, by which, upon the evidence then before him, he dismissed the claim of the appellants with costs. That decision was appealed against, and the grounds of appeal, which are set out at page 149 of the record, do not mention the rejection of any evidence nor the improper dismissal of the application of the 16th April 1860.

The matter came on to be heard by the District Judge on the 10th December 1861, and the decision of the Moonsiff was affirmed, and the appeal dismissed by the District Judge, on the ground that the matter was *res judicata*, and accordingly he ordered the appellants to pay the costs of that appeal.

From that decision there was an appeal to the High Court. The grounds of that appeal are set forth, and it appears that in neither of those grounds is there contained anything distinctly referring to the rejection of the evidence, or the dismissal of the application of the 16th April 1860; but, the matter coming on to be heard before the High Court on the 5th October 1863, that Court reversed the decision of the Judge, considering that he was in error in treating the matter as *res judicata*, and, accordingly, directed it to be submitted to a new trial. That date, the 5th October 1863, it is very material to observe, because it is obvious that, as from that date, it was perfectly competent to either of the parties to make any application with respect to the introduction of fresh evidence, or to the adding to the evidence which had been given in the former suits, or as to producing the depositions of the witnesses which had been taken in either of the former suits. Accordingly we find that, on the 4th April 1864, an application was made by the respondents to be allowed to file a copy of the deposition of that particular witness to whom we have already alluded, viz., the witness who stated that he had written the bond in question. That application states that the witness appears to have been dead. That is a statement which does not appear to have

been in the least degree disputed, and, in the judgment of their Lordships, there is no reason to suppose that the Court acted at all erroneously in allowing that deposition to be filed; but what is more material to the present enquiry is, that although there was this application on the part of the respondent on the 4th April 1864, there was no application whatever by the plaintiffs for the production of any of the evidence mentioned in their petition of the 16th April 1860, nor any complaint made to the Judge as to the evidence having been shut out. Accordingly, the District Judge re-heard the case, and, on the 4th April 1864, he confirmed the Moonsiff's decision, having arrived at the conclusion, *first*, that the bond in question was a true deed; and, *secondly*, that its validity was confirmed by the fact of long undisturbed possession in consistency with the terms of that deed. Thus, upon those two questions of fact, viz., first, the validity of the bond; and, secondly, the long possession of the defendants consistently with the provisions of the bond, there have been two decisions of the Courts in India, both arriving at the same conclusion.

There was, however, an appeal to the High Court from that decision of the District Judge, and the grounds of that appeal state, amongst other things, that the evidence in support of the bond was not sufficient to establish it, but they do not raise any distinct or separate grounds of appeal on the point now insisted on as to the rejection of the evidence mentioned in the petition of the 16th April 1860. That appeal was dismissed by the High Court on the 25th January 1865, and the matter now comes before this Committee. In their Lordships' judgment, the whole case is now open before them both as to the law and as to the facts, and the question which their Lordships have to consider is, whether it will be their duty, under the circumstances of this case, either to advise Her Majesty to make an immediate decree in favor of the plaintiffs, or to remand this matter to India for further trial, or to dismiss this appeal.

As to the first alternative, that of making an immediate decree in favor of the plaintiff, having regard to the pleadings and evidence in this case, it is difficult to see what immediate decree could now be justly made in their favor.

The plaint asks that the whole of the villages may be awarded into the plaintiffs' possession, but the evidence on both sides clearly shows that the defendants have always had some share in the villages, though the extent of that share is disputed. The plaint also admits a borrowing by the ancestors of the plaintiffs from the ancestors of the defendants, and the award upon which the plaintiffs rely finds a sum of money due from the plaintiffs to the defendants, and gives a charge on one-half of the income of the villages to secure the repayment of that sum. A decree in accordance with the plaint is, therefore, inconsistent with the evidence on both sides, and it would be equally difficult to make a decree in the nature of a redemption decree in favor of the appellants, while they have not proved the existence of any mortgage, and while they assert that the only mortgage which has been put in evidence, that of 1792, is a forgery.

It remains to be considered whether it is right that this case should be sent back to India for a further hearing. The litigation between these parties and their ancestors has already existed since the year 1836; there have, as I have already said, been two decisions on matters of fact by the Courts in India. These decisions have been approved by the High Court, and it has been the invariable practice of their Lordships sitting here to require a very strong case indeed to induce them to interfere with such decisions of the Courts in India upon mere questions of fact. It would require a very strong case to induce their Lordships to send such a matter, upon a mere question of fact, for further trial, especially when, in the opinion of their Lordships, the appellants have had abundant opportunities of producing evidence, and when the material questions of fact are few and simple, being mainly, first, the question as to the validity of the bond of

1792; and, secondly, the question relating to the possession of the property in question.

First, then, as to the bond. The bond has been insisted upon by the defendants ever since they first entered into evidence; it has been recorded in Court ever since the 23rd January 1841; it is supported by the evidence of the witness who swears that he wrote it, and whose evidence has not been impeached, except by an attempt which has been made to displace his evidence by a formal objection, which, in the opinion of their Lordships, is entitled to no weight, viz., that he was not proved to have been dead when this deposition was admitted. But this bond is also to some extent supported by the evidence brought forward by the appellants themselves. There are several instances in which the substance of the bond is referred to by their own witnesses. I may refer to one at page 32 of the record, witness No. 51, who is one of the plaintiffs' witnesses. He says:—"In 1791 there was a famine. Ever since that time Godubhai's ancestors enjoyed the income of the village on account of debts." He there refers to the year before that in which the bond bears date, and refers to the possession of Godubhai's ancestors of the income of the village on account of debts. So, also, at page 38 another of the plaintiffs' witnesses, No. 56, says:—"My father used to say the Puchhegaummen, having borrowed money from the ancestors of Godubhai, had given the villages in aghat (mortgage). I do not know for how many years Godubhai's men held the management of the villages under that right of mortgage." At page 119, another of the plaintiffs' witnesses, No. 151, says:—"Previous to 1813 Godubhai's ancestors used to receive out of these villages an income for about 20 years on account of debt." He refers there to 20 years before 1813, which would bring us to the year 1793, being one year after the date of the bond, and agreeing very nearly with the evidence of the other witness, which brings the date to one year before the date of the bond.

But if it could be shown that the possession of the property has been inconsistent with the title created by this bond, or if it could be shown that an agreement had been entered into by the respondents of such a nature that it could only be accounted for by their belief in the invalidity of the bond; if either of those positions could be established on behalf of the appellants, no doubt very great suspicion would be cast on the validity of the bond. But, in their Lordships' opinion, no such agreement is proved to have been entered into or to have been acted upon, and there is a decree, which has not been appealed from, which has decided that there was no award binding on the respondents or affecting their interests.

It remains, therefore, only to consider whether the possession of the property has been inconsistent with the title created by the bond, and this is the second of the two questions of fact. The appellants mainly rely upon the allegation that there was a joint possession from 1842 to, as it is stated in the plaint, 1852, 1853, or, as it has been put in the argument, down to 1852, 1853, or 1854. It is material again to observe that the razeenamah, which is in December 1841, states that the award directed that possession should be given to the plaintiffs. That razeenamah is dated 6th December 1841, and it states that possession is to be delivered to the plaintiffs, but that, after deducting the assessment, the defendants are to enjoy, in lieu of interest, one-half of the income. Now, with respect to the numerous witnesses who have been called in support of the case of the plaintiffs, the objections have been justly made that none of them reside in the villages in question, and that many of them state what appears to their Lordships to be altogether inconsistent with the real truth of this case. They state not only joint possession before the alleged joint possession commencing in 1842, which is that which is now relied upon mainly in the argument and stated in the plaint, but also a payment, either by the ancestors of the appellants or by the appellants themselves, of the Government assessment before the year 1842. We may refer to a few

ave taken a right view of the question. He overruled the objections to the execution, which had been repeated by the appellant.

The case then went by appeal to the High Court, and two of the learned Judges of that Court then took the view which I have just alluded to as being, in their Lordships' opinion, erroneous, saying that she could not stand in her husband's shoes; that it lay upon her to prove that Shurbeshur had actually expended his own moneys in performance of the ceremonies, and they therefore, in the first instance, overruled the order and judgment of the Principal Sudder Ameen. There was, then, an application for review before the same learned Judges; and upon their being referred to the decree in the other suit, and to some additional evidence, but principally to that decree in the other suit, they came to the conclusion that the widow must be taken to have established, chiefly, if not wholly, by that decree that of which they had required proof from her, viz., that Shurbeshur had expended his own moneys in the performance of the ceremonies; that therefore their former order was wrong; and that the final order to be made was, that she should be entitled to issue execution,—in fact, to affirm the Principal Sudder Ameen's order. A subsequent order was made, declaring her entitled to interest on the amount for which the original execution had been sued out.

Their Lordships are unable to assent to the reasoning of the learned Judges of the High Court. They think, for the reasons given, that the original order, reversing the Principal Sudder Ameen's order, was wrong; but if that order had been properly made, they would have been unable to adopt the reasoning of the learned Judges as to the effect of the decree in the suit of the appellant, which certainly does not prove that Shurbeshur expended his own moneys in the performance of ceremonies. The utmost which that decree can be taken to prove is that the appellant had failed to show that he had performed separate ceremonies upon his own account, or that he was entitled to recover the sum claimed in that suit, in respect of those ceremonies.

The effect, however, of the final orders of the High Court is to give to the widow that to which their Lordships consider she is entitled; and therefore the order which they will humbly recommend Her Majesty to make is that both these appeals be dismissed, and that the orders of the Courts below, which are the subjects of them, be affirmed.

The 24th February 1869.

Present :

Sir James W. Colvile, Lord Justice Selwyn, and Lord Justice Giffard.

High Court—Remand—Issues—Rejection of evidence—Appeal.

On Appeal from the High Court at Madras.

Katchekaleyana Rungappa Kalakka Tola Oodiar
versus
 Kachivijaya Rungappa Kalakka Tola Oodiar.

A High Court should record the grounds of its decision in a case which is appealed to the Privy Council.

In a case as to the amount of maintenance to be awarded out of an estate, which was remanded by the Privy Council for the purpose of ascertaining and fixing the amount of such maintenance and for decision under s. 351 of the Code of Civil Procedure, it was held that it could not be objected that no issues were directed in the manner prescribed by the practice of the Courts in India.

Held, further, that during the enquiry in question either party could have produced evidence in support of his case, and where in his grounds of appeal from the judgment of the Zillah Judge passed on such enquiry, the defendant did not urge that the Judge improperly rejected evidence tendered by the defendant, he could not in appeal to the Privy Council raise that objection.

Their Lordships have considered this case, and they must in the first place express their great regret that the record contains no statement of the grounds of the decision of the High Court which is now under appeal. The charter of the High Court of Judicature expressly requires that the reasons of its decisions should be recorded by the Judges and transmitted for the information of this Court, and it is the subject of great regret, especially in the case which comes before their Lordships *ex-parte*, that the grounds of the judgment appealed from should be wanting on the record. But in the absence of any such information, their Lordships must deal with the case as it appears on the record in this present suit.

The first objection which is taken is, that in this case no issues were directed in the manner which has been prescribed by the practice of the Courts in India. But the order of the 19th December 1862, which directs that the matter shall be referred to ascertain the amount of maintenance which may appear to be justly and properly payable with reference to the means of the defendant, and the other facts of the case, and to proceed to decision in the manner indicated in s. 351 of the Code of Civil Procedure, invalidates any such objection, because that is in substance an order for enquiry, and an order for enquiry raising the very points upon which the appellant has relied in the arguments before this Court; for it is a direction to ascertain the amount of the maintenance which may appear to be justly and properly payable with reference to the very point which it was urged ought to have been taken into consideration, viz., the means of the defendant, in connection with the other facts of the case. It appears to their Lordships to be impossible to object to such an enquiry as that, upon the ground of its not being sufficient. It is therefore equivalent to issues, and rendered any further issues entirely unnecessary. The first ground of objection, therefore, fails.

We proceed, then, to the second ground, viz., that there was in this case an improper rejection of evidence. Now it appears to their Lordships that, under an enquiry such as that to which I have alluded, it was obviously competent to either party to produce evidence in support of his case during the conduct of that enquiry; and if evidence had been properly tendered on the part of the appellant, and had been improperly rejected by the Judge, such improper rejection of evidence would have constituted a valid ground for appeal. But we find that, in fact, there was an appeal from the decision of the Judge,—a decision arrived at in the prosecution of that enquiry,—and at page 10 of the record the eleven grounds for the appeal from that judgment are stated. In considering these eleven grounds, we find, in the first place, that the appellant raised the case that the plaintiff's case was barred by the Statute of Limitation; and secondly, the plaintiff not having produced, nor given notice to the defendant to produce, the *istimrari sunnud* of the zemindar, no judgment could be passed as to the nature of the property. Now, that appears to be again raising the same question which had been decided before, viz., as to whether this property was acquired property, or whether it had been inherited? It appears to have been originally acquired by one zemindar, but it had descended to the then zemindar, and therefore it could not then be properly considered as acquired property. That had been already decided, and that point, once before decided, seems to be intended to be raised again by the second ground of appeal. The third ground proceeds to raise the objection as to the plaintiff's mother being entitled to maintenance, and then the fourth is "The Civil Judge's estimate of the income of the zemindary is erroneous, and even opposed to the plaintiff's own allegation." The fifth is "The Civil Court has not correctly estimated the wants of the plaintiff." We need not

at length go into the other grounds, but it is to be observed that these grounds proceed mainly upon an insufficiency of the evidence produced by the plaintiff, and that they do not in the least degree point to any evidence having been tendered by the appellant, or having been improperly rejected by the Judge; and under these circumstances, even if the appellant had any such ground of appeal, if he did not think fit to produce it before the Court, where such an appeal might regularly have been prosecuted, and where such a ground would have afforded a sufficient ground for such an appeal, in the opinion of their Lordships it is not competent for him to maintain it now; and it appears to have been raised for the first time in the petition of the 6th August 1864, No. 16, where it is said, "Because your petitioner was not permitted to prove what the net income of the zemindary was." Their Lordships, therefore, are of opinion that that second ground of complaint also fails.

Then it is said that the decision is erroneous, inasmuch as it is based upon an assumption that the income of the zemindary was Rs. 50,000, which is more than has been alleged in the original plaint, which only claimed maintenance as against an income of Rs. 40,000. But in the opinion of their Lordships this is a misconception of the terms of the judgment. The judgment appears to have proceeded upon this. The claimant alleges that the income of the zemindary is Rs. 40,000, but the Judge finds that upon a former occasion, many years ago, it is true, the appellant had admitted the income to be Rs. 50,000; and that on a former occasion, also many years ago, in the year 1831, a sum of Rs. 250 *per mensem*, or Rs. 3,000 a year, had been awarded to another brother of the zemindar for maintenance. The Judge, proceeding upon that, says, "I find an allegation of Rs. 40,000 on the one side, an admission of Rs. 50,000 on the other, and a former order allotting for maintenance Rs. 3,000; and, in the absence of any evidence to the contrary, the fair inference to be drawn from these documents is that Rs. 2,000 is a reasonable sum for maintenance, with the addition of a house." Under the circumstances, their Lordships are of opinion that it cannot with justice be said that the Judge has proceeded upon the foundation of the income being Rs. 50,000, and therefore in excess of the allegation made by the claimant.

It remains only to notice the other point with respect to the residence. It may, we think, be fairly assumed that this question was taken into consideration by the Judge in fixing the amount of the maintenance. It was a matter for the discretion of the Judge, and a matter with which this Board would be very reluctant to interfere, unless it could be shown that that Judge had miscarried in some very gross and striking manner. Now, in the opinion of their Lordships, there is no such miscarriage in this judgment, having regard to the documents which were proved and to the absence of any other evidence. It appears to their Lordships not to be unreasonable to award the sum which has been awarded by the Judge, with the addition of the residence, and therefore their Lordships will feel it their duty humbly to advise Her Majesty that this decree should be affirmed, and the appeal dismissed.

The 1st March 1869.

Present :

Sir James W. Colville, Lord Justice Selwyn, and Lord Justice Giffard.

Questions of fact—Registry in Government books—Evidence.

On Appeal from the High Court at Bombay.

Devaji Goyaji and others
versus
Godubhai Godbhai and another.

The Privy Council followed in this case the usual course of confirming the concurrent judgments of the Courts below on questions of fact, and stated that even if they had felt some doubts in it they would have hesitated long when they were asked to continue the litigation and send the matter again for trial in India.

Where the name of a person or his ancestor has always been entered in the Government books, and it is found that he has always paid the Government assessment in respect of certain villages, though that may not be evidence of title, it is very strong evidence of possession.

Their Lordships having had very full opportunity of considering the facts in this case, and the arguments which have been addressed to them, are now prepared to dispose of it.

The matter has been conveniently divided into three stages. The first litigation is that which commenced in the year 1836 by a suit by the present appellants before the Assistant Collector, the proceedings in which, to a certain extent, are printed at page 134 of the record. That appears by those proceedings to have been a suit instituted by them for the recovery of the villages in question. On that occasion, it appears that the defendants did not enter into any evidence, and accordingly, upon the evidence which then existed, which was entirely on one side, in August 1838 a judgment was given by the Assistant Collector in favor of the present appellants.

That judgment was appealed against to the District Judge, who remanded the case for re-trial before the Principal Sudder Ameen. The trial proceeded, and, in the course of this, which was the first litigation in which the respondents entered into any evidence, the bond of the 24th February 1792, was put forward by the respondents in support of their case. By that bond, after mortgaging the share in the village for the sum of money which is there mentioned, it is stipulated that the money shall be paid with interest; and if the mortgagors do not pay it with interest within ten years, "the said villages shall become 'aghat,'—an absolute transfer in your favor." This bond was filed and deposited in Court on the 23rd January 1841, and it has ever since remained there. With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships' opinion, sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it, and who therefore were entitled to the possession of it; so that the bond must be held to have come from the proper custody. On the 14th July 1841, the evidence of the witness which is stated at page 168, was given in support of that bond. The witness No. 11 states that the "bond was written out by me. I do not remember by whose hands the signatures were made." He says, "I do not know whether I made them or caused to make them. The names of the persons who made the signatures are written in the said signatures. I do not know who attested the writing."

That suit proceeded until the 14th December 1841, when it was dismissed on the application of the plaintiffs, and on that occasion the razeenamah, upon which so much discussion has since arisen, was recorded as the foundation of that dismissal. Whether the practice of the Indian Courts be exactly in accordance with the practice of our own Courts, by which a plaintiff may, up to a certain stage, dismiss his own suit upon obtaining an order for its dismissal with costs, it is unnecessary to enquire, because we think it is quite sufficient to say that, on the face of these proceedings, it is apparent that the razeenamah was entered upon the record as the ground for the withdrawal of the suit; but at the same time it is equally clear that it was stated expressly upon the record itself that the defendants' vakeel represented that they were not aware of the razeenamah, but, as the plaintiffs' vakeel admits the razeenamah, the Court removes the suit from

the file, and orders that the plaintiff should bear all the costs; in other words, the Court says the defendants do not in the least degree admit any of the statements contained in the razeenamah, for they state they were not at all aware of the razeenamah; but as the plaintiff admits that he desires to withdraw his suit and to pay the costs, with that precautionary recital in favor of the defendants, the justice of the case was obviously met by allowing the plaintiffs to withdraw their suit, and ordering them to pay the costs of the suit thus withdrawn. But, at the same time, with reference to the questions of fact with which their Lordships have now to deal, it is very material to see what were the terms which, by this razeenamah, were alleged to have been entered into and agreed to by the parties. The razeenamah states—"The said case is pending in this Court, but we plaintiffs and defendants appointed arbitrators in regard to this case, and got the case decided by the arbitrators as follows: that the defendants should make over to the plaintiffs possession of the two villages of Waodi and Tugdi, in Pergunnah Gogo; that the plaintiffs should pay to the defendants Rs. 7,150 of Sicca currency; that until the payment of the said money the defendants do enjoy in lieu of interest half of the income of the villages, after deducting the assessment, and the plaintiffs do enjoy the other half, and that the defendants being the descendants of Devaji Sutaji their shares in the villages be upheld." Therefore, that is in plain terms a statement of an agreement of reference to arbitration and a subsequent award, and that under that award the plaintiffs were to be put in possession of the whole; consequently, that the plaintiffs being in possession were to bear the burdens incident to that position; that is, they were to pay the assessment, and that then the defendants, in lieu of interest, should enjoy half of the income of the villages after deducting the assessment. It is material also to observe that the evidence in the case certainly does not come up to anything like the performance during any period of time of that agreement or award, so stated in the razeenamah; but by that razeenamah, and by the consequent dismissal of the suit, the first litigation is put an end to.

This brings us to the second litigation, which commenced in 1850; and, although we have not the claim which was then filed, the substance of it appears from the judgment which is set out at page 27 of the record; and from that it appears that the second suit, the suit of 1850, which was instituted by the then plaintiffs, was a suit mainly relying upon this alleged award. The defendants appeared to that suit, and again set up as a defence the bond of 1792. The suit having been heard by the Moonsiff, he, by his judgment, considered that the plaintiffs' case, so far as it depended on the submission and the award, failed. He enters into a long statement, into the details of which it is not necessary now to go, showing the manner in which the submission to the arbitration had been signed, so as not to bind the defendants in that suit, and also into the question as to how the alleged award was signed, ending with the conclusion that those documents were not proved. He says, "Under the above circumstances the Court finds the writing sued on is not properly proved; and, therefore, the Court throws out the claim of the plaintiff with costs." That suit was, therefore, so dismissed by the Moonsiff on the 23rd March 1852.

From that decision and dismissal there was an appeal to the District Judge, and his decision was given on the 27th March 1856, and is set out at page 31 of the record. He says, "The plaintiffs' claim is to recover half of the said villages under the award of the arbitrators, but they have not proved their claim. The Court therefore orders that the decree of the Moonsiff of Gogo, dated 23rd March 1852, be affirmed, and that this decree be no bar to the plaintiffs' filing a suit to establish their right of inheritance, if they have any." And then the costs are thrown on the appellants. That decree terminates the second litigation; and it is only material to observe that from that decision of the Moonsiff, so affirmed by the decision to which I have just referred, there has been no appeal.

The present litigation, then, commenced by a plaint in the Court of the Moonsiff, filed on the 16th June 1859. It is material to observe that that plaint prefers a claim on behalf of the present appellants to be let into possession of the whole of the two villages. After stating the proceedings in the former suit, they state "That the half of the said two villages was in our occupation, possession, and enjoyment up to 1852—1853, as above stated; but after the passing of the said decree by the Moonsiff of Gogo, the defendants forcibly took the said half share into their possession. The other half share has also been forcibly retained by them, although the debt due to them has been liquidated. We therefore pray that the whole of the said two villages of Waodi and Tugdi, together with the lands, trees, &c., may be awarded into our possession." That suit proceeded; and in that suit the defendants again set up as a defence the bond of 1792. The time for producing evidence was frequently enlarged; but on the 25th February 1860, an order was made that the cause should be brought on on the 10th March 1860. On that day the hearing of the cause was again postponed; and on the 16th April 1860, an application was made on the part of the appellants for leave to adduce evidence, the principal object of such evidence being to show that the bond of 1792 was a forgery. On the 19th April 1860, that application was formally refused by the Judge upon the ground that the parties had already had quite sufficient time for entering into evidence, and that it was then too late to ask the Court to allow further evidence to be gone into. He says: "The application for witnesses and papers now made ought to have been made previously, but it has not been done so. Now at this stage, that of giving judgment, this application cannot be admitted. It is therefore rejected and recorded in the case." It is material to observe upon that rejection, because in the course of the argument before their Lordships this application of the 16th April 1860 has been repeatedly referred to as being a pending application, whereas it appears that there was a formal judgment refusing that application on the 19th April 1860.

Under these circumstances, the matter came on to be heard before the Moonsiff, and he made his decree on the 19th April 1860, by which, upon the evidence then before him, he dismissed the claim of the appellants with costs. That decision was appealed against, and the grounds of appeal, which are set out at page 149 of the record, do not mention the rejection of any evidence nor the improper dismissal of the application of the 16th April 1860.

The matter came on to be heard by the District Judge on the 10th December 1861, and the decision of the Moonsiff was affirmed, and the appeal dismissed by the District Judge, on the ground that the matter was *res judicata*, and accordingly he ordered the appellants to pay the costs of that appeal.

From that decision there was an appeal to the High Court. The grounds of that appeal are set forth, and it appears that in neither of those grounds is there contained anything distinctly referring to the rejection of the evidence, or the dismissal of the application of the 16th April 1860; but, the matter coming on to be heard before the High Court on the 5th October 1863, that Court reversed the decision of the Judge, considering that he was in error in treating the matter as *res judicata*, and, accordingly, directed it to be submitted to a new trial. That date, the 5th October 1863, it is very material to observe, because it is obvious that, as from that date, it was perfectly competent to either of the parties to make any application with respect to the introduction of fresh evidence, or to the adding to the evidence which had been given in the former suits, or as to producing the depositions of the witnesses which had been taken in either of the former suits. Accordingly we find that, on the 4th April 1864, an application was made by the respondents to be allowed to file a copy of the deposition of that particular witness to whom we have already alluded, viz., the witness who stated that he had written the bond in question. That application states that the witness appears to have been dead. That is a statement which does not appear to have

been in the least degree disputed, and, in the judgment of their Lordships, there is no reason to suppose that the Court acted at all erroneously in allowing that deposition to be filed; but what is more material to the present enquiry is, that although there was this application on the part of the respondent on the 4th April 1864, there was no application whatever by the plaintiffs for the production of any of the evidence mentioned in their petition of the 16th April 1860, nor any complaint made to the Judge as to the evidence having been shut out. Accordingly, the District Judge re-heard the case, and, on the 4th April 1864, he confirmed the Moonsiff's decision, having arrived at the conclusion, *first*, that the bond in question was a true deed; and, *secondly*, that its validity was confirmed by the fact of long undisturbed possession in consistency with the terms of that deed. Thus, upon those two questions of fact, viz., first, the validity of the bond; and, secondly, the long possession of the defendants consistently with the provisions of the bond, there have been two decisions of the Courts in India, both arriving at the same conclusion.

There was, however, an appeal to the High Court from that decision of the District Judge, and the grounds of that appeal state, amongst other things, that the evidence in support of the bond was not sufficient to establish it, but they do not raise any distinct or separate grounds of appeal on the point now insisted on as to the rejection of the evidence mentioned in the petition of the 16th April 1860. That appeal was dismissed by the High Court on the 25th January 1865, and the matter now comes before this Committee. In their Lordships' judgment, the whole case is now open before them both as to the law and as to the facts, and the question which their Lordships have to consider is, whether it will be their duty, under the circumstances of this case, either to advise Her Majesty to make an immediate decree in favor of the plaintiffs, or to remand this matter to India for further trial, or to dismiss this appeal.

As to the first alternative, that of making an immediate decree in favor of the plaintiff, having regard to the pleadings and evidence in this case, it is difficult to see what immediate decree could now be justly made in their favor.

The plaint asks that the whole of the villages may be awarded into the plaintiffs' possession, but the evidence on both sides clearly shows that the defendants have always had some share in the villages, though the extent of that share is disputed. The plaint also admits a borrowing by the ancestors of the plaintiffs from the ancestors of the defendants, and the award upon which the plaintiffs rely finds a sum of money due from the plaintiffs to the defendants, and gives a charge on one-half of the income of the villages to secure the re-payment of that sum. A decree in accordance with the plaint is, therefore, inconsistent with the evidence on both sides, and it would be equally difficult to make a decree in the nature of a redemption decree in favor of the appellants, while they have not proved the existence of any mortgage, and while they assert that the only mortgage which has been put in evidence, that of 1792, is a forgery.

It remains to be considered whether it is right that this case should be sent back to India for a further hearing. The litigation between these parties and their ancestors has already existed since the year 1836; there have, as I have already said, been two decisions on matters of fact by the Courts in India. These decisions have been approved by the High Court, and it has been the invariable practice of their Lordships sitting here to require a very strong case indeed to induce them to interfere with such decisions of the Courts in India upon mere questions of fact. It would require a very strong case to induce their Lordships to send such a matter, upon a mere question of fact, for further trial, especially when, in the opinion of their Lordships, the appellants have had abundant opportunities of producing evidence, and when the material questions of fact are few and simple, being mainly, first, the question as to the validity of the bond of

1792; and, secondly, the question relating to the possession of the property in question.

First, then, as to the bond. The bond has been insisted upon by the defendants ever since they first entered into evidence; it has been recorded in Court ever since the 23rd January 1841; it is supported by the evidence of the witness who swears that he wrote it, and whose evidence has not been impeached, except by an attempt which has been made to displace his evidence by a formal objection, which, in the opinion of their Lordships, is entitled to no weight, viz., that he was not proved to have been dead when this deposition was admitted. But this bond is also to some extent supported by the evidence brought forward by the appellants themselves. There are several instances in which the substance of the bond is referred to by their own witnesses. I may refer to one at page 32 of the record, witness No. 51, who is one of the plaintiffs' witnesses. He says:—"In 1791 there was a famine. Ever since that time Godubhai's ancestors enjoyed the income of the village on account of debts." He there refers to the year before that in which the bond bears date, and refers to the possession of Godubhai's ancestors of the income of the village on account of debts. So, also, at page 38 another of the plaintiffs' witnesses, No. 56, says:—"My father used to say the Puchhegaummen, having borrowed money from the ancestors of Godubhai, had given the villages in aghat (mortgage). I do not know for how many years Godubhai's men held the management of the villages under that right of mortgage." At page 119, another of the plaintiffs' witnesses, No. 151, says:—"Previous to 1813 Godubhai's ancestors used to receive out of these villages an income for about 20 years on account of debt." He refers there to 20 years before 1813, which would bring us to the year 1793, being one year after the date of the bond, and agreeing very nearly with the evidence of the other witness, which brings the date to one year before the date of the bond.

But if it could be shown that the possession of the property has been inconsistent with the title created by this bond, or if it could be shown that an agreement had been entered into by the respondents of such a nature that it could only be accounted for by their belief in the invalidity of the bond; if either of those positions could be established on behalf of the appellants, no doubt very great suspicion would be cast on the validity of the bond. But, in their Lordships' opinion, no such agreement is proved to have been entered into or to have been acted upon, and there is a decree, which has not been appealed from, which has decided that there was no award binding on the respondents or affecting their interests.

It remains, therefore, only to consider whether the possession of the property has been inconsistent with the title created by the bond, and this is the second of the two questions of fact. The appellants mainly rely upon the allegation that there was a joint possession from 1842 to, as it is stated in the plaint, 1852, 1853, or, as it has been put in the argument, down to 1852, 1853, or 1854. It is material again to observe that the razeenamah, which is in December 1841, states that the award directed that possession should be given to the plaintiffs. That razeenamah is dated 6th December 1841, and it states that possession is to be delivered to the plaintiffs, but that, after deducting the assessment, the defendants are to enjoy, in lieu of interest, one-half of the income. Now, with respect to the numerous witnesses who have been called in support of the case of the plaintiffs, the objections have been justly made that none of them reside in the villages in question, and that many of them state what appears to their Lordships to be altogether inconsistent with the real truth of this case. They state not only joint possession before the alleged joint possession commencing in 1842, which is that which is now relied upon mainly in the argument and stated in the plaint, but also a payment, either by the ancestors of the appellants or by the appellants themselves, of the Government assessment before the year 1842. We may refer to a few

passages in the evidence of the plaintiffs in which that statement is made. At p. 42 witness No. 69 says that, "from before 1813 to before 1832 the management of the said two villages was held by Godubhai's men and the Puchhegaummen men jointly, and, deducting the assessment, the balance of income was divided between them both." So, at p. 47, witness No. 67 says:—"Both the parties held the management previous to 1842;" and, at p. 49, another of the plaintiffs' witnesses, No. 69, says:—"Before 1842 both the parties used to hold the management of the villages. Godubhai used to make collections of the revenue, and then the Puchhegaummen used to come to the village and draw money sufficient only to meet expenses, and they (that is the Puchhegaummen) used to pay the assessment." At p. 50, witness No. 70, another of the plaintiffs' witnesses, says:—"Previous to 1842 the Puchhegaummen and Godubhai used to hold the management of the village, and, after deducting the assessment and expenses, the balance was paid to Godubhai on account of his debts." Lastly, at p. 36, one of the plaintiffs' witnesses, No. 53, says:—"Previously, from 1842 to 1854, the Puchhegaummen men, Godubhai, and Sadabhai held the management and enjoyed the income of the villages half and half. I and my ancestors have been servants of the Puchhegaummen for five generations, and the management of the villages was held through my brother and partly through me also. The accounts of management have been produced before the Sarkar. All these accounts are in the handwriting of my brother. They were produced in the case then pending in the Moonsiff's Court. Godubhai now pays the assessment to Government."

Now, it appears to their Lordships that this statement on the part of the plaintiff's witnesses is inconsistent with the fact which in their judgment is clearly established, viz., that the name of Godubhai or his ancestor has always been entered in the Government books, and that he has always paid the Government assessment; and this fact, though it may not be evidence of title, is, in their Lordships' opinion, very strong evidence of possession. The fact that Godubhai's name has always been entered on the Government record is not only proved by many of the witnesses brought forward on the part of the defendant, but it is also proved by several of the plaintiffs' witnesses. We will give only two instances of that: there is one at p. 41, No. 59, who says:—"Ever since the introduction of the British rule, the name of Godubhai has been entered on the Government records." At p. 46 another of the plaintiffs' witnesses, No. 65, says:—"I do not know what assessment is paid. Godubhai pays the assessment. He has been doing it from before my birth." It appears, therefore, in their Lordships' judgment, that there is one fact which is clearly established in the evidence, that is, that this payment throughout has been made by Godubhai or his ancestor, and that his name and his name alone has been entered on the Government records; and the clear establishment of that fact and the attempt which has been made on the part of so many of the plaintiffs' witnesses to set up a story which is entirely inconsistent with that fact, in the judgment of their Lordships necessarily casts very considerable discredit upon the testimony of those witnesses of the plaintiffs.

But in addition to this, an attempt has been made by means of certain accounts to show that in fact there was such a joint possession. We think, to dispose of that, it is sufficient to say in the first place that the accounts themselves, as they appear at p. xv. of the preliminary record, were brought forward for the purpose of showing that the appellant's father and the other appellants have held the management of the two villages and have received the income and have paid half of it to the respondent Godubhai. Now, even if the accounts had shown any such thing as that, they would certainly have been open to very great suspicion, as being brought forward to establish a fact which is entirely inconsistent, as we have already shown, with the rest of the evidence in the case; but in truth the second observation which may be made upon these accounts is sufficient to dispose of them, that is, that they are not proved to have been accounts in any

degree binding upon the respondents, or made in such a way as that they can be treated as accounts with which the respondents are so connected as not to be able to be heard to dispute any fact alleged in these accounts.

The nature of the claims which have been made by the appellants from time to time, and the sort of interference which has in fact been made by them with the income derived from these villages, is, in their Lordships' opinion, in fact very succinctly stated in the report of the Mamledar. That report appears to their Lordships to be in accordance with the real facts of this case as disclosed by the evidence. It is set out at p. 139, and states among other things that, "ever since the introduction of the British rule, 48 years ago, in this Mehal, the management has been held by Godubhai's ancestor and Godubhai." He also says:—"The papers relating to the collections of the revenue, &c., and the revenue settlement, did not show that the complainants and others of Puchhegaum and the sharers held any management." Now that, in their Lordships' judgment, is entirely consistent with that which is the true result of the evidence; and they are also of opinion that if it had been otherwise, it is evident that the parties who say that they and their ancestors have had this possession, could have proved it distinctly and clearly, and that they have had many opportunities of proving it, but they have not done so. The report proceeds to state that "the complainants and others have filed a suit in the Civil Court in regard to the present matter, and no decision has as yet been given, and the petition had in the time of the late Mamledar presented a petition to the Collector to get his name entered and to obtain possession of the villages." In the fifth paragraph it states:—"The complainants state that they are ready to pay the money, but there is no lease in their name, nor was the money ever paid in their names. The circumstances in regard to this are stated in the first paragraph; the complainant, with a view to secure evidence for the Civil suit, as it appears, made the statements in the petition with the advice of those who are in league with him." That confirms the conclusion which I have before mentioned as being that of their Lordships, viz., the conclusion that, although there may have been on the part of the appellants from time to time attempts to disturb the possession, still the possession has throughout been in Godubhai and his ancestors, and consequently has been a possession in accordance with the title derived under the bond. The report also shows that which the document itself proves, viz., that on every occasion of litigation the appellants are found out of possession. Every plaint and every claim of theirs is a plaint and a claim asking for possession, and it is admitted that from 1852, 1853, if we take the date as stated in the plaint, or from 1852, 1853, and 1854 if we take the dates as stated in the argument, those being the dates when the alleged joint possession terminated, they have been out of possession until the year 1859, when the plaint which commenced the present suit was first filed.

The conclusion, therefore, which their Lordships draw from this evidence is a conclusion in accordance with that to which the two Indian Courts have before arrived,—a conclusion upon questions of fact; but even if their Lordships had felt some doubt or hesitation, in accordance with that which has been the invariable practice of this Board, they would have hesitated long when, upon a mere doubt with respect to a question of fact, they were asked to re-open the litigation and to send this matter again for trial to India. But the conclusion to which their Lordships have arrived being in accordance with that of the Indian Courts, their Lordships have no doubt or hesitation in humbly advising Her Majesty to put an end to this litigation, to affirm the decree of the High Court of Judicature at Bombay, and to dismiss this appeal with costs.

The 10th March 1869.

Present :

Lord Chelmsford, Sir James W. Colville, Lord Justice Selwyn,
Lord Justice Giffard, and Sir Lawrence Peel.

Suit—Hindoo Widow—Bond—Sureties.

On Appeal from the late Sudder Court at Agra.

Mohunt Jyram Gir

versus

Ranee Sheoraj Kooer and others.

Plaintiff sued the widow Ranees and the infant son of a deceased Rajah, and based his claim on a bond signed by the Ranees. The plaint alleged that the debt was the Rajah's, but the bond recited that the Rajah had borrowed moneys from the plaintiff, and that the Ranees had also borrowed from the plaintiff, and it drew a distinction between the dealings and estates of the Rajah, and the dealings and estate of the Ranees.

HELD, that the suit against the Ranees was in the nature of a claim against sureties, and that in the absence of proof that they knew the circumstances under which the Rajah contracted the loan, it could not be maintained against the Ranees.

In this case the plaint is brought against the Ranees or the wives of the late Rajah Chuttpal Singh, and also against the minor son and heir of the said Rajah, who is made a party to the suit. The plaint expressly states that the claim is founded or based upon the bond which is therein mentioned. We may therefore consider the case under two aspects,—*first*, as against the Ranees; and *secondly*, as against the son or infant heir of the Rajah.

First, then, with respect to the claim as made against the Ranees. The plaint states expressly that the debt was a debt due from the Rajah himself, consequently that it was not a debt due from the Ranees but from the Rajah himself. Therefore the claim against the Ranees must be considered as in the nature of a claim against sureties. Now, the bond on the face of it is inconsistent with such a case. The bond, which is expressed to be made by the Ranees, begins by declaring that the Rajah having had monetary dealings with Gir, the banker, the proprietor of the firm which is there mentioned, "we," that is, the Ranees, "also entered into similar dealings with the firm of the said Mohunt; that the whole of the principal debt and interest, consisting of certain unpaid items of previous dealings, and the loan we took on the occasion of the marriage and the 'Mooklaw' ceremony of the Bebee Sahibah, having been balanced, the sum of Rs. 16,960-10-6 has been found due by us up to the present date; that we are at present unable to pay up the said sum, in consequence of our estates being under the management of the Government, along with those of the Rajah, for the liquidation of the debts of the bankers." This bond, therefore, commences with stating that there had been transactions between the bankers and the Rajah, and that the Ranees had similar dealings, drawing therefore a distinction between the dealings of the bankers with the Rajah, on the one hand, and dealings of the same bankers with the Ranees, on the other hand. It also draws a distinction between the estates of the Ranees and the estate of the Rajah. Therefore it appears to their Lordships that upon the construction of this bond it cannot be successfully contended that where the words "we" or "us" are used, those words must be considered as including the Ranees and the Rajah, because there is throughout the bond the distinction drawn between the dealings of the Rajah and the dealings of the Ranees, between the Ranees personally and the Rajah, and between the estates of the Ranees and the estate of the Rajah.

Then treating it as a claim made against the Ranees in the nature of a claim against sureties, the evidence does not show, but, so far as it goes, tends to disprove

that they were informed of the circumstances attending the debt, which is alleged in the plaint as being the Rajah's debt, or that they were informed of the transactions before the Collectors, which raised a question as to the continued existence of the alleged debt. All that the evidence shows is that this bond was taken into the zenana, and was brought out again executed, or stated to have been executed, by them.

Under these circumstances, their Lordships are of opinion that this claim, in the nature of a claim against sureties, cannot be established against the Ranees.

It remains to consider the *second* question,—as to the liability of the infant heir, the son of the Rajah. Now the plaint is expressly based upon the bond; but there is no evidence of the particular debt mentioned in the bond which is a debt mentioned as being owing from the Ranees. There is an account produced, but that account does not tally with the sum mentioned in the bond as being due; and it is clear that there was another account which is not produced or proved, and which might have disclosed the fact of the payment made by the Collector. The only debt which is proved to have existed is that which was the subject of the adjustment before the Collector. The Judge of the Zillah Court proceeded upon the footing of the fact of the adjustment before the Collector having been established in evidence; and the memorandum of regular appeal does not dispute that such an adjustment had been proved, but virtually admits that some adjustment had taken place. The evidence of Meer Mookarim Ali proves that the debt in question was for the balance, after deducting the composition; and if his evidence is to be excluded or considered as untrustworthy, then there is no evidence to prove the debt alleged in the plaint.

In the opinion of their Lordships it is established by the whole of the evidence, including the documentary evidence in this case, that such an adjustment did take place, and that by virtue of that adjustment the appellant obtained and received payment of a sum of money from the Collector, who, in the exercise of a public duty, was *de facto* in possession of the Rajah's property for the benefit of his creditors, and that that sum was so obtained and received by the appellant upon the faith of the representation made by him to the Collector, that his debt was satisfied, or that he would accept the sum that was then paid in satisfaction of the debt owing to him. We are of opinion that the appellant cannot be heard in a Court of justice to contradict the representation or to sue upon a debt or contract having such an origin.

Their Lordships therefore think that the decrees in question ought to be affirmed, and we shall humbly advise Her Majesty to dismiss this appeal.

The 10th March 1869.

Present :

Lord Chelmsford, Sir James W. Colville, Sir Robert Phillimore, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

Custom—Alluvial lands—Canoongoe papers—S. 2 Reg. XI of 1825.

On Appeal from the late Sudder Court at Agra.

Rae Manick Chund

versus

Madhoram and others.

The custom to be established under s. 2 Reg. XI of 1825 as to the disjunction and junction of alluvial land by the encroachment or recess of a river, must be a local custom.

Canoongoe papers are not sufficient to prove the existence of such custom.

Their Lordships are of opinion that the only arguable question upon this appeal is, whether it has been established, within the meaning of s. 2 of Reg. XI of 1825, that there is an immemorial custom by virtue of which the River Ganges at the point in question is taken to be the boundary between the estates on either bank, so that alluvial land, like that in question, belongs to one or other of those estates according to the actual course of the river.

If that custom is not established, their Lordships are perfectly satisfied that the appellant had succeeded in the Court below in establishing every circumstance which was necessary to bring his case within the second clause of the fourth section of the same Regulation,—that he had shown that the land was separated from his estate by a sudden change in the course of the river, and had clearly identified it as cultivated land which had formed a portion of his estate.

Upon the question of immemorial custom, he had the judgment of the Zillah Court in his favor. The learned Judges of the Sudder Court have reversed that judgment on the ground that they thought there was sufficient evidence of the custom to warrant them in so doing. That is not their Lordships' opinion.

The reasons assigned by the learned Judges do not support their conclusion.

They rely principally on the letter of the Collector, Mr. Morris, which was written in an early stage of the proceedings mentioned in the record to the Sudder Board of Revenue; but it seems to their Lordships that they have put an entirely erroneous interpretation upon that letter. That letter, as their Lordships read it, amounted to this,—that the main stream of the Ganges had hitherto been held to constitute the boundary of the two pergunnahs for police and fiscal purposes; and that if that rule were to determine the proprietary right to alluvial land, it would no doubt follow that the land in question belonged to the zemindary on the southern side of the river. But the Collector went on to state his opinion, and to give reasons for that opinion, that the question of proprietary right was not to be determined upon that principle. Therefore the Judges of the Sudder Court seem to have been in error in treating the opinion of the Revenue Officer so given as an argument for coming to the conclusion to which they did come. And it may be further observed that the Sudder Board of Revenue, the authority to which the Collector's letter was addressed, does not appear to have taken that view.

Then, as to the other evidence upon which the Judges of the Sudder Court rely, it seems to their Lordships to be far from sufficient to justify the conclusion that an immemorial custom had been proved. The Canoongoe's evidence, which has been chiefly relied upon, is clearly too slight for that purpose. The proceeding with reference to the Gogra, which is set forth in the record, if it amounts to a decision that such a custom as that which is now set up obtains on the banks of that river, affords no evidence that a similar custom exists on the banks of the Ganges where it forms the boundary between the Pergunnahs Jhosee and Chail. The language of the Regulation implies that the custom to be proved is a local custom.

Upon the whole, then, their Lordships are of opinion that in holding that the custom was established, the Court below was wrong.

The only further question for their Lordships to consider is, whether they should reverse the decree under appeal and affirm the decree of the Court of first instance, or whether they should remit the case, as the Judges of the Sudder Court seem at one time to have thought of remitting it, for a new trial? It appears that the parties were fully informed what issue they had to prove; they should have come prepared with evidence to prove it, if it was capable of proof; and they have failed to do so.

Their Lordships think therefore they ought to take the first of the before-mentioned courses, viz., reverse the judgment of the Court of Appeal, and affirm the judgment of the Zillah Court.

Considering, however, that the case of the respondents may have failed from mere defect of proof, and that similar cases may arise between other parties in the neighbourhood of this locality, their Lordships are desirous to state by way of caution that this judgment should not be quoted in any future case between other parties as a conclusive decision of this Court of Appeal, to the effect that no such custom as that which has been here alleged exists. All they intend to decide is, that it lay on the respondents to prove the custom which it was essential to their title to prove, and that, as they have failed to do so, the title of the appellant must prevail.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the late Sudder Dewanny Adawlut at Agra, in order that, in lieu thereof, a decree be made dismissing the appeal to that Court from the decree of the Zillah Court of the 27th July 1864, with costs. And the respondents must also pay the costs of this appeal.

The 12th March 1869.

Present:

Lord Chelmsford, Sir James W. Colville, and Sir Joseph Napier.

Hindoo Law—Adoption—Succession—Decree.

On Appeal from the late Sudder Court at Agra.

Chowdry Pudum Singh

versus

Kooer Oddey Singh.

When a widow adopts a son under the authority of her husband, such authority must be strictly pursued. The son adopted is adopted to the husband, and not to the widow; and an adoption by the widow alone would not for any purpose required by the Hindoo law, give to the adopted child, even after the widow's death, any right to the property inherited by her from her husband.

Where a plaintiff was declared by a judgment to be entitled to a share of the property sued for, and the decree on that judgment awarded the whole of the property to the plaintiff, but there was nothing to enable the Appellate Court to limit the decree to the share to which his right was established, the decree was entirely set aside, and the case was remanded to ascertain that share.

This is an appeal from a decree of the late Sudder Dewanny Adawlut at Agra, reversing a decree of the Principal Sudder Ameen of Zillah Meerut, made in favor of the appellant.

The suit was instituted by Chowdry Mohur Singh, the father of the respondent (who died while the suit was pending), to recover possession from the appellant of the whole of the moveable and immoveable property formerly belonging to Chowdry Hem Singh, deceased, a cousin of the plaintiff, consisting of ancestral property and of property acquired and amassed by Chowdry Hem Singh and by his widow Khoosal Kooer, out of the proceeds of his ancestral estate.

The suit was instituted after the death of the widow Khoosal Kooer, the plaintiff's claim being founded on his right of heirship to Hem Singh. It appears by the plaint and a genealogical table annexed to it, that there were other persons descended from the same common ancestor as the plaintiff, who would have an equal right with him to a share in the succession of Hem Singh. The plaintiff in his plaint assigns as a reason for not including them among the defendants, that "they had not possession of the property in suit, and that if

they thought they had any right or interest in the matter, they could proceed against the plaintiff at their option."

The plaintiff states that after the death of Khoosal Kooer the managers of the estate presented a spurious will to the Collector, setting forth the defendant as her adopted son, and by that means he contrived to get possession of the estate. And it alleges that the defendant is not the adopted son of the deceased widow Khoosal Kooer, and that she had no power to adopt a son as long as the plaintiff was alive. That the defendant does not belong to the family of which Khoosal Kooer and plaintiff are members, and that he is merely the foster son of Suhej Kooer. That it is not true that Khoosal Kooer ever executed a will, and, had she done so, a will made on the point of death would not be legal.

The defendant by his answer to the plaint states that the villages and properties claimed belonged to Hem Singh, the sole and absolute proprietor, though some of the properties were purchased after his death by his widow Khoosal Kooer. That Hem Singh had no issue, and therefore he selected the defendant, who was of the same family and sect as himself, and was then but twelve months old and the youngest child of his parents, with their consent, to be his adopted son. That he received defendant into his arms and brought him up as his own son, and authorized his wife, in case the rites of adoption were not performed during his own lifetime, to perform them after his death, declaring that he had constituted defendant proprietor of his entire estate, as though defendant were his own son. That, accordingly, when Hem Singh died, Khoosal Kooer carried out his injunctions and performed the ceremony of adoption of the defendant.

The defendant further states in his answer that the property left by Suhej Kooer, aunt of Hem Singh, also came into his possession in consequence of his being Hem Singh's adopted son; and that, although being the rightful heir and successor to the estate, he did not need the support of a will, yet that, as a matter of precaution, Khoosal Kooer executed a will in his favor. That he does not rest his title upon that will, but bases his claim as lawful and absolute proprietor of the estate on his hereditary rights.

Issues were framed by the Zillah Court which were calculated to raise various questions, but the Sudder Court, in their judgment upon appeal from the Zillah Court, after observing that the issues were very badly drawn, said—"The pleadings show that the only point for determination was whether the widow, Khoosal Kooer, adopted the defendant, Pudum Singh, by desire of her husband, Hem Singh."

This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the judgment in the Zillah Court, and also in the Sudder Court, proceeded.

The Principal Sudder Ameen dismissed the plaintiff's claim with costs, being of opinion that it was clearly proved by the testimony of the defendant's witnesses,—most of whom, he said, were respectable and trustworthy persons,—that Hem Singh adopted the defendant Pudum Singh when he was twelve months old, and gave authority to his wife, Khoosal Kooer, to complete the formal ceremony of adoption, and that it was further proved by the same witnesses that after Hem Singh's death, Khoosal Kooer went through the ceremonies of adoption in respect to the defendant.

Upon appeal from this decree to the Sudder Court, that Court, upon the documentary evidence in the cause, arrived at a conclusion directly opposed to that of the Lower Court, considering that it entirely excluded the presumption of the truth of the defendant's story, that the widow adopted him at the end of 1836 by desire of her husband.

They therefore held that the plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of Hem Singh, and decreed in

favor of the appeal and of the plaintiff's claim, and reversed the decision of the Lower Court with costs.

The decree which was drawn up in conformity with this judgment, embraced the whole of the property included in the plaint, although the Court held that the plaintiff was entitled only to a share in the succession as one of the next of kin of Hem Singh. The decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to the share of the property to which the plaintiff has established a right. It is possible, also, that some portion of the property claimed may have belonged to Khoosal Kooer in her own right, and may have passed to the defendant by her will, the validity of which as to such property the plaintiff can have no right to question.

But although the decree in favor of the respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to Hem Singh if there were a valid adoption of the appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below), in order to prevent further litigation respecting it.

The question as to the adoption of the appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a widow under an authority conferred upon her for that purpose by her husband. Of course, such authority must be strictly pursued, and as the adoption is for the husband's benefit, so the child must be adopted to him, and not to the widow alone. Nor would an adoption by the widow alone, for any purpose required by the Hindoo law, give to the adopted child, even after her death, any right to the property inherited by her from her husband. In order, therefore, to establish the validity of the adoption in this case, it was necessary for the appellant to prove—

1st.—The authority given by Hem Singh to his wife to make the adoption; and

2nd.—The actual adoption by Khoosal Kooer of the appellant as the son of Hem Singh.

The appellant proved, by several witnesses to whom the Principal Sudder Ameen gave credit, but upon whom the Sudder Court placed no reliance, that the appellant was the younger son of Zalim Singh; that Hem Singh asked and obtained permission of Zalim Singh and his wife, to adopt the appellant. That Hem Singh took away the appellant, then a child of twelve months old, and carried him to his house, and placing him on the lap of Khoosal Kooer, said—“I have brought you this child to adopt as our son.” That a year after, Hem Singh said to Khoosal Kooer—“If I live long enough, I shall go through the ceremony of adopting the child myself; if not, I authorize you to perform the ceremonies of adoption as soon as he is five years old;” and that Hem Singh died a year after giving this authority. The witnesses also proved that when the appellant had attained the age of five years, Khoosal Kooer went through all the ceremonies of adoption, which they minutely described. It does not appear by the evidence of any of the witnesses that Khoosal Kooer declared at the time that the ceremonies were performed for the purpose of the adoption of the appellant as the son of Hem Singh, in pursuance of the authority which he had given her. One of them, on the contrary, says that “Khoosal Kooer adopted Pudum Singh as her own son, at the request of Hem Singh.”

If the adoption of the appellant as the son of Hem Singh had really been completed by Khoosal Kooer, his name ought to have been substituted for hers in the books of the Revenue Collector, as the property of Hem Singh would, by the act of adoption, have been devested from Khoosal Kooer, and would have vested in the appellant as his son and heir. Some of the witnesses say that after performing the ceremonies, Khoosal Kooer ordered her dewan to give notice of the

adoption to the Collector. Either this order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's books; and Hem Singh's property continued to be registered in Khoosal Kooer's name down to the time of her death, which took place at least ten years after the appellant had attained his majority. But Khoosal Kooer caused herself to be entered in the books of the Canoongoe or Record-keeper of the village of Koorja, as the guardian and protector of Pudum Singh (the appellant).

Now, if this were intended as the record of the fact of an adoption which had divested the property of Hem Singh from his widow, and made her merely guardian of the minor adopted son, it seems extraordinary, after such a complete lawful adoption as the witnesses represent, that Khoosal Kooer did not take the most effectual mode of recording it, by pursuing the regular course of substituting the appellant's name for her own in the Revenue Collector's books. In the absence of any such record, the instances of the occasional description of the appellant as the son of Hem Singh are of no value. The Principal Sudder Ameen laid great stress upon a supposed entry of the defendant's name as under the guardianship of Khoosal Kooer in the khewut for Proprietary Register of 1256 Fuslee, which he said would not have been made if the appellant were not the adopted son of Hem Singh. Upon turning, however, to the only khewut printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of Putteedar" the appellant is entered as "Pudum Singh, son of Hem Singh." In a statement of mutation of names of lumberdars and putteedars, however, in which Pudum Singh's name is entered in the columns of putteedars, but not as the son of Hem Singh, there is the signature of Khoosal Kooer, with the addition of the words "guardian of Pudum Singh;" and it is probable that the Principal Sudder Ameen mixed up the khewut and this document together in his mind. It is the only one of similar documents in evidence which is signed by Khoosal Kooer, and there is nothing upon the face of it to show that it relates to Hem Singh's property.

The description of Pudum Singh as the son of Hem Singh, in the first power of attorney executed by him and Khoosal Kooer, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of Hem Singh's name as the father of the appellant in the income-tax receipts, as most of the particulars inserted in the different columns could only be known to and filled in by the party by whom the tax was to be paid. The appellant, in support of the evidence of an adoption, relied upon a proceeding by Khoosal Kooer on the 25th March 1836, when she presented a petition at the office of the Deputy Collector of Revenue, describing herself as the widow of Hem Singh, and praying that the name of Pudum Singh might be added to her own in the zemindary registers of certain villages. The Sudder Court observed upon this proceeding "that the joint entry of the widow's and Pudum Singh's names was in some respects inconsistent with the averment of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And they added, "We find that the application referred to property acquired by the widow after her husband's (Hem Singh's) death, and which is not in suit in the present case."

There is some doubt as to the accuracy of the statement that the villages named in the petition of Khoosal Kooer are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the plaint. But there still remains an objection to the use of this proceeding in proof of the adoption of the appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The appellant was twelve months old at the time of the commencement of the intended adoption. Hem Singh lived a year afterwards, and died on the 22nd October 1834. The ceremonies of adoption are stated to have been performed by Khoosal Kooer when the appel-

lant was of the age of five years, which, according to the dates, he could not have been on the 25th March 1836, when the petition of Khoosal Kooer was presented.

All the acts of Khoosal Kooer with respect to Hem Singh's property appear to have been dictated by a desire to continue to be zemindar during her life, and to secure the succession to it after her death to the appellant. She may have attempted, at the same time, to reconcile her continued possession with the alleged wishes of her husband in favor of the appellant.

The documentary evidence produced on the part of the respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by Khoosal Kooer, as it is wholly inconsistent with the idea of any such adoption having taken place.

It must always be borne in mind that Khoosal Kooer remained the registered owner of Hem Singh's property for the whole of her life. In addition to this circumstance, there are acts and declarations of Khoosal Kooer which cannot be reconciled with the fact of an adoption of the appellant. Stress was laid by the Counsel for the respondent on a statement made by Khoosal Kooer in a suit instituted by her against Tara Singh, claiming the succession as heir to the whole of her husband's property, that "Hem Singh died without leaving any issue, male or female." It was observed that this action, which was brought on the 23rd March 1836, was contemporaneous with the above-mentioned petition of Khoosal Kooer to have the appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th March 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and therefore it was then strictly true that Hem Singh had died without leaving issue. But yet it is extraordinary, if Khoosal Kooer had any intention of carrying out her husband's wishes with regard to the appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of Hem Singh's property. Again, in 1841, long after the alleged adoption, Hem Singh and Tara Singh his brother, having been joint proprietors of a village, and upon the death of Hem Singh, Khoosal Kooer's name having been entered in the register instead of his, and upon the death of Tara Singh, the name of his widow Meha Kooer having been substituted, upon the death of Meha Kooer, Khoosal Kooer caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the appellant as heir of Hem Singh, he would have been.

Although the appellant does not rest his title to Hem Singh's property upon the will of Khoosal Kooer, yet it is impossible to pass over the fact of her having made this will or to omit all notice of the contents of it. Although, according to the case of the appellant, Khoosal Kooer had failed in her duty by not divesting herself of Hem Singh's property upon the completion of her adoption, yet as that act made him heir to his adopting father, no strength could be added to his title by the will of the widow. In consequence, however, of her remaining in possession of Hem Singh's property, doubt would probably be cast upon the fact of the appellant's adoption, and therefore her declaration of her having performed the ceremonies in pursuance of her husband's authority would have been useful as evidence ; but instead of describing the appellant as the adopted son of Hem Singh, the will of Khoosal Kooer is in these terms :—"As Pudum Singh, the adopted son of your petitioner, has been in possession of your petitioner's estates for a long period, and as petitioner has no other heir or successor but him, and as petitioner has retained him in possession during her lifetime, and he carries on all the business of managing the villages and zemindaries, &c., therefore petitioner prays that the name of Pudum Singh be substituted for her own name as proprietor of all the zemindary and malgozary villages and maafee lands of her estate, and Pudum Singh may be recognised as the owner of all her real and personal property."

Upon the death of Khoosal Kooer reports were made of the facts connected with her death by the Canoongoes of the different mouzahs, in which Khoosal Kooer was styled either zemindar, or zemindar and lumberdar, and all of them stated the conditions of settlement of mouzahs in these terms:—"Whomsoever Khoosal Kooer may constitute her heir in her lifetime, the same shall be entitled to the office of mālgoozar after her death."

The putwary's memorandum on the death of Khoosal Kooer is as follows:—"The said Mussamut departed this life by the will of God on the 17th December 1861, etc., and left Kooer Pudum Singh, her adopted son, aged thirty-one years, as the heir and successor to all her property."

Pudum Singh, being of the age above-mentioned at the time of Khoosal Kooer's death, it is not likely that he had never heard of his having been adopted as the son of Hem Singh, if such a ceremony had taken place. And if he had been informed of the fact, it was to be expected that, although he had patiently submitted to Khoosal Kooer's usurpation of his property during her life, he would have seized the earliest opportunity of asserting his rights as the heir of Hem Singh. But it appears that this was not the course which he pursued, nor the title by which he claimed the succession. The report of the tehseeldar of Koorja on the succession to Khoosal Kooer, states "that the putwary and Canoongoe, in their respective reports of the death in question, have mentioned Kooer Pudum Singh, her adopted son, as the heir to the property of the deceased Mussamut. And that Pudum Singh had put in a petition praying that his name might be recorded as lumberdar and putteedar in place of that of Khoosal Kooer, deceased, as there was no other heir but himself."

The Counsel for the appellant endeavoured to explain away the effect of this claim as heir of Khoosal Kooer, by the suggestion that in thus claiming, the appellant had been misled by the reports of the Canoongoes as to the right of succession to the property held by Khoosal Kooer. But (as already observed) if the appellant really had a title to the property as the heir of Hem Singh, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of lawful adoption of the appellant as the son of Hem Singh by Khoosal Kooer, and consequently against the truth of the story told by the witnesses upon the subject.

Their Lordships, therefore, agree with the Sudder Court that the appellant has failed to prove that he was lawfully adopted as the son of Hem Singh by Khoosal Kooer, in pursuance of authority conferred upon her for that purpose by her husband; and that he has, therefore, no answer to the claim of the respondent to a share of the succession to Hem Singh's property. But as the Court has made a decree which gives the respondent the whole of Hem Singh's property, when he is entitled only to a part, that decree must be set aside.

Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit that the appellant is not the duly adopted son of Hem Singh, and that, on the death of Khoosal Kooer, Mohur Singh, the father of the respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of Hem Singh, of which his widow died possessed. And they will recommend to Her Majesty that with this declaration the cause be remitted to the High Court of Agra to make such enquiries as shall be necessary to ascertain what share of the estate of Hem Singh the said Mohur Singh was entitled to, and what part of the property claimed by the plaintiff was the estate of Hem Singh. And as the appellant has succeeded in proving the invalidity of the decree, although he has failed in his opposition to the plaintiff's title, their Lordships will further recommend that each party bear his own costs of the appeal.

The 12th March 1869.

Present :

Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

*Sale—Mortgage—Suit—Champerty—Specific performance—Onus probandi—
Contract—Mokurruree tenure—Limitation—Pendency of appeal—S. 32
Act VIII of 1859—Reg. VII of 1822.*

On Appeal from the late Sudder Court at Calcutta.

Rajah Saheb Perhlad Sein

versus

Baboo Budhoo Singh.*

Kalee Pershad Tewaree

versus

Rajah Saheb Perhlad Sein.†

Rajah Saheb Perhlad Sein

versus

Doorga Pershad Tewaree.‡

Rajah Saheb Perhlad Sein

versus

Run Bahadoor Singh and others.§

Rajah Saheb Perhlad Sein

versus

Maharajah Rajender Kishore Singh.||

A sued *B* on a deed of sale for possession of 4 annas of certain lands, which *A* alleged *B* had sold him in consideration of an advance of a sum of money which *A* said he paid to *B* when the deed was executed. *B* answered that, being in want of funds to carry on a suit for the recovery of the very lands, 4 annas of which *A* now sues for, he gave *A* the deed in question on condition that *A* was to advance him the amount mentioned in the deed, but that *A* only advanced portions of the sum from time to time. The allegation of *A* that he paid the money to *B* when the deed was executed was found to be false.

HELD, that the execution and transfer of the deed of sale from *B* to *A*, and the partial payment of the purchase-money by *A* to *B*, did not pass to *A* a complete title to the lands, and that *B* in retaining possession could not be regarded as having only a lien for the unpaid portion of the purchase-money or liable to account to *A* as a mortgagee in possession of the rents and profits.

HELD, that even if part of the purchase-money had been paid by *A* to *B* at the time of the execution of the deed, and *A* tendered to *B* the remainder of the purchase-money, *A* would not have been entitled to a decree for specific performance, the contract sued on being eminently a speculative, not to say a gambling, one.

Where a plaintiff sues to set aside a deed of mortgage executed by him, under which possession passed to the mortgagees, on the allegation that the consideration had not been received by him, the law of India (the English law being the same) casts upon him the burden of establishing a good *prima*

* From the judgment of Raikes and Bayley, *J. J.*, in Special Appeal No. 1032 of 1859, decided 27th September 1860.—*See* Sudder Decisions for 1860, p. 239.

† From the judgment of Steer and Seton-Karr, *J. J.*, in Regular Appeal No. 275 of 1860, decided 21st May 1863.—Not published.

‡ From the judgment of Raikes and Seton-Karr, *J. J.*, in Regular Appeal No. 125 of 1863, decided 6th January 1864.—Not published.

§ From the judgment of Sir Charles Jackson and Kemp, *J. J.*, in Regular Appeal No. 164 of 1862, decided 17th December 1862.—*See* 1 Hay's Reports, p. 465.

|| From the judgment of Morgan and Fundit, *J. J.*, in Regular Appeal No. 135 of 1863, decided 21st May 1863.—Not reported.

facie title to the relief which he seeks, and he must make out a clear and consistent case for setting aside his own deed.

In cases of contract in India it has never been held that a contract made under seal of itself imported that there was a sufficient consideration for the agreement.

Where a plaintiff, a zemindar, sues to set aside a mokurruree deed set up by the defendant and to recover possession of the lands covered by the deed, it lies upon the defendant to defeat that right by proving the grant of an intermediate tenure, and the case must be decided, not upon the defects of the plaintiff's claim, but upon the right of the defendant to hold under a perpetual and hereditary tenure at a fixed rent.

By s. 32 Act VIII of 1859, a plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

Where a survey proceeding, conducted in the presence of both parties, declares lands to be included in the zemindary of a person, a plaintiff who sues such person to recover possession of the lands as included in his own zemindary, must prove by counter-evidence at what precise time, if ever, he or any one from whom he claims was in possession of the lands.

In deducting any period under Reg. VII of 1822, it must be shown that plaintiff was "from good and sufficient cause precluded from obtaining redress."

The pendency of an appeal to the Privy Council, does not put the party, who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

Their Lordships have now to dispose of five appeals in which the same person, Rajah Perhlad Sein is an actor, being in four of them the appellant, and in the fifth the respondent. Though the cases are not otherwise connected with or dependent on each other, it will be convenient to state certain facts relating to the Rajah and his title which are common to all. He is now in undisputed possession of the Raj and zemindary of Ramnuggur, the title to which was in litigation from 1835 until 1858. He originally sued for them as the guardian on behalf of his infant son under a deed of gift; they were at the same time claimed by Run Murdun Sein as a son of the former Rajah, Umur Purtab Sein, and by other parties under different titles. Ultimately the right of succession of the present Rajah as the nearest collateral heir of Umur Purtab Sein was declared by a decree of the Zillah Court, dated the 27th February 1845, and that decree was affirmed on appeal by the Sudder Court on the 9th September 1846. From that date the litigation was confined to the Rajah and Run Murdun Sein, who alone preferred an appeal to Her Majesty in Council, which was finally determined in the Rajah's favor in January 1858. The estate was in the possession of one of the widows of Umur Purtab Sein from the time of his death in 1834 until February 1840, when she died. The Collector of the District was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the Sudder Court's decree in 1846, an order was made that the Rajah should be put into possession on giving security to abide the event of the appeal to England; but owing to delays in perfecting that security, he did not obtain actual possession until June 1848. The security afterwards failed; the Rajah was unable to give fresh security to the satisfaction of the Courts; an order was made on the 18th May 1854 that the property should again be attached by the Collector; and it remained under attachment from that time until possession was restored to the Rajah in 1858, upon the determination of the appeal in his favor. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which Budhoo Singh is respondent.

The suit out of which this appeal has arisen (*Rajah Saheb Perhlad Sein v. Baboo Budhoo Singh*) was brought to recover from the appellant (the Rajah) possession of four annas share of certain specified property, comprising the whole, or a very considerable part of the zemindary of Ramnuggur. The original plaintiff was a Mussulman lady, claiming to be, at least for the purposes of the suit, the sole representative of her late husband Sultan Jan, who was the sole representative of one Kajah Hossein Ally Khan. After the institution of the suit she sold all her interest therein to the respondent, who has been substituted as plaintiff on the

record, and may be taken to have all the rights in the subject-matter of the suit which could have been successfully asserted either by Kajah Hossein Ally Khan or by Sultan Jan.

His title is founded on a kowala or bill of sale of the property in dispute, which is admitted to have been executed to the Kajah by the appellant on the 23rd September 1844, and therefore at a time when the latter neither was in the possession of the zemindary nor had established in any Court his title thereto. The case of the respondent is that this bill of sale expresses the real contract between the appellant and the Kajah, which was one for the absolute sale by the former and purchase by the latter of a four annas share of the specified property for the price of Rs. 75,000, and that that sum was actually paid down in cash when the instrument was executed.

The case of the appellant is, that being in want of funds to carry on his suit for the Raj and the zemindary, and for his suit for his own support, he applied to the Kajah, who agreed to make advances for those purposes on condition of having the bill of sale executed, registered, and duly notified in the pending suit; that, no part of the expressed consideration or sum of Rs. 75,000 was paid on the execution of the instrument; and that though the Kajah from time to time advanced small sums of money, the whole amount of his advances fell far short of Rs. 75,000; that afterwards the Kajah absconded from Patna on a charge of disaffection to the Government; whereupon it was agreed between his son, Sultan Jan, and the appellant, that a bond for Rs. 76,000 hypothecating the whole of the property in question, and not merely a twelve annas share of it, should be substituted for the instrument importing the absolute assignment of four annas share; and that, accordingly, such a bond was executed by the appellant to Sultan Jan on the 7th March 1846; but that the Rs. 76,000 was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which Sultan Jan undertook but failed to make.

The questions thus raised between the appellant and respondent are not now litigated for the first time. In August 1848, Sultan Jan instituted two suits against the appellant, of which one, being almost identical with the present, was brought to recover possession of four annas share of the property under the title founded on the bill of sale; and the other was for the recovery of the Rs. 76,000 purported to be secured by the bond which he alleged to have been advanced in addition to the Rs. 75,000 said to have been paid on the execution of the instrument of September 1844.

Both these suits were dismissed by the Zillah Judge (Mr. Hathorn). He held that the plaintiff's story in one suit as to the payment of the Rs. 75,000, and in the other as to the payment of the Rs. 76,000, was false; and in his judgment in the bond-suit, he expressed an opinion that the appellant's account of the transactions was substantially the true one. There was an appeal to the Sudder Dewanny Adawlut against both decrees. The appeal on the bond-suit was absolutely dismissed. On the other appeal the pleaders for the respondent (the present appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which had been put in evidence; and the Sudder Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only; and consequently gave to the plaintiff, Sultan Jan, all the advantages which a judgment of non-suit has over a judgment for the defendant.

The result, however, of that litigation was a conclusive decision against Sultan Jan in the bond-suit; whilst in the other suit a decision on the merits was passed against him in the Zillah Court, which was only so far qualified by the decree of the Sudder Court that he was left at liberty to bring a new suit. The date of that decree was the 4th January 1853.

In this state of things the present suit was instituted on the 22nd August 1856. It was brought in the Court of the Principal Sudder Ameen, who dismissed it

with costs; and on appeal his decision, except as to costs, was confirmed by the Zillah Judge (Mr. Atherton). Both decisions proceeded upon the assumption that the respondent's case as to the payment of the consideration of Rs. 75,000 was false, and the appellant's true. And both Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the bond for Rs. 76,000 of 1846 had been given in substitution for the absolute bill of sale of 1844. According to the practice of the Courts of India, these two decisions were final in India on questions of fact, though on questions of law or procedure there lay a special appeal to the Sudder Court. Such an appeal was in fact preferred. It is unnecessary to state any of the grounds of it, except the 4th; which is to the following effect: "If for argument's sake it be admitted that the defendant did not receive the full price, yet by reason of his acknowledging to have executed a bynamah (bill of sale), a decree in this suit would be just and indispensable, because the defendant has the power to sue for the recovery of the balance of the purchase-money.

On that appeal the Sudder Court, on the 27th September 1860, made the decree which is the subject of the present appeal. Though bound by the finding of the Courts below that the Rs. 75,000 had not been paid as alleged by the plaintiffs, the Judges who sat on the appeal nevertheless, proceeding upon a statement in Mr. Atherton's judgment to the effect that the advances made to the appellant probably amounted to about Rs. 18,000 or Rs. 20,000 in all, arrived at the conclusion that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held that in these circumstances a complete title to the lands passed to the Rajah by virtue of the bill of sale on its execution; and (by a supposed application of the doctrines of English Courts of Equity) that the vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money, and was to be held accountable as a mortgagee in possession for the rents and profits. They accordingly remitted the cause to the Judge with directions "to decide it *de novo* in his Court, on the points now mooted, or upon others which fairly arise on the pleadings."

Before they consider whether the principles upon which the Judges proceeded were sound in themselves, or applicable to a transaction of this nature between Hindoos or between a Hindoo and a Mussulman, their Lordships must observe that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part payment of the consideration for a subsisting contract of sale, and not, as the Rajah insisted, upon a contract for security. And, indeed, the decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the bond for the original contract, left this very point open.

Their Lordships, however, are of opinion that even if this question of substitution had been determined in favor of the respondent, the decree of the Sudder Court would nevertheless have been erroneous.

It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sudder Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a bill of sale by a Hindoo vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of

a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases * cited in the judgment under review; in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the purchaser had alleged that he was in that condition, having paid the whole of the price on the date of the execution of the instrument, but that allegation had been found to be false. Nor, if the fact had been, as assumed by the Sudder Court, that part of the purchase-money was paid upon the execution of the contract, and the purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a decree for specific performance; for the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the vendor agrees, in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the purchaser, at a sum far below the real value of the thing sold. But if the purchaser under such a contract has retained part of the price for several years, and until the risk has been determined by the happening of the contingency, he has *pro tanto* diminished the risk which he contracted to bear; and the vendor has *pro tanto* lost that for which he stipulated—the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed according to the true meaning and intent of the contracting parties. Their Lordships are therefore of opinion that the decree made by the Sudder Court upon their assumption of the facts was in every point of view erroneous, and cannot be supported.

They have now to consider not only what decree the Sudder Court ought to have made on the special appeal, but what ought to be the final decree in the suit; since, in order to complete justice between the parties, they have allowed the learned Counsel for the respondent to impeach the decrees of the two Lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. Bell. The first and most material question is, whether it has been correctly found that the Rs. 75,000 were not paid, as alleged by the respondent, upon the execution of the bill of sale. That has been so found by three Courts in India; and, therefore, in attempting to disturb the finding, the learned Counsel undertook a more than ordinary burden. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. Hathorn; and that that gentleman's judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the appellant in executing the bill of sale, and the receipt for the purchase-money, and in subsequently recognising them. Their Lordships fully concede that though, according to the law and practice of the Courts in India, those acts were not conclusive evidence against the appellant, the presumptions arising from them ought to have been allowed due weight upon the trial of the issue whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held that some were credible and respectable, and others altogether unworthy of credit. Nor can their Lordships say, after giving full weight to the presumptions in question and to the other

* Gopee Mohun Kur v. Koroona Dossea, Sudder Decisions for 1857, p. 225; Sarbonarain Singh Mahraj Singh, Sudder Decisions for 1858, p. 601.

circumstances in the case, that the finding was wrong. They are disposed to believe that the real arrangement between the appellant and the Kajah was for advances to be made from time to time; and that the form of the contract was adopted in order to evade the effect of the Indian Courts in respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding that the Rs. 75,000 were not paid as alleged; and it follows, from the reasons which they have already stated when dealing with the judgment of the Sudder Court, that if that finding was correct, the suit was properly decided in the appellant's favor upon it. Their Lordships, however, think it right to add that upon the evidence, corroborated as it is by the fact that the bond hypothecated the whole, and not only three-fourths of the property in question, they think that the issue as to the substitution of that security for the bill of sale would also have been properly found in the appellant's favor.

Mr. Bell pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the appellant the terms of re-paying the advances actually made to him by the Kajah and Sultan Jan. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. Sultan Jan's proper course was to sue for the re-payment of them in the bond-suit, if they were included in that security; or if they were not so included, under his general title as representative of his father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the appellant, who is not in this suit seeking the aid of the Court, but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstance that the respondent is not the representative of the Kajah or of Sultan Jan for all purposes, but is merely the assignee of the rights which Furkhoonda Khanum has specially claimed in this suit.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be allowed with costs; that the decree of the Sudder Court be reversed, and that in lieu thereof, an order be made dismissing the special appeal with costs. The effect of this will be to affirm the decree of Mr. Atherton. Their Lordships are not disposed to interfere with the discretion exercised by him in respect of the costs of the suit in the Lower Courts.

In the second appeal under consideration (*Kaleepershad Tewarree v. Rajah Sahab Perhlad Sein*), Kaleepershad Tewarree is the appellant, and the Rajah the respondent.

The suit out of which it arises was brought by the respondent to set aside a *zur-i-peshgee* deed, dated the 23rd December 1851, which purports to have been executed by him to the appellant and his brother, Muddun Mohun Tewarree, since deceased, for securing to them the re-payment of Rs. 49,453, with interest, by the pledge or mortgage of 15 mouzahs, part of the zemindary of Ramnuggur. He also claimed *wasilat* or the mesne profits of the property for six years. The respondent admits the execution of the deed, but says that it was executed as a security for the amount appearing to be due on a bond; previously executed by him in favor of the same parties in February 1849; that he never received any consideration for the bond; and that he was induced to execute both documents by his servant, Binda Lall, who was acting in collusion with the Tewarrees.

His story as to the consideration for the bond is, that in the course of the negotiations for procuring the security to abide the event of Run Murdun's appeal to England, which he had to give when he got into possession of the property in 1848, it was arranged that Ranee Unopoorna, who became his surety and pledged her property by way of security, should receive a bonus of Rs. 20,000: that the appellant and his brother should pay that bonus, and for so doing should themselves receive another bonus of Rs. 20,000; that the bond was given to secure

these two sums of Rs. 20,000; but that the Tewarrees failed to pay the Rs. 20,000 to the Ranee, who consequently contrived to escape from her obligations as security by means of a Revenue sale and *benamee* re-purchase of the property which she had pledged as security, and so brought about the re-attachment of the zemindary in 1854. His case, therefore, is that the deed impeached was obtained from him fraudulently and without consideration.

The case of the appellant is that the transactions were what they purported on the face of them to be; that the bond was given to secure advances which had been made in Calcutta to Binda Lall as the agent of the respondent, with his sanction and on his account; and that the *zur-i-peshgee* deed was executed to secure a balance found on a settlement of accounts to be due in respect of the bond debt, and some other transactions.

It is an admitted fact that the appellant and his brother have been in possession of the property under the deed for several years. The appellant's case is that he is still in such possession; but this seems to be disputed by the respondent.

The cause was tried by the Principal Sudder Ameen, who dismissed the suit with costs. His decree was reversed by the High Court, chiefly on the ground that the defendants, the Tewarrees, had failed to prove that they had been given consideration for the bond; but the decree of that Court, though it directed that the *zur-i-peshgee* deed should be set aside, refused to award any of the *wasilat* or *mesne* profits sued for, and gave no costs.

The appellant, as the survivor of the two defendants, appeals against the decree; and there is also a cross-appeal against so much of it as rejects the claim to *wasilat*, and refuses to give the costs of the suit to the respondent.

From the foregoing statement it sufficiently appears that the question between the parties is one of fact, viz., which of these conflicting stories is true.

It is obvious, however, that in the first instance it lies upon the respondent, who comes into Court to set aside a security solemnly executed by himself and perfected by possession, to make out his case. And the first question to be considered is whether he has done so, at least so far as to cast upon the defendants the burden of proving theirs. There has been some argument as to the rule and practice of the Courts in India on this point, and, in particular, upon the ruling of the Sudder Court in its judgment in the suit of Sultan Jan upon the bond for Rs. 76,000, which has been made one of the exhibits in this cause. Upon that their Lordships observe that if what was stated by the Sudder Court be read in connection with the context, it does not seem to go beyond what both sides would admit to be the law in India. The appellant in that case had argued that, unless the "party sued in the bond could establish affirmatively that his signature had been obtained under the influence of force or fraud," he was conclusively bound by that signature, and that a decree must pass against him. The Court said, in answer to this, that it had become the established practice of Courts in India, in cases of contract, to require satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable. The former may be too loosely expressed; and the later cases cited by Mr. Pontifex show that if it is to be taken as affirming that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burden of proving payment of that consideration, it is too wide. It is further to be observed that a party who, like the plaintiff in the case referred to, comes into Court to enforce a bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance.

Their Lordships have no doubt that, in the latter case, the law of India, as of this and probably every other country, casts upon the plaintiff the burden of establishing at least a good *prima facie* title of the relief which he seeks: and they will first proceed to consider how far the respondent has affirmatively made out the case upon which he relies.

Now, what are the facts which are either common to the cases of both parties, or are proved beyond dispute?

In 1845 Binda Lall was in Calcutta, as the agent of the respondent, looking after the appeal in the great suit for the raj which was then pending in the Sudder Court, and possibly other law business. He remained there after the Sudder Court's decree of 9th September 1846 had been made in the respondent's favor. The principal business which he had then to perform was to procure the security which the respondent had to give in order to get into possession. Whilst he was so resident in Calcutta, he certainly had some transactions with the Tewarrees, one of whom, Muddun Mohun, was or had been the vakeel, or quasi-diplomatic agent of the Maharajah of Nepal, but who also carried on there some of mahajunny or money-lending business. On the 27th December 1847, Ranee Unopoorna executed the security bond, pledging her property; and on the same day entered into an agreement with Binda Lall as the respondent's agent, by which it was stipulated that for her protection her manager should be allowed to make the zemindary collections from Ramnuggur, paying thereout an allowance to the respondent, but keeping the surplus money in deposit. There is not a word in this subsidiary agreement about the bonus of Rs. 20,000. The respondent seems to have objected to the arrangement so proposed, and for that, or some other reason, it was not carried out. The security itself was, in the first instance, rejected by the Zillah Judge, Mr. Hathorn, but on appeal to the Sudder Court was admitted as sufficient. The delay caused by these proceedings accounts for the interval of time between the date of the security bond and June 1848, when the respondent was actually let into possession. The proceedings put in by the respondent show that in September 1848 Ramchund, and, very shortly afterwards, Unopoorna herself, made an application to have the security bond set aside and Unopoorna and her property released therefrom. The final order of the Sudder Court refusing to release her was, however, not made until the 19th February 1851. Thereupon she took the steps which have been already mentioned to release herself. The property which she had pledged by way of security was sold for arrears of revenue on the 11th October 1851. Notwithstanding this sale, the respondent remained in possession of the zemindary until May 1854. Run Murdun's first application for fresh security was not made until August 1853; fresh security, the nature of which does not appear, was then tendered, and was finally rejected in May 1854. The respondent, whilst still in possession, received from the Tewarrees for at least two years the rent payable to him under the zur-i-peshgee deed. After the attachment, the following circumstances occurred. The Collector in the first instance attempted to make the gross collections from the zemindary irrespectively of all interests intermediate between the zemindar and the ryots which had been created by the respondent. A remonstrance was made by many of those claiming such interests, though not, so far as the evidence goes, by the Tewarrees. The Commissioner directed that such interests should be respected pending the attachment. In consequence of this, the Collector issued an order to the respondent, calling upon him to specify what mouzahs he had given in mokurruree and under simple leases and zur-i-peshgee deeds; and in answer to that order he filed a report, stating, amongst other things, that the fifteen mouzahs in question were under zur-i-peshgee to Muddun Mohun Tewarree. Thereupon the tenure and possession of the Tewarrees was confirmed by an umuldustuck of the Collector, dated the 7th June 1855; and, on the 8th June 1855, two mookhtars filed in the name of the respondent a petition in answer to

some remonstrance of Run Murdun Singh's, affirming, among other things, the *bona fides* of this transaction with the Tewarrees, and repudiating the imputation that they were servants of the respondent holding for his benefit. In August 1856, under orders of the Collector confirmed by the Commissioner, the Tewarrees obtained a refund of Rs. 1,883 9 annas 2 pies, the amount of the collections deposited in the Collectorate in respect of the rents and profits of the fifteen mouzahs received between date of attachment and that of the Commissioner's order above referred to. This proceeding seems to have elicited from the respondent, the first suggestion of the case now made by him. On the 18th October 1856, a petition was presented by a mookhtar, professing to act in his name, complaining of the order for the refund, and setting up against the Tewarrees a case substantially, but not altogether, the same as that now made. The petition was referred to the respondent in order to ascertain whether it was really his act; and by another petition signed, not by himself, but by a Moonshee, he adopted it generally, though he disputed the accuracy of some of its statements, and insisted that the fifteen mouzahs ought to be re-attached. It does not appear by any evidence what, if anything, was done on the petitions; but the mouzahs were certainly not re-attached. The Tewarrees remained in possession of them up to the time when the respondent recovered possession of the zemindary in 1858, if not up to the day of the commencement of this suit.

What, then, is the case proved by the respondent, and how far is it consistent with these established facts?

It is not very easy to make out from the plaint and the depositions of the respondent in support of it, a clear or consistent story touching the alleged undertaking of the Tewarrees to pay the bonus to the sureties. His case must be tried by the testimony of his witnesses, of whom Binda Lall, though treated as having colluded with the Tewarrees, and made a defendant to the suit, is the most important, and certainly not the least friendly. He is, moreover, admitted to have been restored, whatever his former delinquencies may have been, to the respondent's service.

According to that testimony the history of the transactions in question is this:—

Before the security bond was drawn up, *i.e.*, before the 27th December 1847, Binda Lall had agreed with Unopoorana, or with Ram Chund on her behalf, to pay the bonus of Rs. 20,000 as soon as the respondent, upon the acceptance of the security, should be put into possession. After the execution of the security bond, but before it was tendered to Mr. Hatliorn, Muddun Mohun Tewarree, on Binda Lall's application, agreed to become responsible for the payment of the bonus on the condition that he and his brother should receive the further bonus of Rs. 20,000 to be paid out of the estate.

The undertaking, therefore, was given some time before the 18th June 1848, and ought to have been performed at that date. The bond was executed in February 1849. The witnesses who speak to that transaction all admit that the respondent then knew that the *bonus* had not then been paid to the surety. They do not explain why, in these circumstances, the bond was taken for Rs. 40,100, or bore interest from its date.

According to Beharry Lall and some of the witnesses, it was in consequence of the failure of Muddun Mohun to perform the promise of payment, which he renewed at the time of the execution of the bond, that the surety first made her attempt to be released from her security. But the documentary evidence already adverted to, shows that she had applied to be released before the bond was executed. Again, the witnesses who speak to the execution of the *zur-i-peshgee* deed, equally prove that the respondent then knew that Muddun Mohun had not paid the bonus which they say he had undertaken to pay. They allege that he then renewed his promise to pay it, and that on the faith of that promise the

zur-i-peshgee deed was executed. They represent that in consequence of the non-performance of this last promise, the surety caused her pledged property to be sold at the auction-sale. Yet the documentary evidence proves that it had been so sold more than two months before the date of the zur-i-peshgee deed. The respondent himself admits that he executed that deed to secure the amount of principal and interest due on the bond. But neither he nor any of his witnesses give any explanation why interest was thus allowed upon a sum which, to his knowledge, had not been paid. Again, Binda Lall says that when he finally discovered that the surety had not been paid the bonus and had escaped from the liability, he wrote to the respondent not to give the Tewarrees possession under the deed. Yet the documentary evidence proves that they were put into possession, and that the respondent repeatedly recognized them as *bonâ fide* zur-i-peshgeedars in possession, until, in the autumn of 1856, he was induced to put forward some such case as that now made.

The learned Counsel for the respondent sought to account for the discrepancies above mentioned by various suggestions; but these were all more or less speculative and inconsistent with the depositions of their witnesses. They also contended that their case was established by the admissions made by the appellant in his deposition.

Their Lordships, however, are of opinion that these admissions cannot fairly be taken to amount to more than that the appellant and his brother, or one of them, took some part in the negotiations with Ram Chund and Unopoorina for procuring the security; that they knew the surety was to receive a bonus, and believed that she did in fact receive Rs. 18,000 from Binda Lall, partly directly and partly through them, that is, out of the advances which they made to Binda Lall on the respondent's account. If there is any doubt as to what really took place between Binda Lall and the Tewarrees, on the one side, and Ram Chund or Unopoorina on the other, and in particular whether, as suggested at the Bar, there were negotiations after the sale of her property for the renewal of that particular security, it lay upon the respondent to clear all that up by examining, as he might have done, the two last named persons, or one of them.

Upon this evidence the Principal Sudder Ameen came to the conclusion that the plaintiff had failed to prove his case, and dismissed the suit. The judgment of the High Court proceeds on the ground that the respondent had at all events established such a *prima facie* case as threw upon the appellant the burden of proving his own, and that he had failed to do so. Their Lordships cannot assent to the reasoning by which the Judges of that Court have arrived at the first of these conclusions. They seem to their Lordships in some passages to substitute speculation for proof; in others, as for instance in all that relates to Unopoorina's security, which they treat as subsisting down to 1854, to proceed upon a misconception of the facts proved; and in others to draw inferences from facts proved or admitted, which are not the necessary, or even the legitimate, consequences of those facts.

Their Lordships do not deny that if it lay upon the appellant to prove the truth of his case, he has very imperfectly done so, and that exceptions might fairly be taken to the non-production of his books of account, and to the non-appearance of Muddun Mohun as a witness. But considering that it lay upon the respondent to establish a clear and consistent case for setting aside his own deed, and that the evidence in the cause wholly fails to do so, their Lordships are of opinion that the conclusion to which the Principal Sudder Ameen came was just and proper, though the reasons which he gives for it may not be altogether satisfactory. The order, therefore, which in this case they will recommend to Her Majesty is that this appeal be allowed; that the judgment of the High Court be reversed; and that, in lieu thereof, an order be made dismissing the appeal to that Court with costs; and further that the cross-appeal be dismissed. The respondent must pay the costs both of the appeal and of the cross-appeal.

In the next case to be disposed of (*Rajah Saheb Perhlad Sein v. Doorgapershad Tewarree*), the Rajah is appellant, and Doorgapershad and others, the representatives of Muddun Mohun Tewarree, deceased, are the respondents.

This suit was brought by the appellant on the 31st December 1861, to recover possession of two mouzahs forming part of his zemindary of Ramnuggur, from the respondents "in reversal of an allegation of mokurruree and the proceedings of the Deputy Collector and Collector, dated the 9th and 16th June 1856." He also claimed a refund of a small sum of money, being collections in deposit paid to Muddun Mohun under those proceedings, and the mesne profits of the mouzahs between 1264 and 1269.

His case was that in 1849-50 he made over these villages or their produce to Muddun Mohun Tewarree, who "lived with him," in consequence of the execution of the security bond by Raneer Unopoorna "in lieu of allowance" for his rendering service; that no mokurruree grant of them was ever made by him; that some time in 1851 he discharged Muddun Mohun from his service for bad faith, whereupon his tenure determined; and that the moneys in deposit in the Collectorate had been paid out to Muddun Mohun upon a false allegation of the existence of a mokurruree grant, which the Revenue officers had never seen.

The case of the respondents was that Muddun Mohun Tewarree held the villages under a mokurruree (*i.e.*, an hereditary tenure at a fixed rent) granted by the appellant on 5th Falgoon 1256 (February 1849), as a reward for services already rendered; that Muddun Mohun never lived with the appellant as a servant, in the proper sense of the term, but was the vakeel of the Maharajah of Nepaul, and resident in Calcutta. The substantial issues settled in the suit were—*firstly*, whether the suit was barred by the Law of Limitation; *secondly*, whether the property in dispute was possessed by Muddun Mohun by virtue of a mokurruree grant, or as payment for service from 1257 Fuslee; and if by the mokurruree grant, whether that grant was valid or not; *thirdly*, whether Muddun Mohun Tewarree was a servant of the appellant, or a vakeel of the Maharajah of Nepaul, residing in Calcutta.

The Zillah Judge found that the suit was barred by the Law of Limitation, having been instituted more than twelve years of the date of pottah set up by the respondents, and the commencement of Muddun Mohun's possession. And dealing also with the other two issues of fact, he found that the defendants had had possession since 1256 Fuslee by virtue of the mokurruree grant, and that that grant was genuine and valid. He therefore, on both grounds, dismissed the suit.

Their Lordships will here observe that it is upon the latter finding alone that this decision can be upheld. For, if it be not established that Muddun Mohun, in fact, held possession under a mokurruree tenure, there is no evidence at all that the appellant knew that he claimed so to hold it at any time before 1856, and his suit would be in time. On the other hand, if that fact be established in favor of the respondents, they are entitled to a decree upon the merits. The nature of Muddun Mohun's tenure is, therefore, the only real question in the cause.

The High Court, on appeal, affirmed the decree of the Zillah Judge. The grounds assigned by the Judges were that the appellant had failed, in their opinion, to establish the precise case set up by him; that there was no proof of any lease other than the mokurruree pottah; and, therefore, that Muddun Mohun must be taken to have been in occupation of the lands, either under no engagement at all, which was highly improbable, or under the pottah propounded by his heirs; and the judgment ends with this sentence—"We incline to think that the probabilities are in favor of the latter view of the case; and as we are not satisfied that the decision of the Court below is wrong upon the merits, we see no reason to interfere with the judgment, and dismiss the appeal."

The result of these decrees, if they stand, will be to establish against the appellant, and all who claim under him, the right of the respondents and their

successors to hold the villages in question under a perpetual hereditary tenure at a fixed rent. Their Lordships proceed to consider how far this conclusion is justified by the evidence taken in the cause.

The witnesses of the appellant do not greatly differ from those of the respondent as to the origin of the transaction. They differ somewhat as to the date of it, but all speak to a visit of Muddun Mohun to the appellant, and to a demand by the former of something for his support. Again, those for the appellant, whilst they treat what was given as being a retainer for future services, admit that it was also a reward for past services, including that of procuring the security on which the appellant had obtained possession of his estate. It is, moreover, clear that Muddun Mohun was not, in the ordinary sense of the term, a servant of the appellant; that he was or had been the *vakeel* of the Maharajah of Nepaul; that his residence was in Calcutta, and that whatever services he had rendered or was to render to the appellant were rendered or to be rendered there. On the whole, the weight of the evidence on this part of the case is in favor of the conclusion that whatever was given was given as a reward for a past and special service; and that the gift was not a mere assignment in the nature of wages to a servant for continuing services determinable with those services at the will of the master. The chief and irreconcilable discrepancy between the witnesses is as to the subject of the grant. Those for the appellant say that the mouzahs in question were then under lease to two *ticcadars*, and that in answer to Muddun Mohun's demand the appellant caused letters to be written to those persons directing them to pay their rents to Muddun Mohun and his brother Munnoo Tewarree, who was to remain at Ramnuggur. From one of the proceedings which will be afterwards mentioned, though not from the testimony of the witnesses, it appears that for the assignment of those rents, which amounted together to nearly Rs. 1,000 per annum, Muddun Mohun and his brother were to pay the appellant a reserved rent of Rs. 81 per annum. And it has not unnaturally been asked why, if this case be true, is it not corroborated by the production of the letters to the *ticcadars* or by some evidence on their part, or by proof of a *kubooleut* from the Tewarrees undertaking to pay the reserved rent of Rs. 81.

On the other hand, the witnesses for the respondents depose that in answer to Muddun Mohun's demand of a reward, the appellant caused a *mokurruree* deed of the two villages to be then and there drawn in the name of Muddun Mohun, and signed and sealed it himself. And the respondents produce a deed which purports to grant to Muddun Mohun a *bekh-birt* *mokurruree* of the two villages on an annual jumma of Rs. 136 to be enjoyed by the lessee from generation to generation. It appears to have been originally on plain paper (for the memorandum at the foot of it shows that the respondents before filing it in this suit had to pay a penalty for getting it stamped). It was never registered; and as set out at page 39 of the record, it does not appear to bear the appellant's signature. It was contended at the Bar that the impression of his seal is also wanting. Their Lordships cannot think that if this were really the case, both the Courts below would have omitted to comment on these material defects in the document, of which the original was before them. On the other hand, their Lordships are bound to say that the evidence before them, so far as they have hitherto considered it, is far from being satisfactory proof of the grant of a *mokurruree* tenure.

The respondents have also produced the *farkhuttee* or receipt (No. 24, p. 39). The importance of it is that the appellant thereby purports to admit the receipt of the rent of the villages from 1256 to 1261 (1849 to 1854) from Baboo Munnoo Lall Tewarree, *mokurrureedar*. The date is the 10th Bysack 1261. But, in their Lordships' opinion, this document and the evidence in support of it are extremely suspicious. On the face of it, it does not bear the appellant's signature, but that of some other person. It was written on plain paper. It does not specify the amount paid, and it treats Munnoo Lall, who is not named in the *mokurruree*

deed, as the mokurrureedar. Again, it is a general receipt for rents which would in ordinary course have been paid on separate receipts, at different times, during four or five years. The witnesses who speak to it say that it was signed by the Rajah on a settlement of accounts between him and Munnoo Tewarree, and that the Rajah then requested Munnoo to give him the receipts or letters which he had received. If these receipts were returned, they are not produced; if they were retained, no sufficient reason is assigned for their retention. And this piece of evidence appears to be so far from advancing the respondent's case that it throws additional suspicion upon it.

The degree in which the proceedings which took place after the re-attachment of the zemindary tend to corroborate the case of either party remains to be considered.

On the 26th October 1854, the Collector called upon the appellant to make a return of the mouzahs of which he had given mokurruree, simple ticca, and zur-i-peshgee ticca leases. On the 13th November 1854, the appellant made a return of the mokurruree tenures created by him, in which there is no mention of that which is now in dispute. He did not then send a list of the ticca leases, but promised to do so thereafter. On this the Collector passed an order that the collections should be made from the attached estate, without regard to the tenures created by the appellant. The persons affected by this appealed to the Commissioner who, on the 27th December 1854, passed an order reversing that of the Collector, and directing that such rents only as the appellant would have been entitled to, had he remained in possession, should be collected by the manager. Amongst the appellants, whose names and claims are stated in the Commissioner's proceedings, Muddun Mohun Tewarree is not found; and on the other hand, certain persons claiming to be simple ticcadars of the villages in question are so found. On the 14th March 1855, the appellant, in obedience either of the original perwannah of the 26th October 1854, or some subsequent perwannah, sent to the Collector the *urzee* (No. 6, p. 16), in which he says he has, on enquiry into his records, had prepared a detailed statement (which he forwards) of all the mouzahs in Raj Ramnuggur, containing the names of the ticcadars and zur-i-peshgeedar, and the names of servants to whom particular mouzahs have been assigned in lieu of wages and other particulars. And the exhibits Nos. 4 and 5 (pp. 15 and 16) were treated by the appellant's Counsel as extracts from that statement. These relate to the two mouzahs in question, state that Muddun Mohun is the ticcadar of both at jummas which make up the sum of Rs. 81; and further that each village is held "on conditions of service." There is in these exhibits also a statement of sums under the head of expenses, which their Lordships feel some difficulty in explaining or in reconciling with the hypothesis of either party. On the other hand, Mr. Pontifex for the respondents relies strongly on the exhibit No. 29, which is signed by one Binda Lall as the Roojoonovees on the part of the Rajah, and was filed in the Collectorate on the 17th October 1854. In that document Muddun Mohun Tewarree is stated to be mokurrureedar of the two villages, and the rents payable by him amount to Rs. 81.

There are some receipts which show that the Surbarakur afterwards received rent from Muddun Mohun as mokurrureedar on various occasions; but these receipts being for small sums do not show whether the total annual rent received was Rs. 81 or Rs. 136. It is further shown, and this is one of the proceedings impeached by the suit, that on the 9th April 1855, Muddun Mohun, describing himself as mokurrureedar of the two villages, petitioned for a refund of the rents held in the Collectorate in deposit, and named a sum of Rs. 189 as the amount of such rents under an order of the Commissioner dated the 28th August 1856, in which the villages are described as covered by the mokurruree deed executed by the appellant. There is, however, no other evidence that the deed now relied upon was produced before the Revenue authorities; and their Lordships doubt whether

an unstamped paper would have been received by any such officer. It is further to be observed,—and this fact has been strongly pressed against the respondents,—that in his petition Muddun Mohun described himself as holding the two villages at jummas aggregating Rs. 81, under a mokurruree deed, whereas the rent reserved by the deed now produced is Rs. 136.

Their Lordships must observe that it is difficult, if not impossible, to extract from the proceedings last adverted to any recognition, binding on the appellant, of Muddun Mohun as mokurrureedar of the villages in question under the deed now propounded, or even under any deed.

The jummaabundee filed by the Roojoonovees has been attacked, and the character of the party signing it was impugned by Muddun Mohun himself in his petition at p. 29. It is not shown under what circumstances it was filed ; and, in any case, it was filed before the Collector's order of the 18th October 1854, and cannot be treated as binding on the appellant in equal degree with the returns made by him in pursuance of that order. And lastly, it states that the rent of the villages is Rs. 81, and is so far inconsistent with the deed now produced. The appellant cannot be held bound by the form of the Surbarakur's receipts, or by the proceedings for the refund, to which he was no party.

Their Lordships are not insensible to the defects in the appellant's proof. They have already intimated that, in their opinion, the evidence preponderates in favor of the hypothesis that whatever was given as a reward for past services, and was not recoverable upon the dismissal of Muddun Mohun, of which dismissal there is in fact no proof. They have also pointed out that the appellant's case as to the nature of the reward might, if true, have been better proved. But even if it be admitted that the appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion that the respondents had established their right to hold the lands under their mokurruree tenure. It is possible that the reward to Muddun Mohun may have been an assignment of the rent of the villages to him for his life, or other life interest.

The appellant is the zemindar ; as such he has a *prima facie* title to the gross collections from all the mouzahs within his zemindary. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the lifetime of Muddun Mohun Tewarree.

On the other hand, they have felt that the respondents have the concurrent judgments of the two Indian Courts in their favor ; that some of the doubts thrown upon the instrument produced might have been removed if the original instrument, to which exceptions, which do not seem to have been taken in the Court below, have been taken here, had been before them ; and that if that document does purport to bear the Rajah's seal or signature, no evidence to show that it is a forgery has been given.

They have, therefore, somewhat reluctantly come to the conclusion that the safer course is to remit the cause for further trial on additional evidence. If it shall come to such a trial, the duty of the Court which tries it, will be to require satisfactory proofs of the genuineness of the mokurruree deed produced ; for it is upon that, and not upon the defects in the appellant's case, that the right of the respondents to hold these villages under a perpetual and hereditary tenure at a fixed rent must depend. The order which their Lordships will humbly recommend Her Majesty to make on this appeal is that the appeal be allowed, and the decrees of both the Zillah and the High Court reversed, and that the cause be remitted to the High Court with directions to re-try the same or cause the same to be re-tried upon further evidence on the first issue of facts, and to decide the same or cause the same to be decided accordingly. With respect to

the costs of this appeal, their Lordships propose to take the course which has been followed here in similar cases, viz., to cause the costs of both sides to be taxed, and to make it part of the order to be recommended to Her Majesty that these costs be costs in the cause to be dealt with by the High Court.

In the fourth of these cases (*Rajah Saheb Perhlad Sein v. Run Bahadoor Singh and others*) the Rajah of Ramnuggur is the appellant, and Run Bahadoor Singh and others are respondents. In this case, as in the last, the appellant has brought his suit to recover two villages which the respondents claim to hold on a mokurruree tenure created by him. Their title is founded on three deeds, of which two are Bekbarut deeds which purport to have been executed by the appellant, as father and guardian of the infant son for whom he originally claimed the zemindary, on the 13th Jeyt 1250 (being some time in 1843-44); and the third is a *Sudruth Puttur* or deed of confirmation purporting to have been executed by the appellant in his own right on the 17th Bhadoor 1255 (1847-48). The appellant impeached these documents as forgeries; and there may have been other questions to be tried concerning them. The Principal Sudder Ameen, however, saw fit to settle one issue in bar in these words, viz.:—"Does limitation apply or not; and when must the cause of action be said to have arisen in this suit;" and on the assumption that the determination of the suit depended on that issue, proceeded at once to try it.

The question raised by the issue was not whether the deeds impeached were genuine, but whether the appellant was precluded by the Law of Limitation from showing that they were not genuine, and the twelve years period of limitation was to be calculated, not necessarily from the date of the deeds impeached, but from the time when the appellant having notice of them might first have brought his suit to impeach them. That time the appellant alleged to be the 27th December 1854, in which case his suit, which was commenced on the 31st December 1861, was in time.

The Principal Sudder Ameen, however, found the issue against him, and dismissed the suit. His decision proceeds on the ground that on the 7th December 1858, the appellant by his mookhtar had filed a petition before the Collector, admitting that the respondent Run Bahadoor Singh was mokurrureedar of the villages in question, and assenting to the payment of some rents in deposit to him out of the Collectorate. The Principal Sudder Ameen held that this was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. His decision was affirmed in effect by the High Court, and the question is whether those decisions can stand. It was almost admitted at the Bar that they cannot. It is obvious that the petition, if taken as mere proof that the appellant knew of the title asserted by the respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of the genuineness of the deeds, and thence to infer that the appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it.

Their Lordships, therefore, must in this case advise Her Majesty to allow the appeal, to reverse the decrees of both the Courts below, and to remand the cause for trial upon its merits. The miscarriage being that of the Judge, they think that the costs of this appeal should likewise be costs in the cause, and should be dealt with in the same manner as those of the last case.

In the fifth and last of these appeals (*Rajah Saheb Perhlad Sein v. Maharajah Rajender Kishore Singh*) the Rajah of Ramnuggur is appellant, and the Rajah of Bettiah is the respondent.

The suit was brought by the appellant to recover 5,000 beegahs of land or

thereabouts, being the whole or larger part of the lands included between the yellow and red lines on the Map No. 2, which is one of the exhibits in the cause; and with them the right of realizing certain profits derivable from a bazaar attached to the fair which is periodically held within them at a place called Tribenee. The question between the parties is therefore simply one of boundary, viz., whether the property in dispute lies within the limits of the zemindary of Ramnuggur or within those of the contiguous zemindary of Bettiah. The northern boundary of that property is the River Bechund, which in that locality is the frontier line between the territories of British India and the Kingdom of Nepaul.

The suit has been decided both by the Court of first instance and also by the High Court of Calcutta upon the question of limitation. The plaint was filed on the 31st December 1861.

On this point of limitation the respondent raised two distinct questions. He alleged that the boundaries between the two Rajs had been fixed and adjudicated by a decision of the Thakbust (or Survey) authority, dated the 11th February 1848; and that under Act XIII of 1848, the appellant's suit was barred because brought more than three years after the date of that decision. He also alleged that it was barred by the general Law of Limitation.

The Principal Sudder Ameen, who first tried this case, held that the suit was barred by both the special and the general Law of Limitation. The High Court entertaining some doubt as to the application of Act XIII of 1848 to the particular case, rested its decision upon the general Law of Limitation alone.

In the course of the argument their Lordships intimated their opinion that this case was not within Act XIII of 1848, because the operation of that Act is in terms limited to awards made by the Revenue authorities under Reg. VII of 1822, Reg. IX of 1825, and Reg. IX of 1833; and the learned Counsel for the respondent had failed to show that the Thakbust proceeding in question was an award made under either of those Regulations. They now deem it right to observe that having, since the close of the argument, examined the Regulations more closely, they are not prepared to say that the Thakbust proceeding of the 11th February 1848 may not be an award under Reg. IX of 1825 within the meaning of the Act; for although Reg. VII of 1822 was originally limited in its operation to what are now known as the North-Western Provinces, many of its provisions were by Reg. IX of 1825 extended to the Lower Provinces of Bengal; and looking at ss. 2 and 3 of the latter Regulation, and at ss. 36 to 44 (both inclusive) of the Survey Manual issued by the Board of Revenue, their Lordships think it probable that Mr. Chapman, as Superintendent of Survey, was duly invested with power to determine boundary disputes by an award under s. 34 Reg. VII of 1822, and may have made such an award by the proceeding in question. The proceeding seems to have been assumed in the Courts below to be an award within the scope of Act XIII of 1848; and if the determination of this appeal necessarily turned upon the applicability of that Act to the present case, their Lordships would have had that point re-argued with reference to the Regulations to which they have drawn attention.

Their Lordships, however, have come to the conclusion that the Courts below have properly held that this suit is barred by the general Law of Limitation.

The appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th March 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of Ramnuggur was last in possession is consistent with a right to institute this suit. Act VIII of 1859 s. 32 shows that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

In the present case the Magistrate's order of the 26th March 1851 certainly

did not cause the dispossession. As far as its effect can be gathered from the document at page 13, if it proves anything, it proves that the appellant was then out of possession, and had been so at all events since the date of the Thakbust proceeding of the 11th February 1848 ; it does not in any degree prove that he or any former Rajah of Ramnuggur had been in possession at any former period. The appellant has, however, produced evidence to show that in point of fact he was in possession after the date of the Thakbust proceeding, and up to 1851. But both the Courts below have treated that evidence as unworthy of credit ; and their Lordships cannot see any grounds for holding that they were wrong in that conclusion. That there was any possession adverse to the Rajah of Bettiah after the date of the Thakbust proceeding seems highly improbable.

Great stress is then laid upon the report and proceedings of the Commissioners who in 1847 settled the frontiers of Nepaul and British India, and on the evidence given in this cause by two of the Nepaulese Commissioners. The effect of the official documents is merely to show that as between the two Governments it was settled in January 1847 that whatever was north of the Bechund, within certain limits beginning from the Tribenee Ghât, and extending to Gurh Somessur, was to be treated as Nepaulese, and all south of that river, as British territory. It is true that one document recommends that the Amlah of Ramnuggur should be directed not to make any collections north of the Bechund, and that another speaks of settling the boundary of Ramnuggur. But it is to be observed that if Map No. 2 be compared with any good general Map of India, and the frontier line of Nepaul and the course of the River Bechund be carefully examined, it will be found that a considerable portion of the tract south of the Bechund, which was the subject of discussion, lies beyond the red line on Map No. 2, and within the admitted limits of Ramnuggur. And it was far from improbable that the Commissioners and the Resident should speak of all the lands south of the Bechund as Ramnuggur without adverting to the precise boundary line between that and the contiguous zemindary of Bettiah with which they had no concern. Again, the testimony of the two Nepaulese Commissioners proves at most that, according to their information at the time, the collections of the Tribenee Fair, and the lands immediately south of the Bechund River at that point, were in 1847 in the possession of the Rajah of Ramnuggur, who has since been dispossessed by the Rajah of Bettiah. The evidence might be worth something if it stood alone ; but when opposed by that which is to be gathered from the contemporaneous Thakbust proceeding, it is really worth little or nothing.

From that proceeding it appears clearly that before January 1846, the boundary between the two zemindaries was in dispute, and that on the 1st February of that year, Mr. Yule, the ticcadar of Ramnuggur under the Collector, invoked the aid of the Superintendent of Survey, complaining that in the Fuslee year 1253 the Bettiah Rajah had forcibly collected the proceeds of the fair. The inference is that if he had ever had possession of the lands on which the fair is held, he had then been dispossessed. The Bettiah Rajah on the 2nd May 1846, brought his case before Mr. Chapman and asserted that the lands in question had been always part and parcel of the zemindary. The Map No. 2 was then made. The Amlah on both sides pointed out what each side considered the boundary line ; and these are designated by the red and yellow lines upon the Map. Mr. Chapman, however, delayed to make any final order in the matter before the decree of the Sudder Court affirming the title of the appellant had been made. It is proved that the appellant then executed a mookhtarnamah in the name of Lalla Sohur Dutt, and appeared by that person in the subsequent proceedings ; and he must be taken to have then adopted the proceedings of Mr. Yule, who seems, on the appellant's appearance, to have retired from the contest. The final judgment of Mr. Chapman was on the 11th February 1848, as has been already stated. It held, on the proofs of possession before him, that the greater part, if not the whole of the lands

between the yellow and the red lines, with the right to the profits of the fair, belonged to Bettiah, and settled a line of demarcation which, if not identical with the red line, at least includes the lands which are the subject of this suit within the limits of Bettiah.

Now, whatever be the effect of that proceeding, and whether it were or were not an award under Reg. VII of 1822, it cannot be treated as being other than a material piece of evidence upon the question of possession now under consideration. To discredit it, their Lordships have been referred to the proceedings before the Magistrate on the 21st March 1851 (No. 19), and to the decree in the Civil suit which was brought thereon (No. 20). But these seem to their Lordships not to relate to the lands now in question or to the effect of Mr. Chapman's proceeding, but to other lands and to a question of boundary settled by some other proceeding. Their Lordships think that this proceeding before Mr. Chapman establishes that the property in dispute was then in the possession of the Bettiah Rajah, and that there is no satisfactory evidence that it has ever since ceased to be so.

They further think that this careful local investigation conducted in the presence of both parties, and implying that the property in dispute had always formed part of the Bettiah zemindary, casts upon the appellant the burden of showing by satisfactory counter-evidence at what precise time, if ever, the Rajah of Ramnuggur was in possession of it. And their Lordships agree with the Judges of the High Court that this he has failed to do. There may have been assertions of right, such as were likely to occur in respect of a tract of wild and jungly land on the confines of two large estates; but of an actual legal possession, and of the determination of it at any given time, there is no proof. And their Lordships must observe that it is a fallacy to treat the appellant, as one of the reasons in the petition of appeal seems to treat him, as having necessarily twelve years from the date of the establishment of his title in which to enforce this claim. For he did not come in under a new title; he merely established his right to succeed to the former Rajah of Ramnuggur: and if the right of that Rajah to sue for the property in question was barred by the Law of Limitation, the right of the appellant was also barred.

Their Lordships, therefore, think that the decrees under appeal may be supported on the ground stated by Mr. Justice Morgan, viz., that even if the appellant was allowed to deduct the full period during which this suit concerning the Raj was pending, he had failed to show that he had a right of suit which accrued to him during the legal period of limitation.

If, however, it were granted that a right of action accrued to the appellant at the date of the Thakbust proceeding,—and their Lordships think it impossible on the evidence to fix the dispossession at a later date,—the suit would nevertheless fall within the twelve years' limitation unless the appellant could show that he is entitled to deduct the whole or some part of the period between February 1848 and the beginning of 1858. And to support this claim to deduction, he must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

Their Lordships would have great difficulty in affirming the proposition that such good and sufficient cause had here been shown to exist. The appellant's title to Ramnuggur was established in the Courts of India in September 1846; he was put in possession of the property in June 1848, though between May 1854 and some day in the beginning of 1858 it was again under attachment. How can it be said, that in these circumstances, he was between 1848 and 1858 precluded from maintaining a suit for protecting his zemindary, and recovering lands taken from it by encroachment? It would be very dangerous, in their Lordships' opinion, to lay down as a rule that the pendency of an appeal to England puts the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

The cases in the 7th Moore's Indian Appeals which have been cited are very distinguishable from the present. In *Troup v. The East India Company*,* the good and sufficient cause was insanity, a personal disability *ejusdem generis*, with infancy, which is specified in the Regulations. In *Rajah Enayet Hossein v. Sayud Ahmed Reza*, the facts are complicated; but it will be found that the decision proceeded on the ground that the title upon which the plaintiff sued had only accrued to him on the 15th January 1842, when Her Majesty's Order in Council had determined the right of succession to be in the general heirs according to the Sheah law of succession, and that the suit to which the bar was pleaded had been commenced in February 1852. Here the appellant's title to Ramnuggur, subject to the appeal to England, was complete in 1846.

Their Lordships, therefore, must humbly advise Her Majesty to dismiss this appeal, and to affirm the decrees of the Courts below, with costs.

The 15th March 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, Sir Robert Phillimore, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

Succession—Inheritance—Rajdom—Custom—Seniority.

On Appeal from the High Court at Calcutta. †

Neel Kisto Deb Burmono

versus

Beerchunder Thakoor and others.

In a suit for succession to a Raj, the right to which was founded on family custom governing the succession, the plaintiff stated that he was the oldest living member of the class out of which the successor could alone be appointed, and that the predecessor of the last Rajah had promised to appoint him the plaintiff. The defendant contended that the choice of the Rajah within a certain class, within which he was included, was absolutely free and could not be controlled by the wishes of a former Rajah.

HELD that where there was evidence of a power of selection, the actual observance of seniority even in a considerable series of successions could not of itself defeat a custom which established the right of free choice, and that even if the instances had been uniform and without exception, that alone would not be sufficient to support the plaintiff's case.

Where the custom required the union of two things to constitute the legal heir, viz., seniority in age and nearness of kin, a claimant who has but one of these qualifications (seniority) cannot be entitled to succeed by the family custom.

HELD that the general rule of Hindoo law, which gives a preference as heir to the whole blood over the half blood, extends also to a Raj, in the absence of evidence showing that the family custom by which the succession to the rajdom is governed supersedes the general law. Where a custom is proved to exist, it supersedes the general law, but the general law still regulates all beyond the custom.

This is an appeal from a decision of the High Court at Calcutta which reversed a decision of the Principal Sudder Ameen of the Zillah of Tipperah. The suit was one in the nature of an ejectment brought by the appellant, the half-brother of the late Rajah of Tipperah, Essanchunder, against the respondent, Beerchunder Thakoor, the uterine brother of Essanchunder, and against the other respondents, to recover a very valuable zemindary, being that part of the Royal possessions of the Rajah of Tipperah, which lies within the Indian territories of the British Crown. The Rajah of Tipperah, though in respect to these lands subject to the laws and Courts of British India, is in fact an independent Prince

* 4 W. R. P. C. 111; 1 Suth. P. C. R. 287.

† From the judgment of Norman, *Offg. C. J.*, and Kemp, *J.*, in Regular Appeal No. 245 of 1864, decided 26th September 1864. See 1 W. R. 177.

with a considerable territory known as the Tipperah Hills ; and as the title to the zemindary and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the musnud or throne of the independent Principality. The respondent, Beerchunder, has been acknowledged by the British Government as *de facto* Sovereign of Tipperah, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to the lands within the jurisdiction of the Indian Courts.

The appellant included originally as defendants to the suit four persons besides the respondent Beerchunder, viz., the third, fourth, fifth, and sixth named defendants in the appeal, being the spiritual guide, and the servants of the deceased Rajah. He charged that these four defendants colluded with Beerchunder to obtain by fraud the Raj and the zemindary in question. Another defendant, the second on the record, was made a defendant on his own petition. He was an illegitimate son of Kristokishore, the father of the claimant and Beerchunder ; and the ladies whose names appear on the record, being the mothers of infants whose legitimacy was disputed, were made parties by the act of the High Court on a petition addressed to it in the progress of the litigation. In disposing of this appeal, however, it is unnecessary, in their Lordships' view, to consider the cases made for or against any of these parties. It will be sufficient, for the purpose of their decision, to treat the suit as being in the nature of an ejectment brought by the appellant against the respondent Beerchunder alone.

The Rajah, Essanchunder, had one legitimate son, Brogendro Chunder, who survived him. He was not made a defendant in this suit. He died after its commencement at some early stage of its progress, but this event affects in no way the questions either of law or fact at issue in this suit.

After Essanchunder's death, Beerchunder claimed and obtained the throne. His claim was founded on an appointment of him as Jobraj by Essanchunder, the deceased Rajah, who, it was alleged, had the day before his death, being the 16th Shrabun 1269, or the 31st July 1862, duly appointed Beerchunder Jobraj, his legitimate son Brogendro Chunder Burra Thakoor, and an illegitimate son Kurta. The fact of this appointment was denied by the plaintiff, who charged it to be false and fraudulently concocted between Beharry Gossain, the family priest, Brojomohun Thakoor, Goorodoss Burdhun, and Bissonauth Goopto, all officers in considerable trust and employment under the deceased Rajah, and who are respectively the third, fourth, fifth, and sixth defendants on the record.

Before the institution of the plaintiff's suit, the second defendant Chuckerdhuj filed a suit of a similar character with the present against Beerchunder and others, and the present plaintiff intervened in it as a defendant. That suit and the present were treated as substantially involving the same questions, and were heard together ; much of the evidence in this suit was taken in the other. The suit of the second defendant, Chuckerdhuj, was dismissed by the Principal Sudder Ameen on the ground of his illegitimacy ; he did not appeal from that decision, and his claim may therefore be treated as no longer in question.

It is not necessary to consider minutely the pleadings in the cause, or the issues settled between the parties. Their Lordships will only observe, in answer to an argument of Mr. Field upon these issues, that, in their judgment, they do not in any degree relieve the appellant from the obligation which lay upon him as plaintiff in a suit in the nature of an ejectment, of recovering by the strength of his own title, and of showing not merely that the defendant's title was bad, but that failing that title he, the plaintiff, was entitled to the possession of the lands in question.

The questions to be determined upon this appeal are simply these :—

1. Had Essanchunder the power of appointing Beerchunder Jobraj in preference to the appellant?

2. Did he in fact so appoint Beerchunder?

3. Supposing there was no valid appointment of Jobraj, who was entitled to succeed to the Raj and the zemindary in question, or is now entitled thereto?

The two latter questions were decided in favor of the appellant by the Principal Sudder Ameen; all three questions have been determined by the High Court in favor of the respondent.

It is admitted that the right of succession to both Raj and zemindary is governed not by the general law but by koolachar, or family custom. This custom had been the subject of investigation, trial, and decision in the Courts of the East India Company in the early part of this century. The cases are reported in the 1 Sudder Dewanny Adawlut reports, and in the second and third volumes of the same work. These cases establish that, according to the custom, a reigning Rajah should name a Jobraj and Burra Thakoor, of whom the first succeeds to the throne, and the latter to the office of Jobraj. Both parties to this appeal admit the custom so far. It is, however, contended by the appellant that if Essanchunder appointed a Jobraj, he was bound to appoint him partly on account of an alleged promise or intention on the part of the former Rajah Kristokishore, and partly on the ground that he was the oldest living member of the class out of which, according to the family custom, a Jobraj could alone be selected. On the other hand, the respondent insists that the choice of the reigning Rajah, at least within a certain class, is absolutely free, and cannot be controlled by the wishes of a former Rajah, had any such in fact been expressed in favor of the appellant.

On the argument of this appeal before their Lordships, the appellant's preferential title by seniority to the Jobrajship was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection, the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice; and had the instances been uniform and without exception, that alone would not have been sufficient to support the appellant's case. Such uniformity of practice was, however, not proved, for several instances appear of infants appointed to the office of Jobraj, whilst relatives within the custom, and older in years, were living. This evidence, therefore, failed. Still it was open to the appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to this Raj; and to this latter branch of the argument insisted on by the learned Counsel for the appellant, their Lordships will now direct their attention.

The question now to be considered is whether, assuming no valid title to the office of Jobraj to have been conferred on the respondent Beerchunder, the appellant establishes a title by seniority. It is not denied that his title to succeed must be made out as legal heir to the last Rajah Essanchunder. The plaintiff is senior in years to Beerchunder, he was the half-brother of Essanchunder, and Beerchunder is Essanchunder's brother by the whole blood. By the general Hindoo law, Beerchunder would be the heir to Essanchunder in preference to his half-brother, were it a disputed succession to divided property. The learned Counsel for the appellant have, however, contended that this preference of whole blood to half blood does not extend to a Raj; and to support this contention they relied on the rule which obtains in certain cases of undivided ancestral estate, when brothers of the whole and half blood are on the same footing.

The rule on which they insisted is this, that in the case of a Raj or kingdom, or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were joint estate, part of an undivided joint ancestral estate, and apply the law applicable to such an estate with a view to the selection

of the eldest from those who would be equal in degree as co-parceners. This position was advanced in the High Court without success. The Court observed that no authority had been cited in its support, and treated the doctrine as novel and unknown to them. The argument has been strongly urged by Mr. Bell, and their Lordships will give their reasons for concurring in the opinion which was expressed by the High Court, somewhat more fully than was done in that Court.

The normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate.

In the absence of proof of division, such is the legal presumption ; but the members of the family may sever in all or any of these three things. The family in which a title to a kingdom exists in one member follows this general law, but it follows it in part only, for the succession to a kingdom is an exception to it from the very nature of the thing (see 1 Strange's Hindoo Law, p. 198): the family may have property distinct from that to which a sole heirship belongs, and may continue joint. Still when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne and the Royal lands is, as in this case, one and the same title. Survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In the Shivagunga case * (9 Moore's Indian Appeals), it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindoo law two leading rules of inheritance,—that founded on the religious duty and superior efficacy of oblation and sacrifice ; and that of survivorship. Where the latter rule cannot apply, the former must be resorted to. Now, this rule of religious obligation and priority marks the brother of the whole blood as preferable heir in succession to the estate of his brother, over the brother of the half blood only. The reason given is that he offers more sacrifices, and benefits more the manes of the dead of his family; in their eyes a real substantial ground of preference. In nature, also, he is nearer, and therefore satisfies the description nearer of kin. Since, then, the custom in this family, where no appointment of Jobraj or Burra Thakoor has been made, requires the union of two things to constitute the legal heir, viz., seniority in age and nearness of kin (which in truth is in conformity with the general law of Royal descent), and the claimant has but one of these qualifications in himself, viz., seniority, he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the general rule as to the precedence of the whole over the half blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. On general principles, therefore, the Hindoo law must be resorted to in this case, and that does not favor the appellant's claim; for unless where survivorship furnishes an exception, the whole blood is preferred.

The decision of this question alone would justify the dismissal of this appeal ; but their Lordships think it right to review also the decision of the High Court on the facts as to the appointment.

The facts stated by the *de facto* Rajah and deposed to by his witnesses on this part of the case are few and simple. The fact that the Rajah had appointed a day and hour for the celebration of the ceremony of opening a new hall, cannot be

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

doubted. The disputed nomination of the Jobraj is said to have been made on that occasion, and during that ceremony the Rajah is stated to have directed the intended Jobraj, Burra Thakoor, and Kurta to bathe and come to his presence. Dresses had been prepared, it is said, by orders overnight to the bearer. The dresses were brought on silver dishes to the Rajah's presence; the Jobraj, Burra Thakoor, and Kurta were invested with their dresses, appeared, made their salaams, were verbally appointed, gave presents of gold mohurs, and, so appointed, received the customary nuzzurs.

This contest is in truth a contest as to the title to reign,—a matter, rather, of state policy than one proper for judicial decision. Into such disputes, passions stronger than those which affect the minds of ordinary litigants may well be supposed to enter, and fear and favor may sway in an unusual degree the minds of those who depose on either side. The power of an absolute prince over the fate of those who surround him may enable him to array a body of witnesses deposing to facts to which it may be difficult to offer any positive contradiction. The addition by false testimony of an incident or two, or of a few words, to an actual scene or ceremony, may, if credited, determine the title to a throne; and it is scarcely possible to conceive a case more requiring, than this does, the nicest scrutiny and examination of the evidence. The defendant Beerchunder is *de facto* Sovereign, and as such has been recognised by the Indian Government, the paramount arbiters in a case of disputed succession. The High Court has founded its judgment on the positive testimony which was given in support of the appointment. The objections stated by the Court below to the testimony of the witnesses, twenty-one in number, are not that they are of a bad character or that their manner and demeanour induced the Court to disbelieve them; but they are of such a nature as a Court of appeal may be well able to judge of without being under any inferiority to the Judge who tried the case. The exact agreement in the story, even to its details, by all the witnesses; the supposed difficulties as to the ready production of dresses and gold mohurs; the dependence of the witnesses more or less on the Rajah's power and favor; the absence of all mention of the appointment in the early letters of the Gooroo to the Superintendent; the want of notification to the British authorities and of the invitations to the members of the family absent from the ceremony, though resident in the palace, with the ignorance as to any such appointment stated by ladies of the palace of high rank; the want of the accustomed religious ceremony and non-observance of regal state in the usual throne-room,—these, with some minor objections, led the Judge below to discredit a story fully and consistently deposed to by witnesses of a class not ordinarily untrustworthy nor to be lightly disbelieved. In addition to this, the *de facto* Rajah was considered to be throwing difficulties in the way of the appellant, who desired to examine the Gooroo and some other witnesses; and the singular character of the answers of the latter, which avoided any recognition of the titles of Jobraj, or Thakoor, or Kurta, augmented the matter of suspicion. Their Lordships are far from saying that the objections urged with so much force by the Counsel for the appellant are undeserving of a very serious and attentive consideration; they appear to have received such consideration in the High Court, and their Lordships, during the argument, and since, have carefully considered and weighed them. The probabilities, however, are, in their Lordships' opinion, strong in support of the fact of a nomination of the *de facto* Rajah by his deceased brother to the office of Jobraj. An experience of Indian cases shows that few of them, however true, are free from admixture of exaggeration; and it is not necessary to the affirmance of this judgment that their Lordships should believe entirely all the attendant circumstances detailed by the witnesses who support the nomination.

The Rajah was infirm in health; his state was evidently one calculated to inspire doubt and alarm; he had two years before declined to appoint to the offices of Jobraj and Burra Thakoor: he was supposed at that time to desire to be suc-

ceeded by his own son ; but from his reluctance to name him when he was of tender age, he may reasonably be supposed to have considered the appointment of an adult sovereign the best for his kingdom. When his own health was seriously impaired, it would become not only to him, but to those around him, a subject of anxious thought how the Raj should be preserved. The appellant had an enemy in the Gooroo, who exercised great influence over the mind of the Rajah, and sickness and the near prospect of death would not diminish that influence. His son was still young ; the Rajah might naturally suppose him unable to compete with one who laid claim by right to the succession upon an alleged superior title. He might dread also the appellant's influence over the hill tribes, whether that influence were real or supposed, the offspring of a jealous fear. The Gooroo might think it best to arrange matters with one Thakoor ; and the appointment of the two sons of the Rajah, one, though illegitimate, to the office of Kurta, gives an air of probability to the supposition that some arrangement may have preceded the actual celebration of the opening of the hall, especially as some rumours of an intended appointment appear to have reached the ears of a witness who deposes on the side of the appellant. Notwithstanding, therefore, the former reluctance of the Rajah to appoint either the appellant or Beerchunder, Thakoor, the changed circumstances prevent the conclusion that his mind was still opposed to the appointment of one of them, his own brother of the whole blood, whom he might desire to associate with his son, for the advantage of his son, of himself, and of the kingdom. Nor is the concurrence of his spiritual adviser in this view, under the changed circumstances of the case, an improbable supposition.

The Rajah was not then in a state in which he was likely to resist any strong pressure upon him to make some appointment to secure the succession. Many feelings might exist in a weak and suspicious mind to explain the absence of the usual ceremonies, invitations, and notification. Fear of the appellant and his influence ; jealousy of the English officials, and apprehensions, however groundless, of annexation to the British rule ; doubts whether some delay or obstruction might be interposed, might induce his advisers to snatch at an opportunity offered by the approaching ceremonial, to add the more important to the less important ceremony. Rival parties appear to have existed in the palace. It seems little credible that a story of an act having been performed before a large audience which never took place should have been adopted by the conspirators in a fraudulent usurpation, as so much larger scope for contradiction would thereby be given by such a mode of fabricating the story ; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy.

The utter worthlessness of this part of the appellant's case lends considerable support to the defendant's story : the Gooroo made no sign till he himself was dismissed or disgraced. And the reliance which the High Court justly placed on the early resistance by the new Rajah to this man, in whose power he would have been had they been common actors in this scheme of fraud, cannot be discarded in considering the weight of the whole body of evidence.

Though, according to the appellant's story, the Rajah had placed his character, and perhaps his power and throne, at the mercy of the Gooroo, he, before the litigation had ended, appointed another agent and deposed the Gooroo from power. Can it be supposed that if the plot was really planned, no thought of it had occurred to the respondent Beerchunder until many hours after the Rajah's death ? A moment of time would have sufficed to give rise to the thought that the throne might be reached by contrivance, and yet the evidence discloses this man as at once weak, timid, and needlessly communicative, crying and exclaiming that the Raj was ruined, and then entering into an inner chamber to concoct a fraud, which some of the conspirators seem immediately eager to reveal. The evidence for the

appellant on this part of the case is inconsistent. One witness stated that the Gooroo told him of the nomination in the afternoon between the hours of 3 and 4 of the 17th Shrabun; whilst the others, speaking of a much later hour of the same day, tell their story of the distress manifested by the Gooroo and Beerchunder because no nomination had been made.

One letter which is treated as a forgery by the High Court, and in defence of which no argument has been advanced before their Lordships, is ascribed to Beerchunder, who is represented by it as informing the Government that he has no hopes of the Raj but from their mercy, whilst at this very time he must reasonably be presumed, if guilty, to have formed the design to usurp the throne. The family took sides in this dispute, part siding with the appellant, and part with the *de facto* Rajah. The ladies in the recesses of the palace might well know nothing of their own knowledge of what actually took place at the ceremony in the hall. The story they repeat may have been so represented to them; but this kind of evidence is negative against positive testimony. It is so regarded, and rightly, in the judgment of the High Court. The mother of the legitimate son of the deceased Rajah supports the appointment, and so do the mothers of the two illegitimate sons. To the argument that they are swayed on the side of the Rajah may be opposed the argument that in these contests of factions in a native palace, little of unbiassed testimony can be looked for. The appellant seems not to have wanted friends and supporters there, and even Chuckerdhuj found support in similar quarters in favor of his groundless claim.

On the subject of the obstruction offered to the appellant's procurement of evidence, the respondent may have feigned a fear of the appellant's measures at his capital, in order to oppose being present at the examination of the named witnesses; but, on the other hand, it is idle to suppose that no one but the appellant himself could have been found to ascertain the identity of the ladies whom he wished to examine. The respondent may have feared, not the true testimony of the Gooroo, but the effect of a fabricated story on the mind of a Court. Amidst all this mass of conflicting probabilities, impeaching or supporting the disputed nominations, the High Court proceeded on positive testimony, weighty enough to decide the issue, if not successfully impeached. Unless native testimony is to be thrown aside entirely, and decisions are to pass on conjecture or suspicion instead of evidence, their Lordships think the High Court did not err in coming to a conclusion that the positive testimony must prevail in this case.

They were able to judge of the sufficiency of the reasons alleged by the Principal Sudder Ameen for discrediting so numerous a body of respectable witnesses. They, it should be remembered, had been the trusted officers of the deceased Rajah, and were continued by Beerchunder in the same posts and at the same salaries. From whom but the servants, officers, friends, and members of the family of the deceased Rajah, could his successor be expected to derive his evidence? These would be the persons most likely to be present at the ceremony of the opening of the hall: and the objection that all were subject to the will of the Rajah can at most be but an argument, and not a conclusive one, for discrediting such testimony. The case is barren of any opposing evidence of persons of equal value who were present in the hall, and who state that they saw nothing of the alleged ceremony of nomination. Again, the concurrence of testimony of many intelligent witnesses, without circumstantial variety, where the facts are very few and simple, and all would be naturally attentive observers of the scene, furnishes no ground for suspicion; and if the evidence showed some sign of drilling or tutoring in the mode of narration, that, however improper, would not constitute a sufficient reason for discrediting evidence of many trustworthy witnesses; since the evidence of witnesses to a true story is too often subject in native Courts to such a kind of manipulation.

The reasons assigned, therefore, by the Judges of the High Court for differing

from the Court below, and believing the evidence which the Lower Court rejected, appear to their Lordships to be satisfactory, and they think that the appellant has not succeeded in showing that the appointment insisted on by the *de facto* Rajah did not in truth take place. For these reasons their Lordships must humbly advise Her Majesty that the decree of the High Court of Judicature at Fort William ought to be affirmed, and this appeal dismissed with costs.

The 15th March 1869.

Present :

Sir James W. Colville, Lord Justice Selwyn, Lord Justice Giffard, and
Sir Lawrence Peel.

Compromise—S. 174 Act X of 1866—Indian Companies' Act.

On Appeal from the High Court at Bombay.

The Bank of Hindoostan, China, and Japan
versus

The Eastern Financial Association (Limited).

The compromise intended to be sanctioned by s. 174 of the Indian Companies' Act X of 1866 might be entered into before the list of contributories has been settled or the liabilities or competence of the shareholders has been ascertained. Such a compromise is a compromise with contributories or alleged contributories, and falls within the section in question.

The power of sanctioning a compromise allowed to the Courts by s. 174 ought to be exercised with very great caution; it is one with which the Privy Council will not interfere unless shown to be based upon an erroneous principle.

Ex parte Tottie distinguished.

In this case their Lordships must assume the validity of the order of the 26th July 1866, against which no appeal has been presented, and by which the Eastern Financial Association has been ordered to be wound up. This order is the foundation of the proceedings; and assuming its validity, there are two questions raised by the present appeal: first, whether the compromise which was sanctioned by the order of the 26th June 1867, was one which the Court was competent to sanction; and secondly, whether the Court, assuming it to have the power, ought to have exercised that power under the circumstances of this case.

The words of the 174th section of the Indian Act are "that the Liquidators may, with the sanction of the Court, where a Company is being wound up by the Court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, whether present or future, subsisting, or supposed to subsist, between the Company and any contributory or alleged contributory, or other debtor or person apprehending liability to the Company; and all questions in any way relating to or affecting the assets of the Company, or the winding up of the Company generally; and on such terms as may be agreed upon, with power for the Liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharge in respect to all or any of such calls, debts, or liabilities."

These words are very wide and general, and they are similar to those contained in s. 160 of the English Winding-up Act of 1862. It may be conjectured that the great amount of costs and expenses incurred in the winding-up of these Companies induced the Legislature to increase the powers of the Court with

respect to compromises, in order to the diminishing of the amount of those costs. The words which are to be found in this section, especially the words "liabilities to calls, debts and liabilities capable of resulting in debts, subsisting or supposed to subsist," and the words "alleged contributory," plainly show that the compromises intended to be sanctioned might be entered into before the list of contributories had been settled, or the liabilities or competence of the shareholders had been ascertained. It appears to their Lordships that the compromise in question is a compromise with contributories or alleged contributories, and consequently that it is a compromise within the words of the section in question.

The authority of the case of *ex parte Tottie* (1 Dr. and Sm. 273 ; 6 Jur., N. S., 849) has been much pressed upon the consideration of their Lordships, but the real ground of the decision in that case is explained in the marginal note of the case, which states that "A Company was being wound up compulsorily, after an attempt having been made to wind it up voluntarily, and the Official Liquidators agreed with thirty-five shareholders to compromise their liabilities for a fixed sum, these shareholders insisting as a condition that the date upon which the compromise was founded should not be divulged. This compromise was sworn to be founded upon details of property and circumstances which if made known would operate detrimentally to the thirty-five shareholders and to the interests of the Company. The Official Liquidators applied to sanction a compromise under that condition, in pursuance of s. 19 of the Companies' Amendment Act, 21st of the Queen. Some of the creditors opposed on the ground of the data not being stated, and the application was refused with costs ; and on appeal the decision was affirmed."

But in that case, there was no question as to the liability of the thirty-five shareholders. The question was as to the amount which was likely to be recovered from those thirty-five shareholders, and that of course was the question which the Court had to decide when it came to consider whether such a compromise was advisable or not ; and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions ; first, whether these persons who are alleged to be contributories are contributories at all ? and secondly, whether, assuming them to be fixed upon the list of contributories, they would be able to pay any, and if any, what proportion of the amount of the calls which might be made upon them ?

Now, the first of these questions, viz., whether they are contributories at all, depends very much upon the time which is to be fixed for the commencement of this winding-up. That is a most material point upon which the ultimate determination of the question as to who are the persons liable to be fixed upon the list as contributories would depend. All the facts relating to that point are apparent upon the affidavits and upon the orders of the Court itself ; for in truth it mainly depends upon the effect which is to be given to the very singular orders which appear to have been made for the winding-up of this Company ; there having been a winding-up order in the first instance, then a proceeding in the nature of a voluntary winding-up, then a discharge of the former orders, and then ultimately the order of 1866, which is the foundation of the present proceedings. Now all these matters were perfectly patent to the Court and to all the shareholders ; and they gave rise to the doubt which existed as to the date at which the winding-up of this Company ought to be considered as commencing.

So also with respect to the competency of the shareholders. The Judges had before them, on the evidence in this case, and from their knowledge of the then state of circumstances existing at Bombay, reason to doubt whether the persons who were on the list of contributories as alleged contributories would be able to pay any considerable sum, supposing they were ultimately fixed upon the list.

In the present case, therefore, there was no agreement for secrecy, there was no object in secrecy, there was no attempt at secrecy ; everything was brought fairly before the attention of the Court ; and consequently, in the opinion of their Lordships, the case of *ex parte Tottie* cannot be considered an authority inconsistent with the decision at which the Indian Courts have arrived.

That brings us, then, to the consideration of the second question, viz., whether, assuming that the Court had power to sanction such a compromise, that power was properly exercised in the present case.

Now, the power is, as has been already said, one of so wide and extensive a character that it is doubtless one which ought to be exercised with very great caution ; but on the other hand, in accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in India when two Courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with very great caution. The fact of the opposition of the present appellants to the proposed compromise was stated to the Court in the affidavit which was filed on the part of the Official Liquidator. All the creditors had due notice of the intention to bring this question before the Court, and the appellants themselves were heard by Counsel in opposition to the order which was proposed to be made for sanctioning the compromise. It appears upon the evidence that all the creditors in Bombay, that is, all the creditors who had the best means of forming a judgment upon the question,—at all events upon the second of the two questions, viz., the competency of the shareholders, assuming them to be fixed upon the list,—all of these creditors assented to the terms of the compromise. From the first there were only three opponents, and of these, the present appellants, who are themselves a Company under liquidation, alone appear here before their Lordships ; and it is stated in the affidavit, and not denied, that the persons concerned in the management of the affairs of this appellant Company, now under liquidation, had sent out orders to Bombay not to accede to a compromise whatever. In addition to this, Mr. Hamilton, one of the Official Liquidators, states in his affidavit that he, after the retirement of another Liquidator, considered himself as bound to act, and that in point of fact he did act, as protector of the interests of the creditors. He says that he has given careful consideration to all the circumstances of the case so far as they bear upon the question of the inadvisability of this compromise, and that in his judgment there is no doubt that it is one which is very advisable, having regard to the interests of the creditors. He says that all the books of account had been from the first open to the inspection of the creditors, and that some of the principal creditors have in fact for a considerable time retained possession of some of the books and accounts, or copies of them. No question has been raised as to the *bona fides* of all or any part of the proceedings which are now before us ; all the material circumstances of the case were brought at the time to the attention of the Court, and were matters in respect of which the High Court of Bombay was much more competent to arrive at a satisfactory conclusion than this Board can possibly be.

As, therefore, their Lordships have, in the first place, no doubt as to the jurisdiction of the High Court to make the order in question ; and in the second, as they see no ground for controlling the discretion which that Court has exercised in accordance with the wishes of the great bulk of the creditors, their Lordships will feel it their duty humbly to advise Her Majesty that the order of the High Court of Judicature at Bombay ought to be affirmed, and this appeal dismissed with costs,

The 28th June 1869.

Present:

Sir James W. Colville, Lord Justice Selwyn, Lord Justice Giffard,
and Sir Lawrence Peel.

Documentary Evidence—Section 39 Act VIII of 1859.

On Appeal from the late Sudder Court at Agra.

Goshain Tota Ram

versus

Rajah Rickmunee Bullub.

The admission of documentary evidence at a period subsequent to the filing of the plaint is not a ground of appeal against the ultimate determination of the Court which admitted such evidence, when it is received under s. 39 Act VIII of 1859, with the sanction of the Court.

This is an appeal against the concurrent decision of the two Courts below, which have found that the respondent, the plaintiff in the action, is entitled to be restored rather to an office in the nature of the headship of a temple, than to the possession of lands in the ordinary sense in which lands are sued for in ejectment, and that the title set up by the appellant cannot prevail against him.

Their Lordships have so constantly, that it is hardly necessary to repeat it, said that in such circumstances they will never disturb the concurrent decision of both Courts below upon a question of fact, unless it very clearly appears that there has been some miscarriage of justice, some mis-trial, or that the conclusion is very plainly erroneous.

In the present case it is contended that the documentary evidence which has been put in by the plaintiff in the suit—by the respondent on this appeal—was improperly admitted. It does not seem to their Lordships that that is the case, or, at least, that there has been such an admission of evidence as would be fatal to the decision of the Courts below. No doubt the evidence was not, in accordance with the new code of procedure, brought in at the time of filing the plaint. It was brought in at two subsequent periods. There seems therefore to have been an irregularity in that respect, which is adverted to in the judgment of the Sudder Court.

Their Lordships, however, do not find that cl. 39 of Act VIII of 1859 makes the admission of any documentary evidence that is not so brought in, so improper as to be a ground of appeal against the ultimate determination of the cause by the Court which has admitted it. On the contrary, what that Clause at the end of it says is—"Any document not produced in Court by the plaintiff when the plaint is presented, shall not be received in evidence on his behalf at the hearing of the suit, without the sanction of the Court."

In the present case there seems to their Lordships to be abundant proof that the evidence was received with the sanction of the Court. A great part of it (some of the documents and accounts being in the Bengalee language) seems to have been referred to a subordinate officer, an ameen, for inspection and verification, and it was ultimately acted on by the Court. It is perfectly clear, therefore, that if the sanction of the Court can purge the original defect, it has been so purged.

Their Lordships sitting here have not been in the habit of determining appeals upon the mere fact that certain evidence may have been improperly admitted. It has always been a rule of this Committee to do substantial justice between the parties, to take the record as it is sent over, and to see whether there is sufficient evidence on the whole record to justify the conclusion to which the

Courts below have come. The Sudder Court, although in these cases they adverted to the irregularity in the proceedings of the Principal Sudder Ameen, have expressed their opinion that the defendant was not ultimately prejudiced by the course which had been pursued.

The contention on the side of the appellant is that this is in the nature of an action of ejectment, and that there is really no evidence whatever of the title of the respondent, who, being plaintiff in the cause, was bound to make out the title. It appears, however, to their Lordships that there was ample evidence to go to the Jury that the persons who actually resided in the temple were the mere agents of the Rajah Gourbullub, and that there was also ample evidence to go to the Jury that Rajah Gourbullub was the adopted son of the person whom he claimed to represent. In that state of things their Lordships think that the burden of proof was properly treated as shifted upon the defendant, and the transaction upon which he relies seems to their Lordships, as it seemed to the Courts below, to be one of a suspicious character. Both those Courts have found that it was not a true transaction, and that even if the instrument had been really executed by the woman with a knowledge of its contents, no title to the temple would have passed thereunder. Their Lordships are not prepared to say that either of those conclusions is wrong.

Under these circumstances their Lordships see no grounds for disturbing the decision of the Courts below, and must humbly recommend Her Majesty to dismiss this appeal with costs.

The 7th July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Suit—Ancient Tenure—Regulation IV of 1831 Madras Code—Co-sharers—Non-payment of Government Assessment—Onus Probandi.

On Appeal from the High Court of Madras.

Brett versus Ellaiya.

Reg. IV of 1831, Madras Code, which must be strictly construed, applies only to suits brought to try the validity of grants emanating from, or confirmed or affected by, the direct act and order of the Governor in Council. A written order under that law is not necessary in a suit brought by a person who claims to hold under an ancient and permanent tenure in existence before the Dewanny.

Where an ancient and permanent tenure is held by several persons in separate shares, and some of the sharers make default in the payment of their quota of the Government assessment, the portion of the tenure held by the sharers who paid their share of the assessment cannot be resumed or forfeited by the Government. In such a case, the *onus* lies on the Government to make out by clear evidence under what special contract, or agreement, or Regulation it forfeits the entire tenure.

This is an appeal from a decision of the High Court of Judicature at Madras, made on special appeal, whereby it reversed a decision of the Civil Court of Chittoor given in favor of the appellant, the defendant in the original suit.

The appeal comes before their Lordships *ex-parte*, and it is desirable to state in detail the case as it is to be collected from the pleadings and issues, in order that the objections to the judgment appealed from may be examined with reference to the case actually before the High Court.

The suit was brought in the Zillah Court of Salem by the plaintiff, a

Brahmin, against Mr. Brett, the then Collector of that District. The plaint states succinctly the nature of the claim, which is this: The plaintiff therein described himself as a co-sharer of Neikarappatu Agraharam, which means a maintenance for Brahmins. He claims to recover Rs. 335 2 annas 2 pies, being the rent collected from him in excess of the permanent Jodikia Pottah granted to him by the Government. He then proceeds to state the circumstances of that grant as follows: "On the assumption of his country by the Hon'ble Company, a permanent revenue was settled in the time of Mr. Macleod for the four shares enjoyed by my ancestors and myself in the said Neikarappatu Agraharam for a long time; for my one karai, consisting of four shares, a pottah has been granted to the effect that a Jodikai revenue should be paid to the Government at 53 pagodahs and $7\frac{1}{2}$ fanams, or Rs. 67 13 annas 2 pies."

He then proceeds to state due payment of his revenue, and that on a pretence that arrears were due on the whole village, it was, inclusive of his shares, attached unjustly, without ascertaining from whom the arrears were due, and collecting the same from the defaulter; and that a revenue in excess was fixed with a difference of rates, and was strictly demanded as stated by him thereafter in his plaint. He then alleges that he paid the money under duress to avoid disgrace and sale of his lands, and stating the excess exacted during three years to be the sum for which he sues, he seeks to recover that demand, and prays that the annual revenue for the future may be adjudged to be collected from him under the pottah of Mr. Macleod.

The answer filed by the Acting Collector on behalf of Mr. Brett, after stating the object of the plaint, insists first on a want of jurisdiction in the Court to entertain the complaint, as it was unaccompanied by a written order under Reg. IV of 1831; and on the other part of the case it prays that the suit may be dismissed for want of due specification of the particular lands on which the alleged excess had been imposed.

A supplemental answer was subsequently put in which states further, in answer to the complaint, that the village was held not in severalty, but jointly, and that consequently the shareholders were jointly as well as severally liable for the quit-rent due on it. The reply insisted that the settlement was made for each plot, and a separate pottah was given to each sharer; that no joint pottah was given for the whole, nor the money collected accordingly, nor a joint receipt given. It contains, besides, answers of an argumentative nature to the objection on the point of jurisdiction which it is not necessary to state in detail.

The rejoinder re-asserts and insists on the objection to the jurisdiction of the Court, and concludes by saying that the defendant does not consider it necessary to rejoin to any other part of the reply.

Upon this state of the pleadings the issues were framed, which are to be found at page 4 of the record.

The points stated there for the defendant to prove are—

1. To prove that the village was not held in severalty, but jointly.
2. That plaintiff, as a shareholder, was jointly responsible with the several holders.
3. That the excess of teerwah was legally due, and under what authority or Regulation.

It appears, therefore, that the Court imposed on the defendant the *onus* of proving the legality of the re-assessment, and of showing under what authority or Regulation it proceeded.

The defendant did not appeal from the framing of these issues; nor does it now appear to their Lordships that, in the framing of them, the Court miscarried by imposing any species of proof upon the defendant from which the law exempted him.

If the new assessment was not legally imposed on the plaintiff, his liability

under the old assessment remained, and his title to recover in this suit was established.

The Court of Salem decided in favor of the plaintiff on the point of jurisdiction, and on the issues it found in favor of the defendant.

On appeal to the Civil Court of Chittoor, to which the appeal was referred by the order of the High Court, the decision appealed from was affirmed.

The plaintiff then preferred a special appeal to the High Court, and that Court reversed the decision of the Civil Court at Chittoor on the third issue, on the other issues agreeing with the judgment below. The objection as to the jurisdiction was not enumerated amongst the grounds of appeal, and was not renewed before the High Court.

The objection to the jurisdiction of the Court was, however, renewed before their Lordships on the hearing of this appeal. As the proceedings before their Lordships disclose the grounds on which this objection rests, and as, if valid, it would apply to the whole litigation from its inception to its close, rendering all the proceedings null and void *ab initio*, their Lordships think it right to say that, in their judgment, the decision of this point in the Court of first instance was entirely correct; and that the Regulation, which must be construed strictly, applies only to suits brought to try the validity of grants emanating from, or confirmed or affected by, the direct act and order of the Governor in Council, and that no proof exists in the cause to bring this inam claim within the provisions of Reg. IV of 1831.

The judgment appealed from was besides impeached for error before their Lordships on these grounds: that the High Court had treated the acts of the Government as founded on Reg. XXVII of 1802; that they had considered the case as one of resumption, and not as one of forfeiture; and had not given due effect to the hookoomnamah, as evidencing the right under which the Collector had acted.

There is some difficulty in their Lordships' minds in supposing that the High Court would have dwelt so much on the Regulation in question, had it not been in some manner relied on for the then respondent. It must be remembered that the third issue imposed on the defendant the necessity of showing under what law or Regulation he had acted in varying and augmenting the old assessment on the plaintiff's shares; and the Court was entitled to receive distinct information on that point. Had the power exercised in this instance been an acknowledged power of the Government, acted on and submitted to in that part of the country, the Collector could, in the opinion of their Lordships, have had no difficulty in proving its continued exercise. Had it grown up as a custom of the country, though without any written law to sanction it, the terms of the issue were wide enough to admit proof of such custom as legalizing the acts complained of. The High Court, however, states in its judgment that no such proof was produced, and none has been presented to their Lordships beyond the hookoomnamah, on which Mr. Forsyth mainly relied.

Their Lordships are anxious to guard themselves from being understood as questioning, or in any way drawing into doubt, any practice which that instrument may indicate as to inamdars. Such an instrument being only a direction from a Government Board or officer to others engaged in the Revenue Department cannot indeed create of itself any new law, or impose any new obligation on existing tenures from which they were antecedently free; but it may indicate in many cases subsequent to it the terms of engagements, and be proof of conditions of tenure in such cases.

As to *inams* of an admitted precarious tenure it might serve as notice of an intention to resume them on failure of the obligation of the inamdars to pay the actual assessment. This case, however, must be determined on the facts alleged and proved. The plaintiff alleges his tenure to be ancient,—antecedent, indeed,

to the assumption of the country by the East India Company ; he admits, indeed, that the lands held by him were re-assessed by Mr. Macleod, but he states that assessment to be permanent, and that he held a permanent tenure under a pottah from Mr. Macleod. This case is inconsistent with an assessment variable at the will of the Government. The defendant nowhere denied in his pleading the permanency of the tenure in this sense, nor pleads that the *inam* was in its nature revocable at pleasure, or that the assessment could be revised at the pleasure of the Government ; he pleads only that the village, though enjoyed in shares, was held in jointure and not severalty, and so the plaintiff's share was liable for defaults of other shareholders.

Mr. Forsyth argued, correctly, that this increase of assessment was not properly a resumption proceeding. But in this particular case the Government claims a right to increase the assessment on one who holds under an ancient and permanent tenure (for that averment is not denied), by reason of a default not arising from himself or any person holding his share. This is not a common incident of tenure, and is not involved in the right to hold the whole lands as hypothecated for the whole rent, though shares are held in severalty and subject to several assessments : it therefore lies on the defendant to prove by what authority this increase in the amount of the rent has been made. The ordinary remedies for revenue in arrear fall short of such a power ; the non-payment of revenue may arise from causes implying only the misfortune of the holder, and in reason and justice, in the absence of contract or consent, a forfeiture should not be implied from a mere default of that nature, still less should the terms of an instrument alleged to evidence a right to declare a forfeiture be constructively enlarged. Now, if the terms of the *hookoomnamah* be referred to, they do not necessarily include such a case as the present. They are capable of being read as extending only to the forfeiture of the shares of the actual defaulters ; in express terms the case of a co-sharer under a separate assessment, and not in default, is not included in it, and its language would not lead one in such a case to consider it as meant to subject him to its operation. Furthermore, the Court rightly observes that, by reason of its posteriority in time to the tenure of the plaintiff, that tenure cannot become subject to its operation ; and their Lordships concur in the opinion expressed by the High Court on this point. Their Lordships think that a power of such an exceptional and anomalous kind as that which has been brought into operation, and insisted on in this case, ought to be shown to have a certain and legal origin, and cannot, in the absence of any Statute or Regulation,—none such appears to exist,—be presumed or established by a Court upon anything short of clear evidence of its continued exercise and prevalence. There has been no evidence amounting to proof of anything of the kind.

For these reasons their Lordships will humbly recommend to Her Majesty that the appeal be dismissed.

The 12th July 1869.

Present :

Sir James W. Colville, Lord Justice Selwyn, Lord Justice Giffard,
and Sir Lawrence Peel.

Hindoo Law—Adoption—Appealable amount—Costs.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Peacock, C. J., and Bayley and Kemp, J. J., dated 11th February 1863, in Regular Appeal No. 35 of 1862 : not reported.

Nilmadhub Doss
versus
Bishumbur Doss and others.

On the issue as to the factum of an adoption as to which there was a conflict of evidence, the Privy Council, in the absence of strong documentary evidence confirmatory of the adoption, and on a consideration of the probabilities of the case, reversed the judgment of the High Court, which upheld the adoption, and confirmed that of the Judge of the original Court who saw and heard the witnesses, and who considered the witnesses in support of the adoption to be unworthy of credit.

In a case of alleged adoption by gift, in which the deed of gift stated that the son was taken by the person adopting as *palluck puttro*, for the purpose of securing future oblations of water and funeral cake ; that he would be brought up like a son ; that the ceremonies of *sungskar* had been performed, and he had been constituted representative of the person adopting ;—it was HELD, that the terms did not import the adoption of a son by gift, and that it was only by reason of the gift that the filial relation to the natural father was extinguished, or the right of the son in the estate of the giver ceased.

An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late when made to the Privy Council at the hearing of the appeal. The costs of the suit should not be taken into consideration in estimating the amount in dispute.

The question raised by this appeal is whether the respondents (the plaintiffs in the suit) are entitled to recover from the appellant three-fourth shares of certain property, the whole of which he claims to hold as the sole heir of his natural half-brother Ramlochun Doss, deceased. This property is admitted to have been part of the separate self-acquired estate of one Gooroooproshad Doss, who was the second of three Hindoo brothers ; the elder, Gungadhur, being the father of the respondents ; the younger, Purmanund, being the father of Ramlochun, and (by another wife) of the appellant and two brothers now deceased. From Gooroooproshad, who died in January 1830, it passed, under the circumstances which will be hereafter considered, to Ramlochun, who died in the month of November of the same year. He was succeeded by his widow and heiress, on whose death the succession opened to those who were then the nearest collateral heirs of her husband.

If the right of succession is to be determined by the test of natural consanguinity, the appellant, as the only living half-brother of the deceased, is the sole heir. But if, as the respondents contend, Ramlochun was adopted by Gooroooproshad, so as to cease to be a member of his natural family and to become the son of Gooroooproshad, then, in contemplation of law, the respondents and the appellant are related to Ramlochun in equal degree, i.e., as first cousins, and are entitled to equal shares in the property. Hence the determination of this appeal depends upon the determination of the question whether the respondents have established that there was in fact such an adoption.

The adoption is alleged to have taken place in 1804. The witnesses who have deposed to it have been treated by the Principal Sudder Ameen who tried the cause in the Court of first instance as unworthy of credit. Their Lordships are not prepared to say that they have been so treated unjustly. The testimony of some of them is directed to prove both the original adoption in 1804, and that in the ceremony of boring the ears of Ramlochun, which took place ten or eleven years later, Gooroooproshad performed a part which was inconsistent with any character but that of adoptive father. Others of the witnesses speak only to one or the other of these facts. They are contradicted by the witnesses for the appellant, and in this conflict of evidence, and, considering the imputations cast on their credit by the Judge who saw and heard them, their Lordships are of opinion that their testimony, unless very strongly confirmed by the documents produced in the cause, cannot be taken to have established the alleged adoption.

The proof of another material fact, viz., the existence at the time of the alleged adoption of an elder brother of Ramlochun, named Rajiblochun, also mainly depends on the testimony of the same witnesses. This fact is denied by the appellant ; and it is inconsistent with the statements made by Gungadhur, the father of the respondents, and the eldest member of the family in 1831.

There is no mention of Rajiblochun in any document of earlier date than the plaint in this suit. And their Lordships are of opinion that his existence has not been proved, and that they must deal with this case on the assumption that in 1804 Ramlochun was the eldest, if not the only, son of his natural father.

Of the documentary evidence a large portion tends to negative the alleged adoption. The kabalas produced show that between 1817 and 1825 Ramlochun purchased various small parcels of land, sometimes in his sole name, sometimes in the joint names of himself and his half-brother Puddolochun; but that in all such transactions he was known and described as the son of Purmanund Doss, his natural father, and not as the son of Gooroooproshad. There is no documentary evidence, other than the hibbanamah afterwards considered, which shows that he was ever held out to the world during Gooroooproshad's life as the adopted son of his uncle.

What then is the confirmation of the respondent's case which is to be derived from the terms of the hibbahnamah, or from the acts of the appellant under it? Their Lordships agree with the learned Judges of the High Court, and differ from the Principal Sudder Ameen in holding that that instrument must be taken to be genuine.

Mr. Mortimer has argued for the respondents that the general effect of the hibbanamah and of the contemporary document therein referred to, was a sort of family settlement of the property of Gooroooproshad. Their Lordships are disposed to think that this view of the transaction is correct. It certainly seems true that under color of a sale for Rs. 2,000 of half the property to the three half-brothers of Ramlochun, they took a beneficial interest of considerable value, subject to the obligation, as the receipts which are at pages 70 and 71 of the record show, of making certain allowances to the three respondents. But if this be so, such a disposition by Gooroooproshad of his property goes rather to negative than to support the hypothesis of a formal and absolute adoption. It is not likely that if Gooroooproshad had regularly adopted Ramlochun, so as to make him in law his own son, and to deprive him of a right to participate in the inheritance of his natural father, he would have left away from him ten-sixteenths of the estate. On the other hand, the disposition is reasonable, if supposed to be made by a childless uncle desirous of making some kind of provision for all his nephews, but of giving the principal share of his property to a favorite nephew to whom he stood in some peculiar relation, short of that of father and son.

The evidence, therefore, of adoption to be gathered from the hibbahnamah is to be found, if anywhere, in the statement :—" But as I had no son or daughter, I took you as my *pulluck-pootro* in the month of Aughran 1211 B. S., with the *unomutty* (permission) of your parents for the purpose of securing future oblations of water and funeral cake, and having brought you up like a son, performed the ceremonies of your Sungskar, &c., and have constituted you my representative."

If these words must be taken to import a declaration of a regular and ordinary adoption, and are incapable of any other interpretation, they are of great weight, and when coupled with the proof of the action taken by Ramlochun under this instrument, would go far to determine the cause.

Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindoo to adopt a son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindoos die daily without having fulfilled this obligation, or made provision for its fulfilment after their death.

Again, if there is, on the one hand, a presumption that Gooroooproshad would perform the religious duty of adopting a son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dryamushyanyana*, or son to both his uncle and his natural father. This latter

kind of adoption would not sever the connection of the child with his natural family.

It is admitted on all hands that the expressions in the *hibbahnamah* are not those which properly import the adoption of a son by gift—*dattaca pootro*; and that it is only by reason of the gift that the filial relation to the natural father is extinguished or the right of the son in the estate of the giver ceases is shown by the *Dattaca Chandrika*, s. 2 Art. 19. The consulted Pundits differ as to the interpretation of the expressions in the *hibbahnamah*. All agree that they do not in terms import the adoption of a *dattaca pootro*; but whilst some argue from the direction as to the performance of the funeral obsequies, that the person designated as *palluck pootro* must be taken to be a *dattaca pootro*, others use that very direction as an argument for the contrary conclusion, because, in the case of a *dattaca pootro* such a direction would have been superfluous. To their Lordships it appears that nothing is to be gathered from these *Vyvashtas* but the conviction that the clause in question admits of more than one construction. And they think that that construction of it is to be preferred which is consistent with the presumption that Purmanund did not commit a breach of duty by giving away an eldest or only son; with the fact proved by the *kobalahs*, that long after the alleged adoption Ramlochun continued to be represented and known as the son of Purmanund, and with the further fact (certainly not disproved), that he participated in the inheritance of his natural father. Nor is it necessary to decide whether Ramlochun was the mere foster-son of Gooroooproshad; or was so filiated by him as to become *dwyamushyayana*, since in neither case would his natural relation to his own family be extinguished. It is sufficient to find that the *hibbahnamah* does not necessarily affirm him to have been “a son given and received.”

It remains to be considered whether what was done by Ramlochun under the *hibbahnamah* is inconsistent with this construction. He neither claimed nor took the property of Gooroooproshad as adopted son and heir-at-law. He took by virtue of the *hibbahnamah* or deed of gift. The only plausible argument which the respondents can derive from his petition for mutation of names is his application of the term “father” to Gooroooproshad. But this is not absolutely inconsistent with the hypothesis that he was only the foster-son of Gooroooproshad; and is perfectly consistent with the theory that he was the son of both fathers. On the other hand, though it may be true that the respondents are not bound by the statements of their father Gungadhur, as they would be if they were claiming the title through him, yet those statements, made as long ago as 1831, by the senior member of the family, are not altogether without weight. They are not to be presumed to be false; and they both deny that the adoption took place, and affirm that Ramlochun was the eldest son of his father.

Upon the whole, therefore, their Lordships are compelled respectfully to dissent from the view taken by the learned Judges of the High Court of the effect of the *hibbahnamah* and the other evidence in the cause. They have come to the conclusion that the respondents have failed to establish that any adoption which severed the relation of Ramlochun with his natural family took place; and that the superior title of the appellant ought to prevail. They must, therefore, humbly advise Her Majesty to allow this appeal; to reverse the decree of the High Court; and in lieu thereof, to direct that an order be made dismissing the appeal to the High Court, with costs. The costs of the appeal must follow the result.

Their Lordships deem it right to add that although they overruled the objection to this appeal, which was taken on the ground that the amount in dispute was below the appealable amount, because it was, in their judgment, taken too late, they must not therefore be taken to assent to the propriety of the order made by Mr. Justice Seton-Karr, who, in estimating the amount in dispute, took into consideration the costs of the suit.

The 12th July 1869.

Present :

The Master of the Rolls (Lord Romilly), Sir James W. Colville, the Judge of the Admiralty Court (Sir Robert Phillimore), Sir Joseph Napier, and Sir Lawrence Peel.

Limitation—S. 14 Reg. III of 1793—Clear and positive proof.

*On Appeal from the High Court at Calcutta.**

Gopee Kishen Goshamee

versus

Bindabun Chunder Sircar Chowdry and another.

Where the plaintiff sued upon a kurarnamah, and in answer to the defendant's plea of limitation, relied upon the exception in s. 14 Reg. III of 1793 :—HELD, that in order to bring the case within that exception, it is sufficient for the plaintiff to show, by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the kurarnamah, and that the defendant admitted this claim to be as of right. It is not necessary that a precise sum should have been mentioned by either party, or that the plaintiff should have specifically made a demand of the amount of debt, or that the defendant should have made a promise to pay that amount.

By "clear and positive proof" is meant such proof as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which is established to a moral certainty. It is by the combined effect of the whole evidence that it is to be judged whether the proof is "clear and positive."

The material questions in this case are, first, whether the kurarnamah on which the suit is based was executed for the consideration, and by and to the parties alleged in the plaint; and secondly, whether the complainant has brought his case within the exception in the Law of Limitation, which prohibits the hearing and determining the merits, if the cause of action shall have arisen twelve years before the commencement of the suit "unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand or promised to pay the money," &c.

In addition to the reasons set forth in the judgment of Mr. Justice Bayley, in support of his opinion that the kurarnamah was executed as alleged in the plaint, their Lordships think it proper to observe that no evidence has been offered in order to disprove the handwriting of the parties by whom the kurarnamah purports to have been executed, or of the attesting witness thereto. Instead of giving or producing any such evidence, the principal defendant has confined himself to the surmises and arguments of his pleader in this answer to the plaint.

Their Lordships are of opinion that the first question should be answered in the affirmative. Taking it, then, as established by the evidence that the kurarnamah was executed by the principal defendant and his father as alleged, it is next to be considered whether the defence of the Law of Limitation has been met by proof of demand and admission sufficient to bring the case within the exception in this law.

The action, though in form a claim of the entire sum secured to the plaintiff and his brother (Gunga Pershad) by the kurarnamah, with interest thereon, is in effect for the plaintiff's moiety. Gunga Pershad does not make any claim on his own behalf for the other moiety; he refused to join as co-plaintiff, and was made a defendant *pro forma*, for the reasons alleged in the plaint, but he has not filed any answer thereto. He was, however, examined as a witness.

It is clear upon his evidence that between the years 1847 and 1857, he received from the principal defendant upwards of Rs. 12,500 on account of a

* From the judgment of Phear, J., over-ruling Bayley, J., under s. 23 Act XXIII of 1861.—2 W. R. 221.

larger claim ; and he does not bring forward evidence of any claim which he then had against this defendant, other than for his share of the debt which was secured by the kurarnamah to himself and his brother jointly. These payments were made after the death of the father of the principal defendant, who, with the principal defendant, had executed the kurarnamah. There is adequate proof that after these payments were made to Gunga Pershad, the principal defendant tried to induce the plaintiff to settle the claim for his moiety upon terms such as those which Gunga Pershad was alleged to have accepted, but that the plaintiff insisted on payment in full.

Their Lordships are satisfied upon the evidence that the payments made to Gunga Pershad were on account of his moiety of the joint claim under the kurarnamah, and that the offers made to the plaintiff related to his claim to the other moiety. No other claim is proved, or could be presumed, to which these payments and offers were appropriate. (*Mandertson v. Robertson and another*, 4 Man. and Ryl., 440.)

These offers were made not to buy off vexatious or doubtful litigation, but to settle a claim secured by an obligation which fixed its amount.

Their Lordships consider that upon the true construction of the Law of Limitation applicable to this case, and in order to bring the case within the exception, it was sufficient for the plaintiff to show by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the kurarnamah, and that the defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party ; or that a promise to pay should have been made by the defendant.

"Clear and positive proof" is such as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which it establishes to a moral certainty ; and it is by the combined effect of the whole evidence that we have to judge whether the proof is "clear and positive."

It was contended that there is no proof that a demand of the amount of debt in dispute was specifically made by the plaintiff ; or that the defendant admitted the truth of such a demand, or promised to pay it ; that as to the admissions of indebtedness, there is some doubt whether any of them were made to the plaintiff himself ; and that there was not any which amounted to a promise to pay the debt due under the kurarnamah, or to an acknowledgment of any specific sum ; that they were but attempts at a compromise, which failed.

The authorities which have been mainly relied on, in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case, were cases of actions on promises, decided on the Statutes of 21 Jac. I, and 9 Geo. IV c. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the statute, but upon the principles of the common law with respect to the cause of action. The issue joined, made it incumbent on the plaintiff to prove a promise made within six years, and such as to agree with that laid in the declaration. In such cases, acknowledgments, whether by words or acts, are of no avail, save so far as they sustain the promise alleged ; there is no exception within which they come ; and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception, are of a different character. In these, the action must be maintained on the original security ; and an acknowledgment within the prescribed period of limitation shows that the obligation was then subsisting and unsatisfied ; a promise to pay is not required.

It has therefore been decided that in an acknowledgment within the 3 and 4 Wm. IV c. 27 s. 40, it is not necessary that the amount of the debt should be specified, nor a promise made to pay it. (*Carroll v. Darcy*, 10 Ir. Eq. Rep., 329.) It has also been held that an admission of a bond debt contained in

the answer of the executors of the obligor, although in a suit to which the obligee was not a party, was sufficient to take the case out of the operation of 3 and 4 Wm. IV c. 42 (*Moodie v. Bannister*, 4 Drewr., 432).

It is one thing to acknowledge a debt and another to promise to pay it, and this distinction is recognized by the terms of the law relied on by the defendant. The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of Limitation, have (as Sir Edward Sugden has observed) "proceeded on a liberal but yet a fair and just construction of these Statutes" (*Blair v. Nugent*, 3 Jo. and Lat., 677).

Giving a light construction to the Law of Limitation that applies to the present case, their Lordships are satisfied that all that is required to be shown to bring the case of the plaintiff within the exception, has been shown sufficiently. If the conclusions at which they have arrived upon the material facts of the case needed confirmation, they are fortified by the omission of the principal defendant to tender himself as a witness in support of his defence in a case, the circumstances of which were all within his own knowledge : and by the unsatisfactory character of the evidence given by Gunga Pershad, who has kept back (evidently from hostility to the appellant) the books which he ought to have produced. Such a course suggests the natural inference that the evidence which has not been produced, was felt to be adverse, and subjects the parties who take such a course to the construction that is least favorable to the views and interests which they seek to support by imperfect or inferior evidence.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed ; that the judgment of the High Court at Bengal, and the judgment affirmed thereby, should be reversed and set aside ; and that the appellant should have judgment for his moiety, with interest at the full legal rate and costs. He must also have the costs of this appeal.

The 13th July 1869.

Present :

Sir James W. Colville, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

*Damages—Plunder of property—Credibility of witnesses—Defendants declining
to give evidence.*

On Appeal from the late Sudder Court at Agra.

Gunesh Sing

versus

Ram Rajah and others.

Where it was found as a fact that a number of persons, in pursuance of a common object, plundered the property of A, it was held that all that was necessary in a Civil suit by A for damages was to identify the persons who were present co-operating in that common design, and that each and every person co-operating in any extent in the plunder was responsible to recoup A for the loss he sustained.

Where two witnesses identified some of the defendants as having been present at the plunder, and these defendants did not think fit to avail themselves of the opportunity they had of exculpating themselves by their own evidence from the charge against them, it was held that their reluctance to give evidence justified the Court in relying on the unopposed testimony of the two witnesses.

In this case their Lordships are of opinion that the judgment appealed against cannot be supported.

In their judgment the Judges of the Court of the Adawlut express their

opinion that the whole foundation of the claim of the complainant fails. The parties that they had before them were only a portion of the defendants against whom the decree of the Principal Sudder Ameen had been made. They say in their judgment, "We are of opinion that the plaintiff, respondent, so far from establishing his claim against the defendants, appellants, has not even proved that the acts of plunder complained of ever occurred. We are, therefore, compelled to differ from the Principal Sudder Ameen, and, reversing his decision, to dismiss the respondent's claim, not only against these defendants who have appealed, but all those defendants who have been included in the decree of the Lower Court, as it would not, in our opinion, be consistent to allow this decree to stand against these latter parties, while the entire claim preferred by the plaintiff respondent has been declared by us unfounded and unestablished."

Now that decision seems rather an indiscriminating decision, for thirteen of the defendants had confessed to their having been present at the plundering, and some of them had partaken of the booty; twenty-seven did not appeal.

Their Lordships cannot entertain a reasonable doubt on the whole of the evidence that there had been a plunder of the plaintiff's property to some extent, and that it was a joint transaction. During the time of the mutiny, the chiefs of some villages collected people together with a preconcerted purpose of plundering the plaintiff's property, and it is quite plain upon the evidence that all were acting with a common purpose of plunder, that they went to the plaintiff's house for the purpose of plundering, and each co-operated more or less; and where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose: as the purpose is common, so must be the responsibility.

Well, then, taking it as plainly established upon the evidence that there was a plunder of the property, that it took place in pursuance of a common design of all these parties who co-operated in carrying it out, the only question was to identify any of the persons who were present co-operating in that common design. In a criminal matter punishment may be apportioned, but in a matter of this description, where the plaintiff is to be compensated for the loss he has sustained, the law does not allow men to apportion their own wrong and does not apportion it for them. Each and every person co-operating to any extent in a plunder of this description is responsible to recoup the party plundered for the loss he has sustained.

That being the case, there was no question in reality that involved difficulty in decision, but to identify the persons who were present and formed part of that plunder party. No doubt in the circumstances of the country at the time, there was a great temptation to accuse, and, perhaps, considerable facility in charging particular persons suspected, or upon whom it might be desired, from any motive, to impose responsibility. But there is this fact, as was very properly observed by Mr. Wood, that none of these parties who now belong to the group of respondents tendered his own evidence to contradict the evidence of the two witnesses required by the Principal Sudder Ameen. His principle seems to have been, that he would not attach responsibility on any individual who had not been shown, by two witnesses at least, to have been present on the occasion. Then, when persons so accused do not think fit to avail themselves of the opportunity they have had of exculpating themselves, by their own evidence, from the charge made against them, surely that general reluctance to meet by their own evidence the evidence brought forward against them justifies the Court in relying on such unopposed testimony. Some of them in the defences which have been made seem to have imagined that because they had not got a large share of the plunder, or because, as they allege, they were coerced to join in the transaction, that excuses them from responsibility. If the matter were to be disposed of in a criminal proceeding, where the Judge had to inflict a punishment or a fine, all that might be taken

into account: but here, in a civil proceeding to obtain compensation for the loss the plaintiff sustained, by a transaction for which all who joined in it are responsible in the eye of the law,—you have nothing to do but simply to see that, in point of fact, the parties accused were part of the common assembly which had, and executed, a common purpose of plundering this man's house, and are bound, each and all, to make him compensation for the loss that he has sustained by the demolition and abstraction of his property. It is very likely that at first, in the confusion of the whole thing and the difficulty of proof, there was exaggeration in the claim which was made, but the claim in respect to the jewels and other things has been reduced, and the plaintiff has certainly confined it within reasonable bounds. It certainly does appear on the evidence that he was plundered at least to the extent at which he now lays his claim, and perhaps considerably more. The judgment appealed against states that the entire claim was unfounded and unestablished, and that the decree was wrong against *all* the parties. But, confining it to the case of parties who had appealed, they were parties who, instead of giving their own evidence before the Principal Sudder Ameen to exculpate themselves and show that they did not form a part of that plundering party,—instead of simply doing this and putting their own evidence against that of the two witnesses who were brought forward against them, they appeal to the superior Court, and argue upon the whole transaction, and get the Court of the Adawlut not to institute a discriminating enquiry into the credit of the witnesses in each case, but to come to the conclusion that there was no foundation for the claim at all. There could not have been any adequate sifting of the evidence, and it does seem to be an unreasonable conclusion, on the whole of the evidence, to say or suggest that the plaintiff had not been plundered at all.

Under these circumstances, their Lordships feel no difficulty in saying that, in their opinion, the judgment of the Adawlut ought to be reversed. The Principal Sudder Ameen had the advantage of having had the witnesses examined before him, and their evidence not having been contradicted by any of the parties themselves, his judgment may be safely adopted.

Their Lordships, therefore, will humbly recommend Her Majesty that the judgment of the Court of Sudder Dewanny Adawlut be reversed, and that the judgment of the Principal Sudder Ameen should be affirmed with costs. The appellants are to have the costs of the appeal.

The 13th July 1869.

Present:

Sir James W. Colville, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Partition—Metes and bounds.

On Appeal from the High Court at Madras.

Rajah Suraneni Venkata Gopala Narasimha Row Bahadoor

versus

Rajah Suraneni Lakshmi Venkama Row.

The principle in *Appovier v. Rama Subha Aiyar*,—that although an agreement for a partition has not been carried out by actual partition by metes and boundaries of the property, it was nevertheless binding upon the contracting parties and operated as a division of the family,—confirmed and supported by further authorities.

The *Shivagunga* case explained.

This appeal has been very ably argued by Mr. Latham, who has stated in support of it everything which in their Lordships' opinion could be said ; but the facts and the authorities are too strong for him, and their Lordships are unable to see any ground upon which the appeal can be supported.

The proof in this case has, perhaps, been somewhat complicated and rendered less effective than it otherwise might have been by the introduction of an issue which is now admitted to be out of the case,—the issue as to the alleged adoption.

The only question now arguable is, whether at the date of the death of the respondent's husband, this family was a divided or an undivided Hindoo family, because the course of succession, of course, depends upon that fact. The property is admitted to be ancestral, and it is now also admitted that the zemindary which forms part of it is not one of those impartible zemindari^s of which there are many in the south of India, but must be treated, as in fact it appears upon some of the earlier documents to have been decided to be, as in its nature partible. Therefore the question is simply whether at the date I have mentioned the family was still an undivided family, as it was up to a certain period, or whether it became divided by virtue of the agreement which is at page 23 of the record, and which has been the chief subject of the argument before us.

Now, although Mr. Latham has pointed out here and there some minute differences in the wording of the two agreements, their Lordships find it impossible to distinguish the arrangement come to in this case from the arrangement which had been entered into in the case of *Appovier v. Rama Subha Aiyar* and others,* 11 Moore's Indian Appeals, 75, in which this Committee held that although the agreement for a partition had not been carried out by actual partition, by metes and boundaries of the property, it was nevertheless binding upon the contracting parties, and operated as a division of the family. Their Lordships observe that the judgment delivered by Lord Westbury was, in fact, an affirmance of the judgments of two of the Courts below, and was fully supported by the authorities then before the Court. It is, however, satisfactory to find in the present case that the High Court of Madras, not advert^{ing} to the case in Moore, which probably had not then come to their knowledge, has in its learned judgment arrived at the same conclusion, and that upon independent grounds and upon the earlier authorities. The passage which they quote from the *Mitacshara* fully supports the proposition involved in the judgment. The passage runs thus: "If partition be denied or disputed, the fact may be known and certainly be obtained by the testimony of kinsmen, relatives of the father or of the mother, such as maternal uncles and the rest, being competent witnesses as before described;" that is one mode of proving partition. It then goes on in the disjunctive, "or by the evidence of a writing or record of the partition," which we have here. And then it says, "It may also be ascertained by separate or unmixed house and field," that is, if other evidence of partition be wanting, it may be supplied by proof that the houses and fields had been actually divided and were held separately.

It follows from what has been said that in their Lordships' view this question is really concluded by authority.

It has, however, been argued by Mr. Latham, that even if this agreement amounted to proof of a partition, yet upon the evidence in the cause their Lordships ought to come to the conclusion either that the agreement was waived, or that there had taken place that which might, according to Hindoo law, have taken place, namely, a re-union of the two brothers. Their Lordships, however, looking at the issues in the cause which are stated at page 3, cannot find that those points have ever been raised. Certainly there is no suggestion of such a thing as a re-union, which would imply that there had been an actual division and then a coming together by mutual agreement of the two brothers; and their Lordships are further of opinion that they must presume, that although there was no division

* 8 W. R. P. C. 1; 1 Suth. P. C. R. 657.

of the zemindary or of the lands, by metes and boundaries, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the plaintiff to show that such was the case. It seems to their Lordships that he has entirely failed to do so, and therefore they can see no ground whatever for interfering with the judgment of the Court below.

Their Lordships deem it right (although it has really no bearing upon the decision of this appeal) to make a remark upon one passage in the otherwise very learned and able judgment of the Court below. The passage is this—"If it" (that is, the zemindary) "was not partible, and the brothers were, as the plaintiff contends, undivided, at the brother's death, the widow would, according to the decision of the Privy Council in the Shevagunga case,* be entitled to the whole estate; so that, whether the plaintiff's own view, or that which we here take, is correct, the plaintiff is not entitled to succeed in this action."

Now that seems to proceed upon a singular misapprehension of the effect of the Shevagunga case. It is immaterial, as I said before, to the decision of this case, because it is admitted that the zemindary was not impartible; but the Shevagunga case was this, the family was shown to be undivided, but the impartible zemindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was, that in that case the zemindary should follow the course of succession as to separate property, although the family was undivided; but if that zemindary had been shown to have been an ancestral zemindary, as in this case, the judgment of the Board would no doubt have been the other way.

Their Lordships think it necessary to make this observation, in order to avoid future misconception as to what was decided here in the Shevagunga case.

They must humbly recommend Her Majesty to dismiss this appeal with costs.

The 14th July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Marriage—Sudra Caste—Illegitimate children—Inheritance—Maintenance.

On Appeal from the High Court at Madras.

Inderun Valungypooly Taver-

versus

Ramasawmy Pandia Talaver and another.

A marriage between two persons of the Sudra caste is not invalid because they belong to two different classes or divisions of that caste, or because the wife was the offspring of an illegitimate father.

In the Sudra caste, illegitimate children may inherit and have a right to maintenance.

The question on this appeal is, first, whether there was a marriage in fact; and secondly, if there was a marriage in fact, then whether there was a marriage in law?

We have the judgment of both the Courts below coming to the conclusion, from the evidence, that there was a marriage in fact; there was evidence before them, on the consideration of which they might fairly come to that conclusion.

* 2 W. R. P. C. 15; 1 Suth. P. C. R. 520.

Unless a finding of that sort—where two Courts are unanimous in their opinion—is unsupported by, or contrary to, the evidence, it is not the course of this Board to interfere with that finding.

There were eight witnesses who spoke to the marriage having taken place, then two of the three urzees, and besides the very material fact of the appellant having admitted before the tehsildar, or done that which was tantamount to an admission, that such a marriage had taken place.

With reference to the urzees, the two first urzees which have been alluded to are very plain and very explicit. The first of them is in these terms:—“Kulalvoy Moli, whom I had married before my succession to the zemindary, had, in defiance of the prescribed observations of my caste, separated from me before giving birth to any issue, and married Vellaiya Tevan, of Nauja Nadu. That Taugammai Nachiyar, whom I married after inheriting the zemindary, and made my patta-sri (or royal wife) might beget issue, vows were made to Tirumalai Sevamaiya, of Teukosi, and by the grace of that deity, and by your good wishes, she has borne me a son and a daughter. Before this I had on your order No. I, dated the 24th January 1856, proceeded to offer up my prayers to the said Twamiya. To do the same once more, now it is necessary that I should send my royal wife and my children. As for their assistance, about thirty persons, both bearers of palanquins and servants, will be sent to accompany them. I request that an order may be issued providing against any obstruction of them on their way.”

The second urzee is as follows:—“I had been for a long time suffering from paralysis, and now I have slightly recovered. When first I was married to the daughter of Govindapera Pandya Tolaivan, I was exceedingly young and the bride was my senior in age, but perceiving her levity of conduct I repudiated her. Subsequently, in contravention of the prescribed usage of the zemindary, she married Vellaya Tevan, of Nauja Nadu. I then married Taugammai Nachiyar, the daughter of Kumaraswami Tadiya Talaivar of Kadambur, who has borne me a daughter and son. I now learn that as I am taken ill, it is intended fraudulently to report to the Government in disparagement of my dignity that my first wife, who, on being divorced by me for misconduct, had married another, has borne me a male child. I deny that he is my son; I further disclaim any relationship to him. As a report of these matters at the time of her repudiation would have derogated from my respectability, I abstain from notifying the same. These matters have also been brought to the notice of the sub-collector. I therefore pray that your benevolence may afford protection to my children and my younger brother.”

Those urzees are plain and explicit enough, and probably little doubt would have been entertained on the matter, but for the urzee which is found at page 49. With reference to that urzee, without saying whether the signature is or is not genuine, but assuming that it is, if we take first of all the date of it, the 3rd of July, the zemindar having died on the night of the 7th in a state of paralysis, and then look to its contents, little effect can be given to it. We cannot read the third urzee through without seeing that it was obtained with an object, and that it bears internal evidence of not being the voluntary, and scarcely, we should think, the conscious act of the zemindar. First of all it refers to the preceding urzees in this way:—“With reference to the urzees addressed by me to your honor and the sub-collector in regard to my disease, on the 1st June, an order having been issued to the tehsildar of the talook of Saukara Pania Kovil, he came and saw me, showed to me the urzee which had been addressed by me, and asked me about it. I saw my signature in the urzee and admitted it.” And then follow these statements:—“I have also reported to the tehsildar that the daughter of Pandia Talavau of Chengottai had been married to me at my infancy; that she, being guilty of misconduct, married Nanjanadu Vellaiya Tevan again, and got children by him; that I brought and kept the daughter of Kadumbur Kum-

marasami Talavau, and, got two children by her, but that she was of a different caste." These last expressions certainly do appear to their Lordships to be put into the mouth of the zemindar with a view to the case which has since been brought forward, especially the alleged difference of caste; and taking the whole together, their Lordships are of opinion that as against the two other urzees no effect or weight is due to this urzee, and that there is no sufficient reason for differing from the finding of the two Courts.

Then, if there was marriage in fact, was there a marriage in law? When once you get to this, viz., that there was a marriage in fact, there would be a presumption in favor of there being a marriage in law. The zemindar, according to the usages of his country and nation, on parting with his first wife, would be naturally desirous of marrying again and having male issue. It would be a most unlikely thing for a person of his race to go through the ceremony of marriage, if it was known that that marriage was a marriage which was invalid in law. Then upon what is it that the invalidity of the marriage, in law, depends? It depends upon this, and upon nothing else, viz., that all the parties being, as is clear from the evidence, of the Sudra caste, it is said that because it is shown by a decree that the father of the mother of the present plaintiff and respondent was illegitimate, therefore the child of that father could not contract a valid marriage, and was in substance of no caste at all. The only foundation for this is the opinions of the Pundits; those opinions are not satisfactory; no decision or authority is brought forward supporting any such proposition. The opinions are matter of reasoning, and where they refer to authority, it is to authority which applies to persons of two different but higher castes, not to the Sudra caste at all, and still less to what may be called different classes or divisions of one and the same Sudra caste.

Their Lordships are not aware that there is any authority—there has been none quoted, and it does not appear that there is any authority supporting any such proposition as that which is contended for by the Pundits; and, though their Lordships do not agree in everything that has been stated in the Court of Appeal, they are satisfied that in the Sudra caste illegitimate children may inherit and have a right to maintenance; and that in this very instance the illegitimate father of the mother of the plaintiff, as well as his daughter, were treated as members of the family; and on the whole, seeing that these parties are both of the Sudra caste, and that the utmost that has been alleged really is, that the zemindar was of one part of the Sudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would in fact be introducing a new rule, and a rule which ought not to be countenanced.

For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and dismissed with costs.

The 15th July 1869.

Present:

Sir James W. Colville, The Judge of the High Court of Admiralty, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel.

Res judicata—Leave to bring fresh suit—Non-suit—Transfer by putneedar—

Reg. VIII of 1819.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Raikes and Seton-Karr, *J. J.*, dated 30th September 1868, in Regular Appeal No. 274 of 1861,—not reported.

Watson and others
versus
 The Collector of Rajshahye and others.

HELD, that the reservation by a Judge of an Indian Court in a decree in a former suit, giving the plaintiff liberty to bring a fresh suit, does not prevent the Court, when such fresh suit is brought, from entering into the question of *res judicata*. Such liberty may be given in a decree only when the suit has failed on some point of form, and not when issue has been joined and the plaintiff has failed on the evidence.

Reg. VIII of 1819 regarding the relative rights of zemindars and putnee talookdars considered. Where a share in a putnee talook is transferred by a registered putneedar without the express consent of the zemindar and in disregard of the Regulation cited, the transfer is not binding on the zemindar.

Their Lordships have formed so clear an opinion on both the points on which the determination of this appeal depends, that they do not think it necessary to prolong the discussion by calling on the other side.

The first question, and that which is the sole question raised by the case of the appellants is, whether the High Court was wrong in holding that the plea of *res judicata* ought to prevail.

The suit is brought to set aside the sale of a putnee talook which took place as long ago as 1849. There was considerable delay, even in the institution of the former suit to set aside that sale, which was not brought till the year 1856. The case is obviously one in which it was the duty of the Courts below, as it is the duty of their Lordships, to look closely to the right of the appellants, the plaintiffs in the suit, to impeach proceedings which took place so long ago, and under which so many fresh rights may have accrued.

Be that, however, as it may, the first question is whether the High Court was right in holding that, notwithstanding the reservation contained in the decree dismissing the suit of 1856, the question was to be treated as *res judicata*.

We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a non-suit, known in those Courts. There is a proceeding in them called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp; and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them.

The decision in this first suit was carried by appeal before the Sudder Court. It was treated in the first instance as not being the subject of such a summary appeal as would have taken place in the case of what is ordinarily known as a non-suit, but as being necessarily the subject of a regular appeal. A regular appeal was accordingly brought, and was heard by three Judges, and, as their Lordships read the opinion of those three Judges, each of them seems to have had very considerable doubt, to say the least, whether it was competent to the Judge in the circumstances to make any such reservation.

The result, however, was that they refused to remand the suit for re-trial, and dismissed the appeal. They did not, however, make any correction of the reservation, and so the case stood until the question arose again in the present suit. In the present suit, the Principal Sudder Ameen seems to have considered

that he was bound by that reservation, and therefore he decided that issue in favor of the appellants.

He decided against them on the other question, which is now to be disposed of, namely, of their title to sue. They, therefore, appealed against his decision, and the High Court, without going into the second question upon which the case had been decided in the Court of first instance, appears to have called upon the appellants to show that notwithstanding the former decree they were still entitled to sue.

It has been argued that that decree not having been appealed against by the respondents in the original suit, was at all events, whether regularly or irregularly made, binding in the particular case, and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court in a case in which the former decree had been pleaded as *res judicata*, and in which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that admitting that the Judge of the Lower Court had in any case such a discretion as was exercised, in making the reservation in question, that discretion was improperly exercised in the particular case.

They are of opinion that the appeal must fail upon the first ground. They are, however, further of opinion that the appeal must also fail, and that the decree of the Principal Sudder Ameen is to be supported upon the second ground, namely, that the present appellants have shown no sufficient title enabling them, supposing it was open to any person at this distance of time to do so, to question the propriety of the sale of the putnee talook.

It will be convenient to consider, first, what has been the ostensible devolution of the talook; next, what is the nature of such a tenure; and, lastly, how it is sought to establish that the title to that talook, and the consequent right to impeach the sale, have passed to the present appellants.

The talook was created in favor of Mr. John Compton Abbott, in May 1837 by the instrument which is at page 101 of the Appendix. It is in the ordinary form, their Lordships apprehend, of a grant of a putnee tenure, and it provides for that for which the Regulation makes provision, namely, the notice to the zemindar of any alienation of the talook, in order that it may be duly registered. The words are—"If you make a gift or sale, or give away in dur-putnee, the eight annas of the above-mentioned *dehee* being your own putnee, you must give instant notice of the same in my Sudder Cutcherry." On the 7th Pous 1248, which we are told was in 1841, Mr. Abbott sold, for the express consideration of Co's. Rs. 11,465 : 12, this putnee to a firm known as French, Hodges, and Company. In the deed there is a requisition to the purchasers to cause themselves to be duly registered in the archives of the zemindar, and although the instrument was not registered in the ordinary register of deeds till 1844, it is probable that they were before that date duly entered and accepted by the zemindar as the putneedars.

Of this there is some evidence in the petition which will be referred to hereafter, of the assignees of Cockerell and Company, for they speak of French, Hodges, and Company as "our benamee owners of the talook at the time of the sale."

The sale took place in 1849, and the proceedings from the Collector's office show that it was treated as the sale of a putnee standing in the names of French, Hodges, and Company; inasmuch as it appears from them that the surplus proceeds of the sale passed to and were divided amongst the judgment-creditors of that firm.

That is then the ostensible devolution of the putnee talook. Of course, the

later deed of the 4th April 1855, in which Mr. Compton Abbott, assuming to be the absolute owner of the putnee talook which had been long previously sold, conveyed it formally to Watson and Company, the present appellants, can have no bearing on the question of title.

It only shows that if under the deeds by which the appellants now endeavour to trace such title or right the putnee talook had got back into Mr. Abbott, or the right to question the sale of 1849 of that talook belonged to Mr. Abbott, he has transferred that right, whatever it was, to the appellants.

It has been admitted at the Bar that in order to show that the title to this putnee talook, and the consequent right to question the sale, has passed to the appellants, it is necessary to rely on certain general words in the various deeds that transfer certain interests in the Bansbarreah Indigo Concern,—and to hold that the talook was in fact an incident to the factories, and that those words must be taken to have passed them.

It appears that at the time when the putnee was granted, Mr. John Compton Abbott was the sole proprietor of the Bansbarreah Concern,—and it may be conceded that (as Mr. Leith has argued) the general object with which an indigo planter takes this kind of tenure is to acquire that power over the ryots which a zemindar has, and which enables him to stipulate that upon parts of their lands at least they shall grow indigo at his rates for the benefit of his factory. Nevertheless, in acquiring those rights, putneedars acquire other very considerable rights; they acquire the zemindar's rights over a large district, comprising lands all of which do not grow indigo; and it is perfectly conceivable that one partner in a factory may have that sort of talook, and the consequent power which the ownership of the talook gives; that he may use that power for the benefit of the factory, and yet that the talook itself may form no part of the assets of the factory. Then, again, it is to be considered as between the parties between whom this question arises, that the zemindar who has sold, and the purchaser who has bought, at the Collector's sale have nothing to do with the motives under which the talook was originally taken,—have nothing to do with those arrangements which the ostensible owner of the talook may make; that the zemindar has granted a tenure of a particular kind, the incidents of which are well defined by law, to a tenant, and that he has a right to look to the ostensible tenant, and is not bound to take notice of the various interests which may be created otherwise than by an authorized alienation. This much is clear, it is certainly not proved by positive evidence,—it is only an inference drawn from the assumed nature of things,—that this talook was part of the assets of the Bansbarreah Concern.

Now, before going to the deeds on which the appellants rely, it may be convenient to look at some of the provisions of the Reg. VIII of 1819, which apply to this kind of tenure. The scope of the Regulation is, first, to legalize the tenure, the legality of which had been doubted; after declaring that putnee tenures are valid, it provides that they shall be transferable and answerable for the debts of the putneedar. It next declares that such tenures are not voidable for arrears of rent, but that the zemindar's remedy, where there is an arrear of rent, shall be a sale under the provisions of the Regulation. It further declares that the zemindar is not entitled to refuse to give effect to a transfer; and then follows certain provisions which are in favor of the zemindar. The Regulation provides that, in conformity with established usage, he shall be entitled to exact a fee upon every such alienation. It fixes the maximum fee; it provides that he shall also be entitled to demand substantial security from the transferee, or purchaser, to the amount of half the jumma rent, or yearly rent payable to him from the tenure transferred, and that the same thing shall happen when the tenure passes in a sale made in execution of a decree or judgment of Court; that the zemindar may refuse to sanction a transfer until the fee and security be tendered; that if there is a dispute as to the sufficiency of the security, it is to be determined

by appeal to the Civil Court; and it gives him further powers. In s. 6 there is this express provision, "That the rules of this and of the preceding Section shall not be held to apply to transfers of any fractional portion of a putnee talook, nor to any alienation other than that of the entire interest; for no apportionment of the zemindar's reserved rent can be allowed to stand good unless made under his special sanction."

Section 11 shows what the consequence of one of these sales is. It gives to the purchaser—assuming, of course, that the sale has been regularly conducted—what we may call a Parliamentary title. It declares that the tenure shall be sold "free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held. No transfer by sale, gift, or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it, for the rent, which is, in fact, his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zemindar."

This being so, it seems extremely questionable whether, if it had been even expressly stated in the various deeds about to be considered, that shares in this putnee talook were transferred in that manner, such transfers of interest would have been binding on the zemindar; whether he would not have been entitled to look to French, Hodges, and Company as the registered owners of that talook; and whether any of the persons who took these limited interests, some by mortgage, some absolutely, but of portions only, would have been entitled to come forward and say, "We claim to be treated as your putneedars." In fact, however, the deeds do not, any of them, expressly purport to convey this talook; and if the dates of the transactions are considered, there is strong ground for inferring that it was the intention of the parties to keep the two things separate,—the tenure separate from the Bansbarreah Concern,—probably from a knowledge that the former could not be dealt with in the way in which it is now pretended that it was dealt with.

It has already been stated that Abbott sold the putnee in 1841 to French, Hodges, and Company for value. The foundation of Messrs. Cockerell's interest in the Bansbarreah Concern is the deed of the 9th of March 1842. That is the deed by which Abbott sold out-and-out to Cockerell and Company three-sixteenth shares of the Bansbarreah Concern. Now, as he had the year before sold the putnee talook as a whole to French, Hodges, and Company, it is difficult to see upon what principle the general words contained in this conveyance can be construed to include and convey three-sixteenths of the talook, supposing that it was competent to the putneedar to sell three-sixteenths of the talook separately.

Then, on the 23rd May 1842, Gilson Rowe French, who probably was one of French, Hodges, and Company—though it is not shown distinctly that he was—mortgages to Cockerell five-sixteenths, and a fraction of another one-sixteenth of the Bansbarreah concern. As far as a mere mortgage went, supposing that any interest in the talook passed by the general words, that clearly would not operate as against the right of the purchaser under the sale, because the Regulation provides that the effect of the sale shall be to sweep away any mortgage created by the defaulting putneedar. Again, on the 30th May 1842, Septimus Hodges mortgages two-sixteenths, and the remaining fraction of another sixteenth, of the same indigo concern, to Cockerell and Company; and on the 28th May 1847, his executors sell to Cockerell a third absolutely of the Bansbarreah Concern, which, I take it, included that which had been already mortgaged by their testator. Therefore, at the date of their insolvency, which, I think, preceded the

sale of the putnee talook, and certainly at the date of the sale of the putnee talook, Cockerell and Company, or their assignees, were owners of three-sixteenths and one-third of the Bansbarreah Concern absolutely, and were mortgagees of the shares transferred by Gilson Rowe French, and thus either as absolute owners or as absolute mortgagees, were entitled to fourteen-sixteenths of that concern, but the remaining two-sixteenths were still outstanding, and belonged to one Henry Gloster French, and in respect of those two-sixteenths Cockerell and Company seem at most to have been equitable mortgagees by deposit of title deeds.

In this state of things the sale of the putnee talook took place. An application was made by the assignees impeaching the sale, in which they speak of French, Hodges, and Company as the benamee owners of the talook for them; but at that time, as I have just shown, even supposing that the beneficial interest had passed under the general words of the conveyances of shares in the Bansbarreah Concern, they were not absolute owners even of fourteen-sixteenths of that Concern, and they were only equitable mortgagees of two-sixteenths. The two-sixteenths were not vested in them until, I think, the 14th April 1853, and probably the difficulty of completing the title to the whole Concern was the reason of the very great delay which took place before the appellants came into Court to impeach the sale in a regular suit.

It is unnecessary to go in detail through the subsequent deeds. The general effect of them is that in 1853, the assignees, the representatives of Glyn, Halifax, and Company, who had acquired some beneficial interest in this Bansbarreah Concern by the pledge of deeds from Cockerell and Company, of London, and a variety of parties, all concurred in getting the whole interest in the Bansbarreah Factories into the assignees of Cockerell and Company, who at the same date transferred it to John Compton Abbott. All these transfers were, however, of nothing but the Bansbarreah Concern. Neither the title to the talook nor the right to impeach the sale of it could pass to John Compton Abbott, or from him to the appellants, unless they were previously vested in Cockerell and Company. It has been shown that, in their Lordships' opinion, the general words in the several conveyances to Cockerell and Company cannot be taken to have passed even an equitable interest in the talook, which cannot be assumed to have been an asset of the factories merely because it was originally taken by Mr. John Compton Abbott when sole proprietor of the factories. In their Lordships' opinion, the putneedars, at the date of the sale, were Messrs. French, Hodges, and Company; a firm which, although some of its members may have had shares in the Bansbarreah Concern, appears on the evidence to have been something distinct from that Concern, and is not even proved to have been trustees for it. In these circumstances their Lordships, without laying down any general rule as to the degree of interest which might entitle a party to impeach the sale of a putnee talook under the Regulations, are of opinion that the appellants have failed to show that they have acquired that interest in this putnee talook which entitles them to dispute the sale in 1849, and that the decision, therefore, of the principal Sudder Ameen upon that point was correct.

They must, therefore, humbly advise Her Majesty to dismiss this appeal with costs of both respondents.

The 22nd July 1869.

Present :

Sir James W. Colville, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Sale by Hindoo Widow—Onus probandi—Consent of husband's kindred.

*On Appeal from the High Court at Calcutta.**

Rajlukhee Debia
versus
Gokool Chunder Chowdry.

A Hindoo widow sold a portion of her husband's property under a deed of sale, upon the face of which there was a statement that the property was sold in order to liquidate the husband's debts. **HELD** that that statement was not sufficient of itself to prove that the property was sold for the purpose stated, but that it was on the party seeking to uphold the sale to prove by evidence that the property was sold for that purpose.

HELD further that a transaction of this sort may become valid by the consent of all the husband's kindred who are likely to be interested in disputing it, or by such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindoo law.

The mere attestation of a deed of sale by a relative does not necessarily import his concurrence.

The question raised by this appeal is whether the sale by two Hindoo widows of part of the estate of their late husband, one Gooroo Pershaud Talookdar, to the respondent, can be upheld as valid?

The suit was brought to impeach this transaction by the appellant as the adoptive mother and guardian of one Mohesh Chunder. The fact of that adoption is not now in dispute, nor is it disputed that Mohesh Chunder was by virtue of it, at the time of the institution of the suit, the next heir to Gooroo Pershaud or to the sons of Gooroo Pershaud, failing his widows or the survivor of them. Mohesh Chunder was still living at the date of the final decree which is the subject of the present appeal; but he afterwards died childless, and the appeal is brought by his adoptive mother, who, as such mother, is his heiress. There is a suggestion in the appellant's case that she has, under the authority given to her by her husband, made a second adoption; but inasmuch as the validity of that adoption is incapable of being discussed in this suit, their Lordships cannot take that into their consideration.

The validity of this transaction is sought to be upheld upon two grounds, first, upon the construction of the hibbannah, or deed of gift, at page 37 of the record, which, it is contended, gave to the widows an absolute interest, subject to be divested in the event of their sons or either of their sons coming of age. If that construction were correct, there would, of course, be an end of the case, because the deed of the widows would be good against all the world. Their Lordships will, therefore, first dispose of that question.

Upon the best consideration which their Lordships have been able to give to this document, they are of opinion that it provides only a species of trust for management, and that it does not interfere with the devolution of the estate, according to the ordinary law of succession, under the Hindoo law. The deed was executed by Gooroo Pershaud in the year 1823, at a time when he states himself to have been not only suffering from corporeal illness, but to have a purpose of going to reside at Benares, and, therefore, from his then circumstances there is ground for the argument of Sir Roundell Palmer, that he meant to provide for the management of the estate, not only after his death, but during his

* From the judgment of Steer and Seton-Karr, *J. J.*, dated the 10th May 1864, in Regular Appeal No. 428 of 1861: not reported.

life, and that seems to their Lordships to be the true construction of the deed. The learned Counsel for the respondent have laid some stress upon the direction, "you shall perform the ceremonies of Sheraddo, &c., according to my means," and have contended that that implies a change in the person to perform the funeral ceremonies of the donor, and, therefore, must be taken to imply a change in the course of the succession to his estate.

Their Lordships, however, are of opinion that the words "Sheraddo, &c.," are somewhat wide and ambiguous, and that if the deed be taken, as they think it ought to be taken, to be an arrangement providing for the management of everything from the date of it during the life of the donor himself, they may be taken to refer to, certainly to include, those family ceremonies which he from time to time would, if he remained in his home and in possession of his strength and faculties, be bound to perform. They, therefore, cannot give to those words the force which, it has been contended, ought to be given to them.

That being their Lordships' view of the construction of the deed, it may be convenient here to consider what has been the course of the succession to the property. If the succession were not altered by the deed, then of course, upon the donor's death, the two sons became entitled to his estate. Those sons are shown to have survived him. Each is also shown to have died in the lifetime of his mother, and to have died childless and under age. The consequence of that is, that on the death of each, his interest would have passed to his mother, and that Mohesh Chunder, who was the adopted son of the testator's nephew, became on his adoption the collateral heir of each son, subject to the interest of his mother. The result, of course, is that upon the death of the widow, who is dead, Gouree Dabea, Mohesh Chunder became entitled to a present interest in the property, which is the subject of this contention, unless it can be shown that that property has been validly passed by the act of alienation which is the subject of the suit.

Their Lordships have next to consider whether treating this deed as one executed by women having only the limited interest of Hindoo females in property which they take either from their husband or their sons, the transaction can be supported upon any of the grounds on which such a transaction is recognized as valid by the Hindoo law. The law upon the point is well ascertained, and has been established by many cases. Some question has been made to-day at the Bar as to the right of a person who is a presumptive heir in reversion to question such a transaction; but their Lordships, if it were necessary to decide the point, would find it extremely difficult to over-rule the many cases in which that right has been more or less recognized. But, in the view which they have now taken of the hibbahnamah and of the present right of Mohesh Chunder, upon the death of Gouree Dabea, to enter into possession of two annas of this property, it really is not necessary in order to support the suit to express any more decided opinion upon that question.

Then, upon what grounds are we to treat this transaction as valid? The statement upon the face of the deed is, that the property was sold in order to liquidate the husband's debts. It recites—"Now our husband's debts not being liquidated the liabilities are being gradually increased by loss in interest. The debts due to the creditors cannot be liquidated at once, by the average profits of the above zemindaries, particularly the debts of the time of our husband for which we had made an instalment bond in Court in our own names with the creditors, Narain Dass and others. Now, that money not being paid, the above creditors are about to have all our zemindaries sold by auction, by putting in force the said instalment bond in Court." Therefore, there is a clear allegation that the transaction was entered into for the purpose of defraying debts of the husband, including a particular debt, secured by an instalment bond and an agreement made in Court, and under the threat of an immediate execution against the zemindaries; though the deed

goes on to say that it was executed for the further purpose of performing "the Shrad, &c., of our husband at Gya."

It is not easy to see why, if the case so stated was true, there should have been any difficulty in giving far more satisfactory evidence of it than has been given in this suit. There is the reference to an agreement in Court, there is the reference to a threat of execution and to the instalment bond which constituted the debt at least of Narain Dass. These things, if they had any real existence, were presumably capable of being proved.

But what has been the course of the litigation? The burden of proof was unquestionably on the party seeking to support the transaction, that is, the present respondent. But it is an admitted fact that in the Court of first instance he gave no evidence in support of the transaction except the deed itself. In that state of things the Principal Sudder Ameen very properly decided the issue against him.

The case then went to the High Court by appeal. When the appeal was heard in the first instance, the High Court, with some variation in the form of the order, confirmed the decision of the Principal Sudder Ameen. There was then an application for a review, and a suggestion made upon that application that the respondent had been shut out by the Principal Sudder Ameen from giving the evidence which he was ready to give in the suit. The judgment of the Principal Sudder Ameen contains a distinct statement that no such application was made. He says, "It was indispensable, however, that he should prove that the sale was made to pay the husband's debts, and the debts contracted for his funeral obsequies, but he has filed no decree of Court, nor any other voucher proving these points. He has not applied for a summons in the name of any witness whatever. He has not even named a single witness, nor adduced any description of evidence whatever." Certainly it appears somewhat singular that, if the learned Judges of the High Court had no other contradiction of that solemn and direct statement upon the face of the judgment of the Lower Court that no evidence had been tendered, they should have acted upon the very wild story told by the witness Gooroochurn Odheekary, and the copy of a petition said to have been made from an original petition lost in the extraordinary manner in which that witness states it to have been lost. It may be that the learned Judges did ascertain, by reference to the Principal Sudder Ameen or to the proceedings, that evidence had been offered and had not been taken, but certainly there is no Constat of anything of the kind. Upon this record, they seem to have acted solely upon that singular evidence to which I have just adverted.

Their Lordships, however, think that whether it were right or wrong in the Appellate Court in those circumstances to admit the additional evidence taken before it, it would not be right for their Lordships to exclude that evidence from their consideration; and they will, therefore, consider it as if there were no objection whatever to its admission.

The material portion of the evidence taken on review is the deposition of Khadem Ally, who describes himself as the jemadar of Gokool Chunder Chowdry, the respondent. He gives a very detailed account of the execution of the deed and of the payment of the money, which he professed to have seen made at the time of the execution of the deed,—he states in particular that he was a witness to the payment of Rs. 9,500, part of the consideration-money to Narain Dass Mahajun upon account of the instalment bond. Although he had not mentioned Narain Dass in the first instance as among the parties present, yet he does distinctly state that he was present. "Narain Dass, who had taken Rs. 9,500, was present there. Seetul Talookdar had given him the said Rs. 9,500. On the said Narain Dass returning the instalment bond, Seetul gave it to the Thakooranies. On my employer asking for it, they did not give it."

Here, then, is very specific evidence of a transaction which took place many years ago; but the singular thing is, that when it is contrasted with the statements of the respondent himself, it does not tally in any degree with his recollection of what passed on the occasion. His statement is that the price of the property was paid in order to pay off the debts of Mahajuns, but he does not recollect the debts of what Mahajuns were paid, and he says, "I gave Gouree Dabea and Surbo Mongola the money myself." The learned Judges of the High Court seem to have thought that in that conflict of evidence, it was impossible to give the credit to Khadem Ally, which they otherwise would be disposed to give. Their Lordships think that in a case in which the party himself having an imperfect recollection of the transaction, and having stated that he paid the money to the vendors personally, a servant—a jemadar—comes forward after the decision of the case by the Court of first instance and the Court of appeal, to make out this elaborate proof of payments of debts to Narain Dass,—the least that can be said of evidence so given is that it is wholly untrustworthy. Nor does the deposition of the other witness, also a servant, deserve more credit. The learned Judges, however, finally decided the case, partly upon the mere fact that Juggut Ram was an attesting witness and must therefore be taken to have been a concurring party to the transaction, and partly upon the corroboration which they seem to think that fact afforded to the evidence of Khadem Ally. Their Lordships cannot see how the one can be any corroboration of the other. The fact that Juggut Ram attested the deed is perfectly consistent with the fact that Khadem Ally is a tutored witness brought forward at the last moment to depose to having seen what he never saw.

Again, with respect to the effect of the attestation of the deed by Juggut Ram, it seems to their Lordships that the learned Judges have attached to that circumstance a weight which it really does not possess. Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindoo law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *presumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction. And one of the difficulties of allowing the present decree to stand is that this point, which was raised at the last moment, was decided upon the mere proof, by the production of the deed, that Juggut Ram was an attesting witness to it. The point had never been raised before. The opposite party has had no opportunity of examining Juggut Ram as to the circumstances under which he became an attesting witness, or what his understanding of the transaction really was. The utmost that the Judges ought to have done in that state of things, was to remand the case to be re-tried for the full consideration of that question.

Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who Juggut Ram was, and what the circumstances of this family were, their Lordships are further of opinion that his concurrence would not in this case be sufficient to set up the deed. In the first place, it is not proved, though on the other hand it certainly is not disproved, that at the date of the execution of this deed, which was executed before the adoption took place, Juggut Ram was the next heir in reversion. He was

unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and even in the adoption of the plaintiff, he is not proved to have been the next heir. On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that therefore his interest, even if it existed, as next reversioner was in all probability likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim. Their Lordships have already said that if anything could have been made of that point, it would have been rather a reason for a remand of the cause to be tried upon such an issue than for the immediate decision of the case against the plaintiff; but in their Lordships' opinion there was no ground in the circumstances for such a remand, because such an issue had never been raised upon the pleadings or in the earlier stages of the cause. The case of the party who sought to support the validity of this transaction was that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram either as supplying the want of proof of the existence of the debts and the necessity of the sale or as a consent equivalent to such proof.

Their Lordships are, therefore, of opinion that the decree which is under appeal must be reversed; and the only question is, what should be the form of the order to be made? They have been furnished by Sir Roundell Palmer with the minutes of the order which he thought he was entitled to claim; and to some extent their Lordships adopt those minutes. They think that the minutes should stand thus:—"Declare that the deed of the 16th November 1845 was and is invalid as against Mohesh Chunder and the appellant as his heir, and declare that Mohesh Chunder became on the death of the widow Gouree Dabea, and that the appellant, as such heir, is now entitled in possession to one moiety of the four annas, and order that the respondent do deliver up to the appellant such moiety, and do pay to her the profits thereof received since the death of Gouree Dabea."

Their Lordships will therefore humbly advise Her Majesty to allow the present appeal, to reverse the decree of the Sudder Court, and to direct that, in lieu thereof, a decree be made to the effect above stated, and further directing that the respondent do pay to the appellant the costs incurred by the plaintiff in both the Courts below. The appellant must also have the costs of this appeal.

The 30th November 1869.

Present :

Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Benamsee Transactions—Presumption.

*On Appeal from the High Court at Calcutta.**

Syud Azhur Ali

versus

Rebec Ultaf Fatima and others.

* From the judgment of Peacock, C. J., and Kemp, J., in Special Appeal, No. 1524 of 1862, decided 5th February, 1862 : not reported.

In a suit between Mahomedans in the nature of an ejectment suit, in which *C*, the plaintiff, sought to recover a share of property in the possession of *D* on the ground that the purchase was made in the joint names of his (*C*'s) father, and *D*'s wife, and in which *D* alleged that he was himself beneficial owner of the property, having purchased it benamee in the names of his wife and son, it was held that the real criterion was to consider from what source the purchase-money came. The presumption is that a purchase made with the money of *A* in the name of *B* is for the benefit of *A*, and it cannot be presumed from the purchase by a father, whether Mahomedan or Hindoo, in the name of his son, that there was an advancement in favor of that son.

In coming to the conclusion to which they have come in this case, their Lordships feel that they are not departing from the wholesome rule—that, unless they are clearly satisfied that the finding of two concurrent Courts in India upon a question of fact was wrong, it will not be disturbed here. For if the judgments in the respondents' favor are carefully examined, it will appear, either that there has been no finding at all of the facts which it was necessary to find, or that those facts have been found in favor of the appellant. Their Lordships may dismiss the judgment of the High Court with the respect due to that tribunal, by saying that the learned Judges who then sat appear to have conceived, rightly or wrongly, that the question in dispute between the parties was one of fact, and that they, under the rules which regulate the hearing of special appeals, had no jurisdiction to disturb the finding of the Court below.

Then, with respect to the first judgment—the judgment of the Court of first instance—it appears to their Lordships that the Judge never dealt with the real question at issue between the parties, namely, the question whether this property was held benamee by the son and wife of the appellant, or whether it was held by those persons beneficially and for their own interest, and in their respective shares.

There were two issues before the Court, one of which seems to be not very accurately framed. It is in terms whether the *ikrarnamah* was genuine or not, which apparently is meant to raise the question whether it was a forgery or not.

The real question between the parties and that which appears to have been decided by the Judge was, however, whether the parties who executed, or purported to have executed, that document were, at the time when they so executed it, infants or of full age. The Principal Sudder Ameen has found that fact against the appellant; and the learned Counsel at the Bar have not called upon us to interfere with that finding. But what was the inference which the Principal Sudder Ameen drew from the fact so found? It was that this document, which was a mere declaration of trust, and a document intended only to facilitate the mutation of names, *i.e.*, the transfer of the property into the name of the appellant, being executed in a manner which was not binding on the parties who purported to have executed it, was a fact fatal to the appellant's title; and that from the fact so found it necessarily followed that the whole of the respondent's case was established against the appellant, and that the property was really held by those who were the ostensible owners of it, in their own right, and not benamee for the appellant. That sweeping inference will not stand a moment's examination.

The case then goes by appeal to the Zillah Judge, who, so far as he finds any facts, appears to have found the material fact in favor of the appellant; for he begins his judgment by stating that the proceedings before the Court proved that the appellant, during his son's lifetime, had purchased property in his name, and always acted as if the son were the real proprietor of the estate.

He goes on to state the appellant's case:—"It is urged by Azhur Ali that all property purchased by him was purchased in his son's name, but with his own funds, which is probably the case." And therefore he has either done what the Principal Sudder Ameen did, namely, omitted to come to any finding at all on the material issue in the case, or he has found that issue in favor of the plaintiff.

That being the effect of the judgments, it appears to their Lordships that there has been really no decision against the appellant in the Courts below, which is capable of being supported on the grounds upon which it professes to rest. The

result is that it lies upon their Lordships to decide the case upon the evidence in the record, putting those decisions entirely out of consideration.

The case is simply this. The respondents bring their suit in the nature of an ejectment suit, to recover, we will take it, that share of the property which would have belonged to their father, supposing that the purchases originally taken in the joint names of their father and the wife of the appellant had been taken for them beneficially. The defendant alleges that of that property, of which he seems to be now the ostensible owner, he was all along the beneficial owner ; that it was purchased by him from his own funds, benamee, in the names of his wife and son ; and that every act of ostensible ownership which was done was consistent with that state of the title. It is not a novel thing in India that that state of things should exist. It has been repeatedly brought before this Committee; and the law relating to it was reviewed in the case of *Gosain v. Gosain*,* 6 Moore's Indian Appeals. Of course we cannot apply to the decision of this case, which is one between Mahomedans, any of the reasons which in the judgment delivered at this Board in that case are drawn exclusively from Hindoo law. It is, however, perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among the Mahomedans as among the Hindoos, and the judgment in *Gosain v. Gosain* and the cases therein referred to are, at all events, authority for the propositions that the criterion of these cases in India is to consider from what source the purchase-money comes ; that the presumption is that a purchase made with the money of *A* in the name of *B* is for the benefit of *A* ; and that, from the purchase by a father, whether Mahomedan or Hindoo father, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favor of that son. Again, the mere fact that this property was purchased, not in the sole name of the son, but in the name of the wife as well as of the son, affords a strong argument in favor of the hypothesis that it was a benamee purchase, for there was no such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property ; and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in this country.

Again, when we come to the evidence which has been given in the cause, it appears to their Lordships to be all on one side. As we have said before, the evidence of acts of ostensible ownership proves nothing ; but we have proof, so far as there is any proof in the cause, of the source from which the money proceeded, that the money was the father's.

We have, moreover, the admission of the son, which though it directly applies only to one portion of the property, throws a light upon, or at least tends to corroborate, the direct evidence which has been given as to the nature of the other transaction. So that, without going through that evidence in detail, it is sufficient to say that, in their Lordships' opinion, there was but one conclusion to which, if the case were fairly tried out, the Judges of the two Courts which dealt with the question of fact ought to have come.

On these grounds their Lordships will humbly advise Her Majesty that the decisions of all the three Courts below be reversed, and that the suit of the plaintiffs be dismissed with costs. They must also pay the costs of this appeal.

* See p. 13 ante.

The 9th December 1869.

Present :

Lord Chelmsford, Sir James W. Colville, Sir Joseph Napier,
and Sir Lawrence Peel.

Construction—Deed by purdah woman.

On Appeal from the High Court at Madras.

Sookyaboye Ammal

versus

Latchmi Ammal.

A document obtained by the chief male member of a family from a purdah woman should receive a strict construction.

Their Lordships entertain no doubt that the Courts in India have put a correct construction upon this instrument, and that this appeal ought to be dismissed.

The effect of the parol evidence is, of course, to be considered in so far only as it determines the position of the parties at the time when the second *razinamah* was entered into, which, as Mr. Grady has argued, may afford some reason for the making of the instrument. Their Lordships, however, do not think that it justifies the conclusion which Mr. Grady would draw from it, viz., that it was a natural or likely thing that the widow should say to the brother of her husband, who was then the presumptive heir in reversion, "Take the property at once, and give me only the sum stipulated for by way of maintenance."

It seems to their Lordships more probable that the brother, being then the presumptive heir in reversion, may have thought it desirable to obtain the custody and management of the property, in order to avoid the risks which a presumptive heir must always run, that during the continuance of the widow's estate the property may be wasted. That may have been the inducement to him to undertake the care and custody of the property. And, on the other hand, the widow may have felt desirous to be relieved from those cares of management which a Hindoo woman, living in a state of seclusion, is not a person very competent to undertake. But however this may be, it seems to their Lordships that the relation of these parties was, at all events, such that a transaction between them should be closely scanned; and that a document obtained by the chief male member of the family from a purdah woman should receive a strict construction.

What then was the intention of the parties to the second *razinamah* as it is to be collected from the terms of the instrument, and without regard to what may have been said in the parol evidence touching their intention?

It is stated distinctly by the Judge, Mr. Goldingham, who is doubtless acquainted with the native language, that the terms used in the original do not import, and cannot be construed to import, anything like words of conveyance. To their Lordships it appears that the translation certainly contains no words of that kind.

It has indeed been argued by Mr. Grady that, in order to give some effect and meaning to the provision that the property should be taken possession of by the brother, that provision must be taken to import conveyance, because he was already in possession; and it must be assumed that the deed intended to give him something which he had not already. Their Lordships are of opinion that that argument supplies no reason for putting on the terms used a construction which they do not naturally bear.

Mr. Grady further endeavoured to support his argument by saying that, in like manner, the first razinamah, when it speaks of one brother giving possession to the other, imports a conveyance from the one to the other. But this really is not so. Before the execution of the first razinamah, the two brothers were joint owners of the whole property. They made a partition, and the senior member of the family being in the position of manager, and the property standing in his name, it was provided by the razinamah that he should give over the possession of the younger brother's share to him. The title of the younger brother was complete before the instrument was executed. There was no conveyance of title from one brother to the other, but simply a provision that on the partition there should be a separate possession of the shares.

Again, it seems to their Lordships that the construction which the High Court has put upon the term, that the lady's allowance was to be paid out of the income of the property which was put into the custody and care of the brother, is correct; and that that provision clearly impressed the property with a trust. That the allowance should fall so far short of the whole income of the property, may be explained by those considerations which his Lordship Sir Lawrence Peel has already suggested, as to the religious obligation of a Hindoo widow to live a recluse, and, in some degree, an ascetic life. Nor is it improbable that there may also have been in the contemplation of the parties the necessity of providing, by the accumulation of the surplus income, against the risks of bad seasons and the consequent depreciation of the landed property, or for the performance of religious duties for which the razinamah makes no express provision.

To suppose that this woman should, without consideration, absolutely give away property, of which a portion only (viz., the Government bonds) produced an annual income of upwards of Rs. 1,500, for an allowance amounting only to about Rs. 660 per annum, plus the value of the rice,—and that secured only by the personal engagement of the other party,—seems to their Lordships a most improbable hypothesis and one which is not warranted by any reasonable construction which can be put upon the terms of the instrument.

Their Lordships must therefore humbly recommend to Her Majesty that this appeal be dismissed, and they think that it should be dismissed with costs.

The 9th December 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Sale—Property escheated by Government—Act of State—Suit.

On Appeal from the High Court at Agra.

Sheo Lall Bohra

versus

Sheikh Mahomed.

Where a sale of landed property which has been escheated by the Government was made by Government without any restriction being attached to the original notice of sale, which stated that the highest bidder was to be the purchaser, it was held that the Government could not, subsequent to the bid and the deposit of the earnest-money, impose any condition, but was bound to make over possession irrespective of the character of the highest bidder.

In selling the property of rebels which it had confiscated, the Government does not perform an act of State, but stands in the situation of an individual selling his property by auction, and a suit may therefore be properly brought against the Government by the purchaser if the Government refuses to give up possession or transfers the possession to another.

This being a case in which no one has appeared on the part of the respondents, their Lordships have felt it to be their duty most anxiously to consider it, in order to see whether any sufficient grounds existed for the reversal of the judgment. They are unable to come to any other conclusion than that the judgment must be affirmed.

This was a suit for possession by establishment and declaration of right of 1,662 acres in the mehal of Thannah Bhowun, which was property confiscated by the Government in consequence of the participation by the former proprietors in the rebellion of 1857.

It was suggested to the Government that this property might be put up for sale; and Mr. Colvin, who recommended this, proposed, in order to prevent the possibility of any of the rebels or of any of their relatives becoming purchasers, that it should be put up in one entire lot. This suggestion was adopted by the Collector of Mozuffernuggur, who, in a letter to the Commissioner of the Meerut Division, said :—"Mr. Colvin's note so fully details how imperfect partition has been made, that nothing is left for me to explain. All the confiscated patches have been accurately defined and formed into one puttee. It has not been thought necessary to make a regular butwarra or perfect partition, although that could be done if necessary; for all practical purposes the separation of the scattered confiscated parcels is complete, and the whole can now be put up for sale with the prospect of some wealthy outsider buying it in. Had the confiscated patches not been divided off and then sold, the probability is the relatives of the rebels would have purchased the lots. Even now there is a fear of the relations buying in the property 'ism furzee.' This will be guarded against as far as I am able."

These extracts from the correspondence are for the purpose of showing that the attention of the Government was at the earliest period called to the propriety or expediency of preventing rebels becoming the purchasers of this property. But the Government did not adopt that view; and in a letter from the Secretary of the Sudder Board of Revenue to the Secretary of the Government, of the 12th January 1864, the Secretary of the Sudder Board says :—"The Board, in recommending the proposal for sale, remark that as the puttee is intermixed, and some of the rights (as in wells) joint, and the responsibility common with the other puttees, it will be inexpedient to place any restriction on the competition of the resident brotherhood, even though connected with the ex-proprietors. A stranger may find it difficult to gain effective possession; and besides, the Government need not lose the chance of a higher price from unrestricted competition."

A sale to this effect was sanctioned by the Lieutenant-Governor. The Under-Secretary to the Government, writing to the Secretary of the Sudder Board on the 16th February 1864, says :—"The Lieutenant-Governor has been pleased to sanction the sale of the confiscated lands . . . as therein detailed."

This was followed by an order of the Revenue Court, dated the 14th March 1864, which directs "that the auction be knocked down to whoever bids the highest, no attention being paid as to whether he be a rebel or not;" and then a notice was issued, following upon that order, in these terms :—"Whereas, in accordance with the sanction of the Commissioner, No. 74, dated 12th March 1864, conveying the sanction of the Government, the auction sale of the property situated in the town of Thannah Bhowun in Pergunnah Thannah Bhowun, confiscated by Government for rebellion, and as detailed at foot, will be held on the 20th April 1864, it is hereby notified that whosoever may wish to purchase should present himself at Mozuffernuggur and do so. Moreover, that the auction-purchaser will have to abide by the conditions of the auction, and that the auction-sale will be knocked

down to whichever party gives the most. No attention will be paid as to whether the purchaser is a rebel. Whoever chooses may purchase."

Of course that was notice to all the world that anybody, whatever he might be, whether rebel or not, going into that auction-room might become a bidder for and the purchaser of this confiscated property. Accordingly, an agent of the respondent appeared in the auction-room and bid for him, and, after considerable competition, was ultimately decided to be the highest bidder, and the lot was knocked down to him upon his bidding of Rs. 19,000.

He then sought to have that sale perfected. He deposited the sum of Rs. 2,060 and desired to complete the purchase, when he was met by an objection that the sale, not having been ratified by the Collector, another person had come forward who had offered a larger sum, Rs. 22,000, and therefore that the sale to the respondent would not be carried out.

The right to refuse to complete the sale is founded on a memorandum at the foot of the statement of the biddings, in these terms:—"This auction has been knocked down to Moulvie Sheikh Mahomed, the son of Moulvie Ahmed Oollah, resident of Thannah Bhowun, through Katim Ully, on the 20th April 1864, on the condition of its being ratified by the Collector."

The principal question in this case is, whether the ratification of the sale by the Collector was or could be made a condition of the sale. It is unfortunate in this case that we have no evidence at all of what the conditions of the sale were, but, according to the opinion of the Judge of the District Court, and also of the High Court, this, which is sought to be imposed as a condition, was no part of the original conditions of sale.

The Judge of the District Court said, "The notice declares that the property shall be sold to the highest bidder, subject to the conditions of sale. What those conditions were does not exactly appear, but no proof is adduced that the confirmation of the sale by higher authority was one of them." And the High Court was of opinion that, "Inasmuch as the Collector, with the sanction of the superior authorities, made it a distinct condition of the sale that the property should be sold to the highest bidder, and that the consideration as to whether he was a rebel or not should not affect his right to purchase, the Government were not at liberty, subsequently to the sale, to disapprove of and annul the sale on the grounds stated. The Government, like any other seller, might impose whatever conditions it pleased in reference to property which it offered for sale, *prior* to the sale; but when it had expressly stated that it would not allow a particular objection to operate, it was not at liberty, *subsequently* to the sale, to impose a condition on the sale not only *novel*, but *directly at variance* with the terms under which it offered the property for sale."

Their Lordships apprehend that, looking at the terms of the memorandum, the words "on the condition of its being ratified by the Collector," must be qualified in this manner,—that, supposing the conditions of the sale have not been complied with, then the Collector might refuse to ratify it; but to hold it to have been in the power of the Collector to refuse to ratify the sale because the purchaser was a rebel, would be a determination utterly repugnant to the terms and conditions upon which, according to the public notice, the sale was to be conducted.

Even assuming therefore, that the appellant is right with regard to the ratification of the Collector being a condition which attaches upon the sale, he was bound to show that the refusal to ratify the contract was by reason of the non-observance or the non-performance of some express condition of sale.

Under these circumstances, the suit is brought virtually for specific performance. In consequence of the contract in the auction-room, an equity arose against the Government, which the party seeks by this suit to enforce.

Now, inasmuch as Sheo Lall pretends or assumes to be the purchaser of this property, it was impossible that such a suit could be instituted without making

him a party to it, and he might have shown that he was a purchaser for valuable consideration without notice, and if that had been the case, he would have been dismissed from the suit. But it appears clearly that he had notice of this purchase by the respondent, because, in a petition which he presented to have his offer accepted and the property conveyed to him, he said, "Whereas the auction-sale of the town of Thannah Bhowun, the property of rebels, and confiscated by Government, was yesterday sold for Rs. 19,000, and that, as yet, the sale has not been ratified, and that the property will admit of a higher price, I, prior to the ratification of the former auction; present this application to the extent of Rs. 22,200 and solicit that, if the authorities deem it advisable, the property be bestowed on me for that sum." He is, therefore, a purchaser with notice, and the same equity attaches against him, as against the Government.

It has been said that this suit could not be instituted by the respondent, inasmuch as what was done was an act of State, which could not be called in question. The meaning, as their Lordships understand it, of an act of State is something which appertains to the functions of Government. Suppose, for instance, any question had arisen with regard to the propriety of confiscating the rebels' property, that would have been an act of State. Probably the determination of the Government to sell that confiscated property might also be treated as an act of State, but in the sale the Government was exactly in the situation of an individual selling his property by auction; and when the property was knocked down, the relation of vendor and vendee existed between the Government and the highest bidder.

It is impossible, therefore, to say that this suit was not properly brought against the Government. It is to be regretted that the Government should have brought itself into the position of having sold to a person who, it appears, is likely to create some dissatisfaction and provoke hostile feelings in the district.

The Government, no doubt, acted from the best motives, and according to the best judgment they could form as to the most advantageous mode of selling the confiscated property, and their Lordships can only hope they will be able to protect the subjects in the district from the danger to which they seem to be exposed from the character of the person whom they have permitted to become a purchaser.

Under these circumstances, their Lordships can do nothing more than affirm the decree and dismiss the appeal.

The 10th December 1869.

Present :

The Master of the Rolls, Sir James W. Colvile, the Judge of the High Court of Admiralty, Sir Joseph Napier, and Sir Lawrence Peel.

Survey award—Boundary Disputes—Evidence.

*On Appeal from the late Sudder Court at Calcutta.**

Rajah Leelanund Singh

versus

Rajah Mohendro Narain Singh and Rajah Jyemungul Singh.

Where the plaintiff sued to recover a quantity of land by rectification of certain survey awards, which he averred demarcated erroneously the boundary between his zemindary and the zemindaries of the defendants, it was held, on a consideration of the evidence, that his suit was rightly dismissed

* From the judgment of Raikes, Trevor, and Bayley, *J. J.*, in Regular Appeals Nos. 552 and 553 of 1858, decided 30th April 1861. See S. D. A. R. for 1861, p. 181.

because he failed to prove the position or existence of a stream which he stated was the true boundary between the zemindaries.

Survey proceedings are evidence of actual possession, and must be regarded as correct so far as the appearance of the country is recorded thereon, but if questioned in time, are not conclusive on the question of title.

The appellant is the present possessor of the large zemindary known as the Kurruckpore Mehals, which includes the whole of Pergunnah Singhol; and one of the mouzahs composing that Pergunnah is called Kusbeh Budholee. This zemindary formerly belonged to one Rajah Kadir Ali, from whom it descended first to his son Ikbul Ali Khan, and afterwards to his grandson Ruhmet Ali Khan: but in 1842 it was sold for arrears of Government Revenue, and was then purchased by Rajah Bidanund Singh, the father of the appellant.

Abutting upon Pergunnah Singhol, and on the west and south of it, is Pergunnah Chundun Bhooka. This includes the mouzahs of Jankeepore, Ahsur Chand *alias* Kuchwa, and Ahsur Biscoond. The two former of these form part of the zemindary of the respondent Mohendernarain Singh, who is the son and successor of Rajah Nirbye Singh. The other village forms part of the zemindary of the other respondent Rajah Jyemungul Singh, who is the representative and successor of Rajah Nuwab Singh.

The question in the suit is one of boundary between the two pergunnahs Singhol and Chundun Bhooka, *i.e.*, whether the 5,000 beegahs of which the appellant, as plaintiff, seeks to recover possession form part of Kusbeh Budholee, and therefore lie within the proper boundary line of pergunnah Singhol; or whether they are included partly in the villages of Jankeepore and Kuchwa, and partly in that of Biscoond, and therefore lie within the proper boundary line of Chundun Bhooka.

From this statement, however, it follows that the portions of the disputed land which are held by the respondents respectively may be so held by them by different titles; and that although the principal question of fact, *viz.*, the true position of the boundary line between the two pergunnahs, is common to both, the one may, in respect of long possession, be in a more favorable position than the other; and that that which may be evidence against the one may not be evidence against the other. And this being so, it is perhaps unfortunate that the appellant's claims against the two respondents should be litigated in one and the same suit. The suit is brought not only for the recovery of the lands in question, but, as a necessary step towards that object, to set aside certain awards passed by the officers employed to conduct the Revenue survey in this district, and to obtain a rectification of the boundary line as defined by them. The suit was brought within the period in which the law allows such awards to be contested in a regular suit. But their Lordships need hardly observe that the plaintiff in such a case has to overcome the strong presumption which the decision of such a question as this by competent officers after full local enquiry, made with the aid of a scientific survey of the locality, is calculated to raise against him.

It may be convenient, in the first place, to state shortly what is the effect of the survey proceedings which are impeached. The line laid down by the survey as the northern boundary of pergunnah Chundun Bhooka, and the southern of pergunnah Singhol, is not a river, but seems to be almost identical with the chain of hills which on the map of Hoolas Roy (A), which has been so much discussed in this case, are delineated as running east and west between the Jobarara and the stream which he calls the Punjhairee Khoord. To these hills we may give the name, which is applied to them in some of the proceedings, of Suhoodree.

There was throughout the survey proceedings a dispute between the appellant and the respondent Mohendernarain Singh, or Nirbye Singh his father, touching the possession of the lands sought to be recovered from the last-named respondent. The earlier proceedings treated that portion of the land in dispute as fall-

ing within the mouzahs of pergunnah Chundun Bhooka, which belong to Mohendernarain. Mr. Brown was dissatisfied with this finding as being inconsistent with Hoolas' Map A; he objected to Birjobookun's Map B, and directed that there should be a further investigation, and a comparison of the country with the Map A. He also proposed to go himself to the spot and decide the question of possession. He never did so; and the question was finally decided by Mr. Quintin, after local enquiry and investigation, in his proceeding of the 24th December 1847.

The case as to the lands sought to be recovered from the respondent Jyemungul Singh is somewhat different. When the survey of these lands first took place, the appellant raised no claim to them. The contest was between the respondent Mohendernarain Singh, saying that they belonged to his village of Ahsur Chand *alias* Kuchwa, and Jyemungul Singh, saying that they belonged to his village of Biscoond. The decision was in favor of the latter.

In the final proceeding of December 1848 before Mr. Wood, and two years after the commencement of the dispute between the respondent, the appellant did intervene as third party, and ineffectually claimed the lands as part of pergunnah Singhol. But his omission to come forward before that time affords a strong presumption that he was at the commencement of the survey out of the possession of these lands, if he had ever been in it.

These survey awards are founded on evidence of the actual possession. They are not, if questioned in time, conclusive on the question of title.

Their Lordships will now consider upon what evidence of title the appellant seeks to impeach them.

The earliest piece of evidence is the proceeding of 1816 before a Mr. Sutherland, described as a Registrar of the Civil Court of Monghyr, who appears, under the law then in force, to have exercised a jurisdiction in questions of possession similar to that which is now exercised by the magistrates under Act IV of 1840.

The complaint was brought by Rajah Kadir Ali against the lessees of part of pergunnah Chundun Bhooka, and seems to have been directed rather against encroachments upon wild and jungle land for the purpose of collecting the forest products, than against any actual occupation of cultivated soil. One Rajah Juswunt Singh, however, describing himself as the proprietor and zemindar of pergunnah Chundun Bhooka, intervened; and the question, what was the true boundary between the pergunnahs, was thus raised between the two zemindars.

Those stated by the zemindar of Singhol were:—"To the west is Geedha Ghaut and Churhee Khoord (by which we understand a line drawn from Geedha Ghaut to Churhee Khoord), to the east is Dabeedah, and to the north is a great mountain, and south is Punjhairee Khoord."

The statement of Juswunt Singh was that the boundary of his lands extended "from the west of Dabeedah straight along as far as the Soordhobee and Sunkareekh and Sireekabutan." It is not easy to identify all these names; but the conclusion to which their Lordships have come is that this statement makes the southern boundary of Singhol that line of hills above called Suhoodree, which is admitted by the respondents to have been the dividing line as regards actual possession and enjoyment, and has been fixed as such boundary by the survey proceedings. If this be so, it follows that Juswunt Singh asserted no title to the land lying to the north of these hills, and between them and the Jobarara; and that he did not treat that stream, or any other stream, under the name of Punjhairee Khoord, as the boundary between the two pergunnahs. On the other hand, the issue thus raised between the parties seems to admit that the Punjhairee Khoord was to the south of that line of hills; and that the controversy was about the lands claimed in the present suit, or part of them.

Mr. Sutherland's decision was in favor of Kadir Ali, and directed that the disputed land should remain in his possession according to the before-mentioned boundaries, until the decision should be rescinded by an action under Reg. X of

1793. In 1817, one Budhnarain was sent by Mr. Sutherland to mark out the western boundary between the pergunnahs in accordance with the last-mentioned decision; and that, starting from Geedha Ghaut, and proceeding southward to some point or another, he did place certain boundary pillars is undisputed. His own statement made on oath in January 1830 is that they extended southward as far as the Punjhairee Khoord, and that that stream is south of the Punjhairee Kalan.

Juswunt Singh and Nirbye Singh, who then first appear on the stage, declined to take any part in this demarcation, and intimated that they intended to dispute Mr. Sutherland's order in a regular suit. No such suit was, however, brought.

It will be convenient here to enquire upon what parties this proceeding of 1816 was binding, and what lands did it cover?

It may be taken to have bound Juswunt Singh, who was a party to it, and those who claim through him. It may, therefore, be taken to have bound Nirbye Singh, and after him the respondent Mohendernarain Singh. But is it binding on Jyemungul Singh, or was it binding on his father and predecessor, Nuwab Singh? That depends on the question how far either derived title from Juswunt Singh; and the evidence is unfortunately either very scanty or altogether silent on their connection with Juswunt Singh, and as to the time at which, and the manner in which, Pergunnah Chundun Bhooka became divided between two distinct zemindaries. The Principal Sudder Ameen in his judgment speaks of Juswunt Singh as the "moories" of the *defendants*. And "moories" is, we apprehend, the same word as "meeras," which, in Professor Wilson's Dictionary, is defined to be the person through whom an inheritance is derived. On the other hand, the judgment of the Sudder Court speaks of the proceeding of 1816 as made against the ancestor of *one* of the defendants. Again, the report of Hoolas Roy alludes to the proceedings on a partition between Nirbye Singh and Nuwab Singh, and speaks of Juswunt Singh as the elder brother of both. Chunderchain Singh, a witness of Jyemungul Singh, also speaks of such a partition.

That the respondents, therefore, held their respective portions of Pergunnah Chundun Bhooka under a title which, up to some date, is a common one, seems probable; but there is little, if any, direct evidence of the fact, and still less of the date at which the separation in title commenced.

There is no statement in the proceeding of 1816 of the specific quantity of the land then in dispute; and the complaint seems to have been of invasion on the part of the tenants of Juswunt Singh occupying lands to the west of the westward boundary. Juswunt Singh, however, claimed all the land which lay south of the line of hills which he said was the southern boundary of Singhol and west of Dabeedah (which we take to be the range of hills on the east of the now disputed land). The question was, whether south of the line of hills the eastern boundary of Pergunnah Chundun Bhooka was the Dabeedah range, or a line prolonging the line from Geedah Ghaut to that line of hills up to the Punjhairee Khoord; and the controversy so stated seems to embrace the whole of the lands now in dispute.

The respondent Jyemungul Singh, whether bound or not by the proceedings of 1816, is certainly not bound by those from 1829 to 1832, in which Hoolas Roy and Motu Roy made their conflicting reports. These proceedings were occasioned by a dispute which arose between Rajah Nirbye Singh and the then zemindar of Singhol, after the supposed partition between Nirbye Singh and Nuwab Singh, and were confined to that portion of the disputed land which is west of the Punjhairee Kalan; it did not, therefore, embrace the land which the appellant now seeks to recover from the respondent Jyemungul Singh.

It was in these proceedings that, in order to get rid of the effect of the order of 1816, Nirbye Singh first raised the point that the Punjhairee Khoord mentioned

in that proceeding was identical with the stream marked in Map A as the Jorbarara. Neither the respondent Jyemungul nor his immediate ancestor Nawab Singh was a party to that issue, nor is the former responsible for the inconsistency which it involves in claiming a boundary inconsistent with the admitted possession. On the contrary, some of the witnesses produced by him in this cause speak of the southern boundary of Pergunnah Singhol as the line of hills which has been assigned as such boundary by the survey proceedings, and such was the boundary asserted by Juswunt Singh in the proceeding of 1816.

We cannot find that Jyemungul Singh has in any way made the identity of the little Punjhairee and the Jorbarara a material question, unless it be by the thirteenth paragraph of his answer. And in that he seems merely to raise the question whether Budhnarain had lain down the western boundary, or the dispute of 1816 had extended further to the south than the latter stream. He does not admit that the southern boundary of the Singhol is the little Punjhairee, whether north or south of the line of hills. On the contrary, by paragraph 15, he distinctly asserts that the line of hills is the true boundary.

If the case rested here, their Lordships, considering the scanty evidence afforded by the proceeding of 1816, would have felt that no sufficient ground had been laid for setting aside the survey proceedings against the respondent Jyemungul Singh, or even against Mohendernarain Singh. The real difficulty in the case has been occasioned by the way in which the cause has been conducted in the Courts of India by the Counsel for the parties, who seem in argument to have accepted as a fact that the southern boundary of Pergunnah Singhol was a river called the Punjhairee Khoord, and to have disputed concerning the position of this stream, and the accuracy of the map of Hoolas Roy. They probably took this course because they felt pressed by the effect of the proceeding of 1816. The Principal Sudder Ameen's judgment proceeds almost entirely upon the preference which he gives to the map of Hoolas Roy over that of Brijobookun. But the map of Hoolas Roy is really a document of very slight authority. He differed from the other arbitrator who was appointed conjointly with him to settle that particular dispute; and no final order was passed in that matter. His map and report were before the Revenue authorities when they made the survey and the survey awards, and were ultimately disregarded by them. When this case came on appeal before the Sudder Dewanny Adawlut, the Judges of that Court observed, as their Lordships think with great justice, that they were bound to treat the survey proceedings as correct so far as the appearance of the country is recorded therein, and failing to find in the survey map any stream which corresponded with the stream set down in Hoolas' map, they rejected that map, reversed the Principal Sudder Ameen's decision, and dismissed the appellant's suit. Afterwards, on a suggestion that there was in the survey map a stream which might correspond with the Punjhairee Khoord of Hoolas' map, they granted a review, and directed a further local investigation into the existence of this stream by an Ameen. The Ameen made a report in which he describes an intermittent stream, dry in some places, flowing in others, which he traced in the jungul. The Judges of the Sudder Dewanny Adawlut upon this report adhered to their former judgment dismissing the suit. When the appeal was heard here, we had not before us their reasons for this conclusion, and we caused a communication to be made to India of which the result is that the final judgment of Mr. Raikes is now before us. That Judge, with better means of forming a judgment on such a point than their Lordships have on the materials before them, came to the conclusion that the stream described by the Ameen did not correspond with the Punjhairee Khoord laid down in Hoolas' map; or with the description given by the appellant's vakeels of the alleged boundary of his zemindary. Their Lordships, after full consideration of the case, are not prepared to say that that conclusion is erroneous. They must observe that upon a boundary question they would be extremely reluctant to

reverse the judgment of an Indian Court, unless they were clearly satisfied that it was wrong. If it had been shown that there was a well-defined stream corresponding, or nearly corresponding, with that laid down in Hoolas' map, they might have felt that, considering the proceedings of 1816 and the way in which the parties have conducted their case, the survey awards ought to be reversed. But as the evidence stands, they feel that the position, course, and very existence of the Punjhairee Khoord are left in such uncertainty, that if the boundary laid down by the survey proceedings were altered, it would be impossible, with any certainty, to fix the boundary to be substituted for it. And in these circumstances they must humbly recommend to Her Majesty that the decree under appeal be affirmed, and this appeal be dismissed with costs.

Order of Her Majesty in Council on the petition of Ramanoogra Narain.

At the Court at Windsor Castle.

The 11th December 1869.

Present:

The Queen's Most Excellent Majesty,
The Lord President, The Lord Chamberlain, Earl Granville, and
Mr. Secretary Bruce.

Practice—Appeal—Privy Council.

In calculating the period of six months allowed for appealing to the Privy Council, the date on which the decree was pronounced or dated should be excluded.

Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 6th December instant in the words following, viz. :—

“ Your Majesty having been pleased by your General Order in Council of the 11th November last past to refer unto this Committee the humble petition of Ramanoozoa Narain, Hindoo, inhabitant of the city of Patna in the province of Bengal, zemindar, setting forth that the petitioner presented (within the prescribed period of time as he humbly submits) to the High Court of Judicature at Fort William in Bengal the ordinary petition praying that leave might be granted to him (under the powers and authority in that behalf vested in the said Court) to appeal to your Most Excellent Majesty in Council against a judgment and decree of that Court (by which he was aggrieved), bearing date the 16th June 1868, and which reversed a judgment and decree of the Principal Sudder Ameen of Gya, bearing date the 19th September 1866, and made in the suit in which the petitioner was such plaintiff as aforesaid, and which latter decree declared and decided in favor of the right and title of the petitioner as such plaintiff to the share of and in the lands which he sought to recover by the said suit: that the petition was accompanied by an affidavit of the fact that the value of the property in suit was above the value of Rs. 10,000: that the hearing on the said petition took place before two of the Puisne Justices of the said Court, viz., the Hon. H. V. Bayley and the Hon. C. P. Hobhouse, who thereupon by their order bearing date the 13th March 1869, discharged the rule to show cause why such leave should not be granted (previously obtained on the appellate side of the said Court by the petitioner) with costs: that the single ground on which such leave was refused was the following, viz., that the judgment and decree against which the petitioner

sought leave to appeal was dated the 16th June 1868, and that his said petition for leave to appeal against the same was not presented until the 16th December 1868, and that therefore it was not in time within the meaning of the terms or words used in that behalf in the Order of your Most Excellent Majesty in Council, dated the 10th April 1838, respecting Indian appeals: that the particular terms or words so referred to by the said Judges are those which prohibit the Courts in India granting such leave to appeal 'unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree, or decretal order complained of:' that the said Judges in and by their said order state the contention between the parties before them as follows:—'The petitioner urges that the day on which the judgment was given, viz., the 16th June 1868, must be excluded, and it is admitted that if that day be excluded from calculation, then the petitioner is in time:' that the reasoning of the said Judges on which their said order was based is as follows:—'When the words "from the day" are used, we think that the proper interpretation of these words is calculating or counting "from" that day, not calculating or counting "after" that day; the words are "from the day of," not from the day following, which is the present petitioner's case; if, therefore, six calendar months are calculated "from the day of the date of the judgment," in this case those calendar months would expire on the 16th December 1868, and unless an appeal was filed within, i.e. before, that day, we should not be able to admit it:' that accordingly the said Judges refused the said application: that the petitioner humbly submits that the construction put by the said Judges on the terms of the said order of your Majesty is both novel and erroneous, being not only contrary to the ordinary meaning attached to the words used, but also contrary to the legal principles and rules established by decisions of your Majesty's Court at Westminster Hall for construing and giving effect to similar words to the above: that the petitioner also humbly submits that the conclusion arrived at and order made by the said two Judges are directly opposed to the decisions and practice of your Majesty's late Supreme Court of Judicature at Fort William in Bengal which established and fixed the construction to be given to similar words, viz., 'from the day' in a similar prohibitory appeal clause or proviso contained in the Letters Patent or Charter of Justice of the said Court granted by His late Majesty King George the Third, dated 26th March 1774, and which construction excluded the day on which the decree was pronounced or dated: that duly authenticated copies of the pleadings and judgments in the said suit and of the proceedings and orders above more particularly referred to have been forwarded to the petitioner's solicitor in England and have been by him deposited for reference if deemed necessary in the Privy Council Office: that the petitioner now humbly submits that his application for leave to appeal aforesaid was made within the time prescribed by your Majesty's said Order in Council, and that by the refusal of the Judges of the High Court to grant such leave, justice has miscarried and the petitioner's rights have been prejudicially affected, as the time has since expired within which the said Court is authorised and empowered to grant such leave, and humbly praying that your Most Excellent Majesty in Council will be graciously pleased to grant him special leave to appeal and to prosecute such appeal against the said judgment and decree of the said High Court of Judicature, dated the 16th June 1868, and that the said High Court may be ordered to transmit to the Privy Council Office with all due expedition a transcript of the pleadings, evidence, judgments, decrees, proceedings, and orders filed or recorded in the above-mentioned suit or for other relief in the premises. The Lords of the Committee in obedience to your Majesty's said General Order of reference have taken the said humble petition for leave to appeal into consideration, and having heard Counsel on behalf of the petitioner, their Lordships do this day agree humbly to report to your Majesty that it ought to be declared that in their Lordships' opinion the time allowed for entering the appeal had not expired when

the petition was lodged, and that the case ought to be referred back to the High Court now to admit the appeal in the usual form upon the production of sufficient evidence that the value of the property in dispute exceeds Rs. 10,000."

Her Majesty having taken the said report into consideration, was pleased by and with the advice of Her Privy Council to approve thereof and to order, as it is hereby ordered, that it be and it hereby is declared that the time allowed for entering the appeal had not expired when the petition was lodged, and that the case be referred back to the High Court now to admit the appeal in the usual form upon the production of sufficient evidence that the value of the property in dispute exceeds Rs. 10,000. Whereof the Judges of the High Court of Judicature at Fort William in Bengal for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

The 13th December 1869.

Present :

Lord Chelmsford, Sir James W. Colville, Sir Joseph Napier, and
Sir Lawrence Peel.

*Enhancement—Onus probandi—Registration in zemindar's serishta—
Reg. VIII of 1793.*

*On Appeal from the High Court at Calcutta.**

Bamasoondaree Dossee

versus

Radhika Chowdrain and others.

In a suit for enhancement of rent under Reg. VIII of 1793, the nature of the tenure is a material question, irrespectively of the question whether the rent is fixed or variable, the nature and extent of the proof which the plaintiff, zemindar, is bound to give being different according as the tenure falls within s. 49 or s. 51 of the Regulation.

The rulings of the High Court, holding that in order to bring a talook within s. 51 of the Regulation, it is sufficient to show that it existed and was capable of being registered in the zemindar's serishta at the time of the Decennial Settlement, approved of.

Where it is found that a talook is a dependent talook within s. 51, the burden rests upon the plaintiff zemindar to show that the rent is variable.

The only question upon this appeal is whether the respondent is entitled to enhance the rent of certain lands held by the appellants within the zemindary of which the respondent is the owner of a six-anna share. In the Courts below some questions were raised touching the respondent's title to her share ; the sufficiency of the notice, which is the statutory commencement of such a suit ; and the justice of the particular assessment, supposing that the rents were liable to enhancement at all ; but these are no longer in dispute.

A suit to enhance proceeds on the presumption that a zemindar holding under the perpetual settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his zemindary, according to the per-gunnah or current rates, unless either he be precluded from the exercise of that right by a contract binding on him, or the lands in question can be brought within one of the exemptions recognized by Reg. VIII of 1793 ; and it also assumes that the defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit. Before the recent modification of the

* From the judgment of Loch and Seton-Karr, J. J., in Special Appeal No. 1296 of 1864, decided 17th December 1864. 1 W. R. 339.

law (which, as Act X of 1859 had not come into operation when this suit was commenced, does not affect the case), the effect of this presumption in favor of the zemindar was undoubtedly to relieve the plaintiff in a suit for enhancement from much of the burden of proof which would have lain upon him in an ordinary suit, and to shift it upon the defendant. Reg. VIII of 1793, however, does not apply a uniform rule to all tenures and right of occupancy. It may be broadly said that it divides them into two great classes, viz., talooks within the meaning of its 51st section, and ryotty and other under-tenures for which provision is made by the 49th section. If it be conceded that the law casts upon those who claim the benefit of the latter section the whole burden of proving that their land has been held at a fixed rent for a period commencing at least twelve years before the date of the Decennial Settlement, it is clear that the 51st section is more favorable to the holders of talooks within its meaning, by imposing upon the zemindar the burden of showing that he is entitled to raise the rent either by special custom, or by contract, or by reason of certain specified conduct on the part of the talookdar. It follows that in every suit for enhancement of rent, the nature of the tenure is a material question irrespectively of the question whether the rent is fixed or variable, since upon the former question depends the extent and nature of the proof which the plaintiff is bound to give.

In the present suit the respondent has come into Court treating the defendants to the suit as ryots having a right of occupancy in certain lands at a variable rent. The case set up by the appellants was that they were shikmee talookdars; that they and their ancestors had become so many years before the Decennial Settlement; and that they held the talook at a fixed rent. In this state of things, it is obvious that the issue settled by the Principal Sudder Ameen, viz., "whether the mehal in dispute is liable to enhancement or not," is not sufficiently pointed, because, in order to determine not only that issue, but also the mode of trying it, it is necessary to determine the preliminary question whether the tenure of the appellants was or was not a talook within the meaning of the 51st section of Reg. VIII of 1793.

To the consideration of this question their Lordships will first address themselves, and they will assume that as the law stood before Act X of 1859 came into operation, the burden of establishing the affirmative of it lay upon the appellants.

The appellants produced in the Courts below two kobalas and a settlement paper, all dated long before the Decennial Settlement, in order to prove and explain the creation of their tenure; and a number of dakhillas, or receipts for rent, to show the payment of rent at an uniform and fixed rate. The Courts in India have rejected these documents as spurious, or at least untrustworthy; and their Lordships accept that finding, and propose to act upon it by leaving them out of consideration.

The fact, however, remains that the appellants derive title from Roopram and Joykristo Ghose, who are admitted in the replication to have held the lands in question under one Ramchunder Bose, from whom the zemindary passed to Kissen Singh and Gunganarain, through whom the respondent derives her title, some time before the Decennial Settlement. The fact is therefore admitted that the tenure of the appellants, whatever it be, existed before and at the time of the Decennial Settlement. The proceedings before the Collector at least prove that as early as 1797, the then holders of that tenure asserted that it was a talook capable of being separated under Reg. VIII of 1793 from the zemindary, and entered in the Collector's books as a talook paying revenue directly to Government.

It appears from these proceedings that the zemindar, although he did not at first appear, ultimately came in and resisted the demand, and that no final decision was come to. It does not appear what were the grounds of his defence, and it is quite consistent with the evidence that he admitted the existence of a talook, but contended either that it was held at a variable rent, or that, by reason of some

beneficial interest reserved to the zemindar, it ought not to be separated from the zemindary but to continue a dependent talook. Again, by comparatively modern dakhillas, produced and proved in the cause, it appears not only that rent at the uniform rate of C. R. 168-4, being the equivalent of S. R. 158-4 15-1, has been paid and received for this holding from 1245 to 1264 B. S., or from 1838 to 1857, but that in those dakhillas the holding was described as "Talook Roopram Ghose and Joykristo Ghose." The notice which was the commencement of this litigation was served in the year 1264 B. S. The jumma-wassil-bakee at page 51 is, so far as it goes, corroborative evidence of the appellant's case, inasmuch as it shows that by a document which, from its nature, would seem to have proceeded from the cutcherry of the zemindar, and was filed in the Collectorate in the year 1810, the lands in question are described as Talook Roopram and Joykristo Ghose, and as held in 1804 at a rent of S. R. 158-4-15-1. Their Lordships, however, do not lay much stress on this document, inasmuch as the respondent disputes its binding force on her, and the evidence concerning it is scanty and not very satisfactory.

The evidence, however, above stated, seems to their Lordships sufficient to establish at least a *prima facie* case that the holding of Roopram Ghose and Joykristo Ghose, which existed before and at the date of the Decennial Settlement, was a talook, and is identical with the present holding of the appellant. Such a case called for an answer from the respondent, and no answer, in the way of evidence, has been given by her to it.

It may be added, that the judgment of the High Court seems to treat the tenure as being in terms a talook, and even a talook in existence at the time of the Decennial Settlement, though afterwards it speaks of it as a talook created at some unknown period, but having a fluctuating rent. The judgment, too, of the Principal Sudder Ameen, which also allows the deduction of 10 per cent. for the expenses of collection, seems to treat the tenure as an intermediate tenure, *i.e.*, something higher than a mere ryot's hereditary right of occupancy.

It is said, however, that the tenure, if a talook, is not a talook within the meaning of s. 51 Reg. VIII of 1793, unless it is shown to have been registered under the 48th section of that Statute.

This proposition is undoubtedly supported by the cases decided on the 30th June and 10th August 1847, and reported at pages 292 and 413 of the Bengal Sudder Dewanny Adawlut Reports for that year; by the case decided on the 29th August 1850, and reported at page 451 of the reports for that year; and by the case decided on the 31st May 1859, and reported at page 607 of the reports of that year. But it is not consistent with the case decided on the 30th April 1858, and reported at page 902 of the volume of reports for 1858, in which two of the Judges, who afterwards decided the case of 1859, extended the benefit of the 51st Section to the tenure of a kudeemee ryot,—a tenure which their Lordships apprehend was not subject to be registered under the 48th Section, and was certainly not shown to have been so registered in fact. And this doctrine of the necessity of registration has been questioned and over-ruled by the cases decided in the High Court on the 28th February 1863 and 23rd January 1867, of which the first is reported at page 220 of Hay's Reports of the decision of the High Court for 1863, and the other is reported at page 63 of the 7th Volume of the Weekly Reporter.

The effect of the authorities in India seems to their Lordships to be that although for several years it was held by the late Sudder Dewanny Adawlut, that in order to bring a talook within the scope of the 51st section it must be shown to have been "registered," "recorded," or "recognized" (for all three terms are used in the cases) at the time of the Decennial Settlement, that construction is no longer recognized as law by the High Court; and that it is at all events sufficient to show that the tenure existed, and was capable of being registered at the date of the Decennial Settlement. It follows that their Lordships are not compelled by a

long course of uniform decisions to put upon the clause in question a construction narrower than that which, in their judgment, its words warrant. And applying this view of the law to the evidence, which, though scanty, is uncontradicted, they must find as a fact that the tenure of the appellant is a dependent talook within the meaning of the 51st Section of Reg. VIII of 1793.

Whether such a finding ought not of itself to be an answer to the present suit is a question which is certainly open to argument; for it may well be said that a plaintiff who brings a suit founded on his rights against a ryot in occupation of land, ought not to be allowed to convert that suit into one founded on a different right and governed by a different rule. Their Lordships, however, without pressing that point, think it sufficient to say that the effect of such a finding is to cast upon the respondent the burden of showing that the rent is variable, and that if there is no evidence of that fact in the cause her suit must fail.

It may be said, however, and that seems to have been the opinion of the High Court, that the evidence given by the appellants itself affords proof that the lands were held at a variable rent. But that opinion seems to their Lordships to be founded on a misconception of the effect of the proceedings before the Collector between 1797 and 1801. The proceeding of the 2nd September 1800 shows that whatever inaccuracy there may have been in the petition stated at page 48, (and the document appears on the face of it to be worm-eaten and imperfect,) the case really put forward at that date by the appellants' ancestors was that they were the holders of a talook at a rent of S. R. 158-4-15-1. Their Lordships are therefore of opinion that upon the evidence in the cause the respondent must be taken to have failed to show that the talook was held at a fluctuating rent, or that she is entitled to enhance the rent, which is proved to have been paid at a uniform rate for so many years.

Their Lordships have further to observe, that if the respondent's case were a true one she would have had little difficulty in proving it. She does not come into Court as the purchaser at a sale for arrears of revenue, who rests upon a statutory title with no documents to support it. She derives title from the zemindar with whom the Decennial Settlement was effected; and she has presumably a right of access to all the records of the zemindary. Her determination in such circumstances to rest upon the supposed defects in the appellant's proof and to abstain from giving evidence of the truth of her own case, affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage.

Their Lordships will humbly advise Her Majesty that the three decrees under appeal ought to be reversed, and that in lieu thereof a decree should be made dismissing the respondent's suit with costs. And the costs of this appeal must follow its result.

The 18th December 1869.

Present :

Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Joint Hindoo family—Partition—Religious trusts—Onus probandi.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Kemp and Campbell, J.J., in Regular Appeal No. 23 of 1861, dated 15th April 1862.

Sreemutty Sookheemonee Dossee and others

versus

Mohendro Nath Dutt and others.

Where the plaintiffs sued to establish a religious trust upon certain lands in the occupation of defendants (the plaintiffs and defendants being members of a joint Hindoo family), and stated that the trust was created by a deed of a date subsequent to another deed, by which the property had been partitioned by the joint family, but which latter deed, they alleged, had never been acted on, having been a mere device to protect the property from the creditors of one of its members who had become an insolvent,—it was held that it lay on the plaintiffs to make out a sufficient case to set aside the prior deed of partition, which was found to be a registered document and which was *prima facie* a good and operative deed.

A Hindoo family, consisting of persons in a near connection to each other, may separate and then re-unite; part also may re-unite, and such re-united members may impress on their re-united property by common family consent such trusts as their law will support.

This appeal is brought to reverse a decision of the High Court at Calcutta, which reversed a decree of the Judge of Beerbhoom in favor of the plaintiffs, the appellants.

The suit was instituted by the plaintiffs, who are the heirs and representatives of four out of five brothers, who formed at one time a Hindoo family joint in food, worship, and estate. The defendant Hurreenauth was the son and heir of the remaining brother. Hurreenauth during the progress of this litigation died, and is represented by his eldest son, the first-named respondent, and his younger brothers, who appear by their guardian.

The object of the suit is to establish a trust of a religious nature against the several respondents, as affecting the lands in their several occupations. The suit originally included two claims which could not properly be joined, viz., a claim in the character of Sebaitis to establish the religious trust, and one founded on the ordinary right of co-heirs in ordinary joint property.

On the objection of misjoinder being raised by the answers of the defendants, the plaintiffs yielded to it, and their plaint has in that respect been reformed, so that the suit must now be regarded as confined to one in the character of Sebaitis, to establish their claim to lands alleged to be dewuttur.

A further objection was advanced by the answers, that the plaintiffs attributed a partible character to an indivisible property by suing for four-fifths only. The Judge of Beerbhoom, admitting the correctness of this view of the nature of such property on which the objection was grounded, appears to have considered the plaint as one that might be supported by attributing to the plaintiffs the character of managers. Whether this view of the subject removed the objection may well be doubted, since such a manager has no partible, and indeed no estate in the lands; and a trust of this character should follow the general rule, and be asserted and established by a suit so framed as to decide finally and entirely the matter of the claim. Their Lordships, however, regarding the point as one which does not affect the merits of the suit, will proceed to the consideration of the case on the merits.

The plaintiffs state their case thus. By a deed of partition executed by the then members of the family in the year 1245 of the Bengal era, answering to the Christian year 1838, the trust was established: the family was then a continuing joint family, and, as such, they dedicated a portion of their joint property to the service of their gods at Brindabun, and their family mansion respectively. The alleged foundation, therefore, of the trust was the common consent so to appropriate their common property; and if this foundation failed, the trust would necessarily fall with it.

The plaintiffs state in their plaint that at an earlier period, viz., the Bengal year 1229, answering to our Christian year 1822, a deed of partition had been executed by the five brothers, who were then all living; but they sought to remove this impediment, and *prima facie* bar to their subsequent endowment, by alleging

that the partition was not acted on, nor designed to be so, being, in truth, a mere device of the family to protect its property from the creditors of one of its members, Gopeenauth, who had become insolvent.

The answer of the defendants Hurreenauth and those claiming under his title, viz., Isserchunder, the defendant Bose, and the Coal Company, on the contrary, assert (amongst other matters) the validity of this prior deed, that it was acted upon, that it was repeatedly established by decrees of several Courts of justice, that property has been distributed and titles derived and enjoyed under it. And they add that it was publicly registered.

Against the deed of 1838 they allege that it was not registered; that it was not stamped; that it had no original character of publicity; that Gopeenauth, an insolvent, is treated under it as equally entitled with the other sharers; that it makes no allusion to the previous deed; that it secularizes some property already devoted to the gods and incapable of such change or transfer; that, without any assigned reason, it constitutes the insolvent the sebaite, and sets up a divided and separate administration of trust for one common object; and for these and some other grounds, they declare this latter deed to be false and fabricated.

The contest, in the opinion of their Lordships, may be decided by declaring to which of these deeds effect should be given, for clearly they cannot both stand together.

The objections raised by the several answers to the case made by the plaintiffs, are compendiously and correctly stated at pp. 53 and 55 of the record, in the form of a statement of issues. The first, third, and fourth are those on which their Lordships will proceed to declare their opinion. A decision on these will render it unnecessary to consider the other issues.

The first, second, and third issues are, whether the case is affected by the Law of Limitation?

Whether the partition took effect in 1229 or 1245?

Whether the disputed villages were given in dewuttur or not?

The first issue was found by the Beerbhoom Court in favor of the plaintiffs, and by the High Court in favor of the respondents, the defendants.

As the plaint was originally framed, this issue was correctly introduced. When the plaint was re-formed and limited to a suit in the character of sebaites against trustees, limitation of time afforded no bar. The decisions, therefore, of both Courts on this issue are formally defective; but, as in both Courts its decision involved one on the validity of the trust itself, the substantial question was, in truth, considered and decided on the merits.

The third issue involves the second, not necessarily indeed, but as the facts are pleaded and presented in this case.

The plaintiffs do not say that a partition once took place, but that the family re-united and then made a fresh and operative partition of its then joint property, and dedicated a portion of that joint property by common consent to the service of the gods, constituting the land dewuttur.

The case of re-union and subsequent partition is not made by the pleadings, and is unsupported by the evidence.

The plaintiffs' case assumes, and assumes rightly, that a valid partition acted on, would render the second deed inoperative. A Hindoo family, consisting of persons in this near connection, may re-unite; part also may re-unite; and such re-united members may impress on their united property by common family consent such trusts as their law will support; but neither of these cases is that before their Lordships.

The burden of proof is on the plaintiffs. The deed of 1229 has the ordinary legal presumption in its favor that it is honest, and is, what it purports to be, a deed of partition. It is also prior in time. It is *prima facie* a good and operative deed. It cannot be got rid of, except by the establishment of a case by the

plaintiffs, as part of their proof, which involves all the family at that time, including those under whom they derive title, in the perpetration of a gross fraud. The deed of partition is declared by their pleading to have been designed for the express purpose and object of defeating creditors. It is, however, said in the pleadings not to have been acted on. It is not clear in what sense this phrase is used, unless it be that all outward acts of the family in acting upon it disguised an inward design at variance with that which their actions declared. There is the most abundant and indeed uncontradicted proof, that his deed was by Hurreenauth and his vendees produced, established, and made the subject of various decrees. It is unnecessary to state the instances of this, which were brought to the notice of their Lordships by Sir Roundell Palmer in his exhaustive argument. Mr. Field, in reply, did not deny that such was the case in numerous instances, but he answered that these acts were all the natural and premeditated results of the original device; that as it was a deed to defraud creditors, it would, of course, be used as such, and that such proof did not exclude the supposition that it might be considered *inter se* by the members of the family as a mere writing, working no change of property amongst them. Without expressing any opinion upon the question, whether a plaintiff supporting his case against those in possession whom he seeks to evict can be admitted to allege the inoperative character of an instrument by which his recovery would otherwise be barred, on the ground of a fraud in its concoction to which all from whom he derives title are parties,—their Lordships, treating the question as one unaffected by such estoppel and one simply of evidence arising on the facts, have to observe that as all these public acts would equally attend the enforcement of an honest and valid deed of partition, when the estates derived under it are assailed, or rights derived under it have to be enforced, they furnish of themselves no evidence of *mala fides*, and should be rather ascribed to the character given to the deed by the defendants, than to that imputed to it by the plaintiffs.

Their Lordships, therefore, are of opinion that the issue whether the partition took place under the deed of 1229 or that of 1245, should have been found in favor of the respondents, which finding should, in their Lordships' opinion, have been followed by a corresponding finding on the third, whether the villages were given in dewuttur, or, that they were not so given.

Their Lordships desire to add that their conclusion, on the effect of the whole evidence as to the subsequent deed, does not materially differ from that of the Judges of the High Court, so far as that Court regarded it as insufficient to establish a trust of this character. The altered state of the family property, their increasing expenses and diminishing means, render it improbable that the family really deliberately resolved and effected that resolution to place out of their control, by a legal dedication, so large a proportion of their remaining property. When it is considered that in this case the plaintiffs have advanced, as a part of their case, that a solemn deed, registered and purporting to effect a valid partition of their property, was designed to have no such effect, but was merely a blind for a covert purpose, their Lordships must ask, what confidence can a Court of Justice repose in their statement that one less solemn and public, and accompanied by many most suspicious circumstances, was designed to be a real and effective instrument of endowment, assented to by the whole family? Whatever may have been the real intention of some of the members of the family amongst themselves, a fact almost impossible to discover amongst the windings of guile and fraud, purchasers, at least, have an undoubted right to bind them, by these their public acts, to the fulfilment of those obligations which such public acts cast upon them. Courts ought not to credit readily assertions of hidden and fraudulent intentions, which, made to-day for one purpose, may be abandoned or denied to-morrow for the assertion of another and inconsistent one.

Their Lordships do not mean to apply the above observations to any mere

benamée transaction, or in any way to shake the authority of the numerous decisions which have established, between the apparent and the real though concealed title, that a benamée transaction devoid of fraudulent design may be made the foundation of a decree in a Court of Justice.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed with costs.

The 18th December 1869.

Present :

Lord Chelmsford, Sir James W. Colville, The Judge of the Admiralty Court, Lord Justice Giffard, and Sir Lawrence Peel.

Religious Endowment—Sebait—Ryotwaree Tenure.

*On Appeal from the High Court at Calcutta.**

Maharaneé Shibessuree Debia

versus

Mothooranath Acharjo.

Where land is dedicated to the religious services of an idol, the rents of the land constitute in legal contemplation the property of the idol, and the sebait has not the legal property but only the title of manager of a religious endowment, and cannot alienate the property though he might create proper derivative tenures and estates conformable to usage. The creation of a tenure at a fixed invariable rent would be a breach of duty in a sebait.

Quære.—Whether a transfer of a ryotwaree tenure can be effected without the consent of the zemindar or talookdar, as the case might be, the immediate successor in estate?

This appeal was heard before their Lordships *ex parte*.

The suit out of which it arose was brought in the Civil Court of Jessore by Mothooranath Acharjo, the sole plaintiff, against Maharaneé Kestomonee Debia, described as sebait of a talook dedicated to the service of the deity, and against certain other persons named in the plaint. It was brought to establish a title to certain jummas and to recover possession of certain lands connected with them, which the plaintiff claimed by purchase from four of the defendants, Mahomedan ladies, who descended from one Gouromohun Biswas, a Hindoo, on whom, as the plaintiff avers, the right to the jummas transferred to him was originally conferred.

The present appellant represents the interests as guardian of her infant, which at the commencement of the litigation were represented by the Maharaneé Kestomonee Debia, since deceased, his grandmother, appointed his guardian under the direction of his deceased father. The tenure, whatever its strict character, whether ryotwaree or of a higher degree, is one held under the infant's title as superior owner of the lands.

The jummas were claimed by the plaintiff as mourusee (hereditary), and also as held at a fixed invariable rent.

The appellant, the sebait, denies the hereditary character of the tenure, the invariable quality of the rent, and the purchase itself. She stated that the tenants of the jummas, from whom the plaintiff asserted that he had purchased, had not any hereditary tenure, and that they had surrendered such interest as they possessed to the appellant, before the time of the alleged sale to the plaintiff.

Of the four defendants, the alleged vendors, three denied the sale and affirmed

* From the judgment of Bayley and Campbell, *J. J.*, in Regular Appeal No. 233 of 1860: not reported.

the surrender ; whilst the fourth affirmed the sale and denied the surrender, agreeing, three of them with the appellant, and one with the plaintiff. They all, however, insisted on the hereditary character of their tenure.

The talook itself with which these jummas were connected by tenure was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The sebait had not the legal property, but only the title of manager of a religious endowment.

In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.

The sale under which the plaintiff claimed was established by the decree of Mr. Seton-Karr, the Judge of the Civil Court of Jessore, who tried the cause.

On appeal from his decision, it was affirmed by the High Court.

Two Courts, therefore, have established the sale to the plaintiff, and have decided against the validity of the alleged surrender.

Into the sufficiency of the evidence to support those several findings, their Lordships do not propose to enquire. Their judgment on this appeal will be confined to the question, whether a tenure held at a fixed invariable rent has been established by the evidence.

The appellant insisted on the authority of Prosonocoomar's case,* which she quoted in her answer and which was relied on in argument at the Bar, that a transfer of such a tenure as that set up in his case, which she termed a ryotwaree tenure, could not be effected without the consent of the zemindar or talookdar, as the case might be, the immediate successor in estate. The Judges in both Courts decided that this tenure was one at a fixed rent, and that the case in question did not apply. On the question of its vendible character without the condition of the superior's consent, they pronounced no opinion. A question of this latter character is likely to be one so much affected by modern and local usage that it would be unsafe for an ultimate Court of Appeal to express an opinion upon it as a mere dry legal question turning on the incidents of hereditary tenure. Their Lordships would be most reluctant to decide on an *ex parte* appeal any question of general consequence not absolutely necessary to the decision of the particular case.

If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings and especially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them.

Their Lordships think that there is no satisfactory proof in the cause that these jummas were ever held at a fixed invariable rent. One important element in this enquiry has been wholly lost sight of, viz., the nature of the sebait title and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a sebait, and is not therefore presumable. Where variableness of jumma is the normal condition, the mere naming a sum certain in connexion with the grant of a descendible tenure does not impart of itself fixity to that sum, in the absence of positive words or of other evidence to show that such was the original design. In this case we start with a double presumption against the rent having been fixed, viz., that founded on the ordinary character of rents, and that derivable from the special character of the tenure. Another presumption arises in this case, that the rent was variable, from the circumstance that the only instrument which asserts positively that the jumma is to be at a fixed rent is one of the three documents on which the signature of Mr. Skinner, the Magistrate, was fabricated. This fraud in tampering with evidence throws additional doubt upon this part of the case.

The terms of the surrender relied on by the High Court do not state that the rent is fixed and invariable. That document, on which the High Court laid

* S. D. A. R., 1855, p. 14.

great stress, appears to their Lordships to afford but a slight presumption that the sebit adopted and admitted that description of the tenure on which the surrenderer relied, though by accepting the surrender she acquiesced in the use of that description by them; and as the instrument does not say that the rent was fixed as well as the tenure hereditary, the implied recognition of the right can be raised no higher than the actual language warrants. The tenure therefore at a fixed rent was, in the opinion of their Lordships, not proved. The acts of the plaintiff cannot be ascribed to a valid title to possession under the circumstances of this dispute, since the only title insisted on in the contest between him and the superior, viz., the right to hold at a fixed rent, is not established, and the general right of the zemindar or talookdar to receive the collections, subject to account, till a valid claim to an intermediate tenure be established must prevail, *ad interim* at least, until the plaintiff, if he think it for his interest to rely on the mourusee title at a variable rent, establish it by a suit founded on that title, in which suit the true nature of the tenure and its freedom from the conditions of the superior's assent to the transfer of the tenure, may be ascertained. Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed and the decision appealed against reversed, and in lieu thereof the respondent's suit be dismissed with costs, and their Lordships think that the appellant should have the costs of the appeal.

The 2nd February 1870.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Succession—Impartible Estate—Separate Estate.

On Appeal from the High Court at Madras.

Stree Rajah Yanumula Venkayamah
versus

Stree Rajah Yanumula Boochi Venkondora and another.

The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession of separate estate.

The Shivagunga case explained.

The question on which the parties in the suit out of which this appeal arises, joined issue and went to trial, was whether the family of which the plaintiff and the appellant's husband were members was an undivided or a divided Hindoo family.

Both the Courts below, giving effect to the presumption of Hindoo law which the evidence failed to rebut, have decided, and in their Lordships' judgment have properly decided, that issue in favor of the plaintiff. The general *status*, therefore, of the family as an undivided family has been ascertained.

Accordingly, the strength of the argument of the learned Counsel for the appellant has been directed to show that this case should be governed by that in the 9th Volume of Moore's Indian Appeals, which is generally known as the Shivagunga case.* They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the Shivagunga case,

* 2 W. R. P. C. 81; 1 Suth. P. C. R. 520.

the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided.

The authority invoked, however, affords no ground for this argument. The decision in the Shivagunga case will be found to proceed solely and expressly on the finding of the Court that the zemindary in question was proved to be the self-acquired and separate property of Gowarry Vallaba Taver. It assumes that if this had not been so, the decision would have been the other way. At page 589, the judgment says :—

"Hence, if the zemindar, at the time of his death, and his nephews were members of an undivided Hindoo family, and the zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar, at the time of his death, was separate in estate from his brother's family, the zemindary ought to have passed to one of his widows, and falling his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible, but Gaurivallabha's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is, that even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the zemindary was to be treated as self-acquired separate property, or as part of the common family stock."

Again, at page 605, it is said :—

"The substantial contest between the appellant and the respondent is, as it was between Unga Mootoo and the respondent's predecessors, whether the zemindary ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions :—

"1. Were Gaurivallabha and his brothers undivided in estate, or had a partition taken place between them?

"2. If they were undivided, was the zemindary the self-acquired and separate property of Gaurivallabha? And if so—

"3. What is the course of succession according to the Hindoo law of the south of India of such an acquisition, where the family is in other respects an undivided family?"

And at page 606, their Lordships, dealing with the second of these questions, say :—

"The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the zemindary as the self-acquired property of Gaurivallabha. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's 'Hindoo Law.'"

It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India.

Has it then been shown that, though the family was undivided, this estate was in fact the separate property of the appellant's husband?

The evidence concerning the original grant of it, and the terms on which it was held, is extremely scanty. The most material document is the Exhibit A at page 10 of the record; which as the statement of the then zemindar, made on an official requisition at a time when he had no interest in giving, nor apparent motive for giving, any but a true account of the history of the estate and of the custom of his family, seems to be in every way worthy of credit. Looking at that document, their Lordships are of opinion that the estate was in its inception part of the common family property, though impartible, and therefore with certain qualifications enjoyable by only one member of the family at the time. It appears to have been substantially granted to the common ancestor of the family, the Dewan

Bapam Dhora; though with his consent and for some undisclosed reason, it was put into the name of his third son, Jogappa Dhora. The document states—

“As the issues which the said Saraba Raghavaraz had, had failed, and as he had no near relatives and heirs, he made up his mind to give up the said Totapalli Taluk attached to Reghavaraz Sima to my said ancestor Bapam Dhora, and the Joddangi Taluk to Boggula Gannamreddi Dhora, and at the time of his death he executed pattas in the names of Jogappa Dhora, the third of the four sons of Bapam Dhora, according to his consent, and of Boggula Gannamreddi Dhora transferring to them respectively the taluks of Totapalli and Joddangi, and authorizing them and their posterity to enjoy them as jaghirs as he had done.”

That the grant was to the family of Bapam Dhora is made more apparent by what follows:—

“From that time Jogappa Dhora enjoyed the taluk (of Totapalli) for forty-nine years. In his time he had managed the affairs of the Taluk and lived at Totapalli, and provided Vasatis (landed gifts) to his three brothers, caused Pedda Mallu Dhora to live in the village of Vajrokatam, Rajani Dhora in Kottange, and Chinna Mallu Dhora in Nellipudi, and thus maintained them.”

These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate in favor of the junior members of the family, who, but for the impartibility of the estate, would be co-parceners with him.

It is argued, however, that whatever may have been the original nature of the property, the effect of what took place when Bapam Dhora supplanted and excluded Mallappa Dhora was to make it a new and fresh acquisition of Bapam Dhora; just as in the Shivagunga case, the new grant of the escheated zemindary to Gowarry Vallaba Taver was held to constitute a new and separate acquisition by him, though a member of the family of the former zemindars. Their Lordships are however of opinion that there is a clear distinction between the two cases. In the Shivagunga case the zemindary had escheated to Government, which was free to deal with it as it chose. By a new sunnud it granted it to the Taver, conferring a legal title which none could dispute. What was done in this case? The document A states—

“On his death Jaggappa Dhora's son, Mallappa Dhora, after joining the people called ‘Desastula,’ fell out with Sri Maharaz, and enjoyed the Taluk as Mokhassa without his interference, by causing much disturbances; consequently my senior paternal uncle, Bapam Dhora, went to Peddapuram, visited Sri Maharaz, represented to him that in the event of your affording me assistance I will turn out the said Mallappa Dhora, enjoy Totapalli Taluk, paying the jamabundi amount formerly fixed by Rajam Dhora, and thus obtained the assistance of some Sibbandis (warriors), came and drove out Mallappa Dhora, entered Totapalli, and took possession of it, and paid 2,700 karuku pagodas for one year in full.”

This account shows no legal forfeiture; no fresh grant by any person competent to grant a legal title. It only shows that on a dispute between Mallappa and the superior, another member of the family came in, and with the strong hand and in concert with the superior, succeeded in ousting Mallappa and in assuming the position and rights of the zemindar. And the document itself shows that the adopted son and successor of Bapam Dhora himself considered this as no substantial change in the nature or tenure of the property; that he still traced his title to the first Bapam Dhora by virtue of the original grant; and spoke of the talook as having been enjoyed by six generations of his family during the period of 179 years.

Nor is it immaterial to observe what he states as regards the practice of succession observed in the family. He says:—

“As regards the practice of succession observed in our family, I have to state that if the holder of the taluk has two or three sons, the eldest of them enjoys the estate, while the rest being provided with vasatis, conduct themselves according to his will, but it has never been the practice of dividing the Taluk among brothers. If the owner of the land has no issue, a competent person out of his nearest cousins is selected, and the Taluk put in his possession.”

Their Lordships are therefore of opinion that, even if the case made for the appellant at their Bar had been made in the Courts below (which apparently it

was not) it must have failed; and that no ground has been shown for disturbing the decrees under appeal. They must therefore humbly advise Her Majesty to dismiss this appeal, with the costs of the respondent on whose behalf an appearance has been entered here.

The 3rd February 1870.

Present :

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Limitation—Title to possession.

*On Appeal from the High Court at Calcutta.**

Beer Chunder Jobraj

versus

The Deputy Collector of Bhullooah.

Where a plaintiff brought a suit in 1856 to recover landed property which was in the possession of the defendant since 1845 and at the time of the institution of the suit, it was held that, before the plaintiff could recover, he must prove, first, possession within 12 years before suit; and secondly, title to possession.

The argument in this case has occupied such a length of time, that their Lordships have been able to give it their consideration and are of opinion that it may be disposed of on the following short grounds :—

The appellant commenced his suit in 1856 : he sought the recovery of certain lands as belonging to Pergunnah Tishnah. A part, viz., equal to 18 dunes of the lands he seeks by his plaint, was ordered to be restored to him in May 1845. Mr. Abercrombie made this order : he ordered that these should be restored to the claimant, and that the detailed particulars of the remaining disputed lands be inserted in the general settlement report.

Possession was given according to the order : from May 1845 till 1856 there has been undisputed possession of the disputed lands by the Government : for the delay in the institution of the suit no reason is given.

There is satisfactory proof of the suit of 1811 and of the proceedings of 1824 having been in respect of part of the lands now in question : there is strong evidence to show that the Government was then in possession.

The Civil Court Ameen of the Sudder division made a report which their Lordships have been asked now to adopt, but it was rejected at the instance of the appellant as well as at the instance of the respondents. The appellant petitioned against it.

The Moonsiff's report was *ex-parte*.

Their Lordships, however, do not consider it necessary to determine whether it ought not to have been received.

It would certainly have been more satisfactory if the Principal Sudder Ameen had recorded his reasons for disagreeing with the Ameen's report ; but, be this as it may, as the Government has admittedly been in possession since 1845 and are still in possession, their Lordships are of opinion that it was essential for the appellant to have proved two things,—first, possession within twelve years before his suit ; and secondly, title to possession :—of title to possession there is no

* From the judgment of Kemp and Campbell, *J.J.*, dated 11th February 1864, in Regular Appeal No. 103 of 1863 : not reported.

proof;—of possession there is not satisfactory proof either:—there is nothing to connect possession with the kubooleuts or any of them. Some of the independent witnesses carry back the possession of the Government for more than twelve years before the suit, and the evidence to the contrary on the part of the appellant is far countervailed by that of the respondent. The *res gestæ* from 1811 downwards are all consistent with possession by Government, and inconsistent with possession by the appellant. The *onus* of proof rests on the appellant, and he has failed to discharge that *onus*. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

The 21st February 1870.

Present :

Lord Westbury, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

*Jurisdiction—Sale of zemindaree rights of Government—Auction purchaser—
Talookdar—Reg. XXI of 1822.*

*On Appeal from the High Court at Calcutta.**

Khajah Assanoollah

versus

Obhoy Churn Roy and others.

The Government purchased the zemindaree rights in a pergunnah under Reg. XXI of 1822 at a sale for arrears of Government revenue and re-settled one of the talooks in the pergunnah, which talook had been created subsequent to the Decennial Settlement, with the plaintiffs as talookdars. Subsequently, and after the expiration of the terms for which they had re-settled with the plaintiffs, the Government sold their zemindaree rights to the defendant, who ejected the plaintiff. Plaintiff thereupon sued the defendant in the Collector's Court under cl. 6 a. 23 Act X of 1859.

HELD, that the suit was properly brought under Act X of 1859.

HELD, further, that it was the intention of Government to retain talookdars in possession of their lands during the subsistence of their tenures subject to the condition of having their rents enhanced according to the pergunnah rates; and as in this case the proceedings which were taken by the Government showed that they did not cancel the plaintiffs' tenure, the defendant, who purchased from the Government, could not eject the plaintiffs, who were entitled to retain possession subject to a liability to enhancement.

Under the Sale Law as it existed before 1822, a talookdar could not be dispossessed at the will of the purchaser; he was at most liable to pay the full pergunnah rate, and could only be ejected after refusal to pay the enhanced rate; but under Reg. XI of 1822, dependent talooks created subsequent to the Decennial Settlement were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of Government revenue, unless they fell within the class contemplated by the 32nd Section of that Regulation.

Where an auction purchaser under Reg. XI of 1822 intends to cancel a talookdaree tenure (a power which he might or might not exercise) he must take some clear step to declare the avoidance or cancellation of the tenure.

The appellant is the present owner of the zemindaree right in that portion of an extensive estate situate in Zillah Tipperah, and called Buldakhal, which includes the lands and villages that form, or once formed, a talook known as Talook Poorba Auttee. This talook was created subsequently to the Perpetual Settlement, and in the year 1803, by Mirza Hossein Ali, the then zemindar of that portion of the estate, in favor of Bishonath Roy, the father or ancestor of the respondents.

* From the decision of Loch and Seton-Karr, *J. J.*, dated 23rd March 1865, in Regular Appeal No. 361 of 1864.—2 W. R., Act X rulings, p. 81.

It was an hereditary transferable talook, to be held at a fixed perpetual rent of Rs. 1,550 and 4½ annas. The estate of Buldakhal, at the date of the Revenue sales afterwards mentioned, seems to have comprehended many other talooks, of which some had existed at the date of the Decennial Settlement; but the greater part had been created subsequently to the Permanent Settlement of the mehals in which they were situated.

In January 1835 an 8 annas share, and in May 1836 a 2 annas share, of the Buldakhal estate (the latter being the portion which included the talook in question), were sold for arrears of Government revenue; and in both instances the Government itself became the purchaser, and thus acquired all those rights which the Sale Law then in force gave to a purchaser of a zemindaree sold for arrears of revenue.

In the exercise of those rights it proceeded to make a re-settlement of the estate, and proceedings, extending over a considerable period of time, were had against the talookdars, including Bishonath Roy or his representatives. These will hereafter be more particularly considered. At present it is sufficient to state that several settlements were ultimately made with the respondent Obhoy Chunder Roy, on behalf of himself and the other respondents, in respect of the lands comprised in Talook Poorba Auttee, viz., a settlement for one year in August 1841; a settlement for twenty years in August 1842; and a second settlement for one year in April 1862. On the expiration of this third settlement, the Government Collector gave notice to the ryots and cultivators of the lands comprised in the talook not to pay their rents to any person except the Government; and on the 23rd November 1863, the zemindaree rights of the Government in the lands were put up for sale, subject to the rights (if any) of the talookdars, and were purchased by the appellant.

In March 1864 the respondents commenced the suit, out of which this appeal arises, against the appellant. It was founded on their alleged dispossession from their talookdary rights in the lands, and was brought under cl. 6 s. 23 Act X of 1859 before the Collector. That officer, by his decree, dated the 7th June 1864, dismissed the suit; but his decision was reversed by the High Court on the 23rd March 1865, and the appeal is against the latter decree and a subsequent order rejecting an application for review of judgment.

The contention between the parties is shortly this. The respondents assert that their talook is still a subsisting tenure, and that, although it is now, as they admit, subject to enhancement of rent by means of proceedings properly taken by the zemindar for that purpose, it gives them a right of possession or occupancy which he is not entitled to disturb. The appellant, on the other hand, insists that the Government, after the sale for arrears of revenue, and in the exercise of its powers as purchaser, effectually cancelled and destroyed the tenure created in favor of Bishonath; that the settlements which it afterwards made with Obhoy Churn were in the nature of mere temporary ijarahs or farming leases; and that the last of these having expired, it was open to the Government, and is now open to him, the appellant, to resume the possession of the lands, and either to make the collections from the ryots and actual cultivators himself, or to make a new lease or settlement with the highest bidder. He further contends that if the proceedings of Government have given to the respondents any equity for a re-settlement, that equity is one which cannot be enforced in a suit brought under the special statutory jurisdiction given by Act X of 1859 to Collectors in cases of dispossession. It is admitted that the appellant, as purchaser, can claim no higher rights than those possessed by the Government at the date of the sale to him; and that, if Government had then waived or lost the right which it may have had originally to cancel the tenure, he cannot now assert such a right.

The questions argued at their Lordships' bar were—

1.—Whether the Government, upon the true construction of Reg. XI of 1822

(the Sale Law under which it purchased), ever had the right to cancel or destroy this tenure.

2.—Whether, assuming that right to have existed, it was ever in fact exercised whilst it was capable of being exercised.

And lastly, whether the suit, whatever be the rights of the respondents, has been properly brought under cl. 6 s. 23 Act X of 1859.

Their Lordships will consider these questions in the order in which they have just been stated.

The general policy of the Revenue Sale Laws that have been passed since the Perpetual Settlement has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They therefore gave, or sought to give, to the purchaser, the power of abrogating all engagements made by the defaulting zemindar or his predecessors since the settlement, whereby the zemindaree rents and profits, which were the security to Government for the due payment of its revenue, were diminished. The Indian Legislature, however, has not uniformly tried to effect this general object by precisely the same means. The various statutes which it has from time to time passed for the purpose differ in the language of their provisions and in the stringency of the powers conferred by them. Those enactments, at least those that were passed before 1840, are reviewed in the very able paper signed by Mr. Colvin, which is printed in this record. It was called forth by a difference of opinion between the Board of Revenue, of which he was then the secretary, and Mr. Dampier, the Commissioner of the Division in which this estate was situate; Mr. Dampier taking the view now contended for by the respondents, viz., that the talookdars, whether their tenures were created before or after the Decennial Settlement, were entitled to retain possession of their lands, subject, save in certain exceptional cases, to the liability of enhancement of rent according to the pergunnah rates. And this, as is shown by the record at page 17, was the view of the law expressed by the Board of Revenue itself in May 1833. Mr. Colvin's letter was written in 1836 on behalf of the Board of Revenue to combat and over-rule this construction of the law.

To some of Mr. Colvin's conclusions their Lordships give an unqualified assent. They concur with him in holding that, under the Sale Law as it existed before 1822, a talookdar could not be dispossessed of his lands at the will of the purchaser at the sale; that he was at most liable to pay the full pergunnah or district rate for them, and could only be ejected from them if he finally declined to hold them at the enhanced rent. They are also of opinion that Mr. Colvin is right in holding that under Reg. XI of 1822 the law respecting dependent talooks created subsequently to the settlement was, "that such talooks were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of revenue," unless they fell within the class contemplated by s. 32 of that Regulation. The language of s. 31 is very distinguishable from that used in the earlier Regulations. It provides that "all tenures which may have originated with the defaulter or his predecessors shall be liable to be avoided and annulled." On the other hand, s. 5 Reg. XLIV of 1793 provides only that the *engagements* which the defaulting proprietor may have contracted with dependent talookdars, as also all leases to under-farmers, shall stand cancelled; and that the purchasers shall collect *from the talookdars* rent according to the full pergunnah rates. The effect, therefore, of the earlier statute was to cancel a farming lease, but to keep alive the talookdar's tenure though at a rent liable to enhancement.

Hence the question between the Commissioners and the Board of Revenue in 1836 was, as the question between the parties on this part of the case now is, whether talookdars of the class of Bishonath Roy were within the protection of the 32nd section. Mr. Colvin contends that "the Mofussil talookdars spoken

of in that section, being described as persons having a hereditary transferable *property* in the lands or in the rents thereof," must be taken to be such talookdars as are described by s. 5 Reg. VIII of 1793 who, at the time of the Decennial Settlement, might have engaged directly with Government for the payment of the public revenue assessed on their lands ; and even after the settlement, and until that right was taken away by Reg. I of 1801, might have claimed to be separated from the estate of the zemindar. He argues that the term does not include dependent talookdars whose tenures have been created since the settlement, they being talookdars who, under s. 7 Reg. VIII of 1793, are declared not to have the *property* in the soil, but to be mere lease-holders.

Their Lordships are of opinion that there is considerable weight in the reasoning of Mr. Colvin, which receives some corroboration from that portion of s. 14 Reg. I of 1801 which declares that the rules regarding separable talooks contained in Reg. VIII of 1793 were never meant to apply to any new talooks constituted since the Decennial Settlement. Considering, however, that they have been referred to no case in which the clause now under consideration has received a judicial construction, that the question was not raised or considered in the Courts below, and that its determination is not absolutely essential to the disposal of this appeal, they abstain from expressing any further or more decided opinion concerning it.

They will assume that an auction purchaser under Reg. XI of 1822 had the option of cancelling and avoiding such a talookdaree tenure as that of Bishonath Roy which Mr. Colvin claims for him. But granting this, they are of opinion that the power was one which he might or might not exercise ; and that, in conformity with the principle of the decision in Ranee Surnomoyee's case (10 Moore's Indian Appeals*), it was incumbent on the Government in this particular case to take some clear steps for the purpose of declaring the avoidance or cancellation of the tenure.

Their Lordships will therefore proceed to consider the second question raised on this appeal, viz., whether the Government has in fact exercised its power of cancellation whilst it was capable of so doing.

Mr. Colvin's letter being the expression of the views of the Board of Revenue, is not merely an able exposition of the law ; it is also the best evidence we can have of what the Government, in February 1836, intended to do in respect of the dependent talooks forming part of this estate. Nor is it possible to read the last paragraphs of that letter, beginning with the 52nd, without coming to the conclusion that it was then the intention of Government, whatever might be their extreme rights, to make settlements with the talookdars of all classes, putting them, or at least all who were not specially protected against enhancement of rent, in the position which they would have held of *right* before 1822, viz., that of under-tenants entitled to retain possession of their lands during the subsistence of their tenure, subject to the condition of having their rents enhanced according to the pergunnah rates. The letter, no doubt, contemplated the exercise of the extreme rights of Government if the talookdars should not, within a certain time, enter into the new settlement. But the primary object of Government was to settle with the talookdars ; and if the settlement were made, the tenure would continue to exist ; though as talooks held at variable instead of fixed rents. Nor is it improbable that, considering the power and influence which the hereditary possession of land seldom fails to give in India, especially in a remote district like that in which this estate is situate, the Revenue officers felt that such an arrangement would be beneficial to Government, as well as to the talookdars.

Do, then, the subsequent proceedings show that Government departed from this its original intention ?

In considering these proceedings, it should be borne in mind that the position

of Government in one respect differed from that of an ordinary purchaser at a sale for arrears of Government revenue ; inasmuch as s. 36 Reg. XI of 1822 expressly declares that an estate purchased by Government shall be subject to the rules applicable to the management of ordinary malgoozaree mehals held khas. By virtue of this enactment the Revenue officers had over this estate in 1833 all the powers conferred upon them by Reg. IX of 1825, and by the provisions of Reg. VII of 1822, which by s. 2 of the former Regulation are extended to and made applicable to estates held khas and the other lands there mentioned. It follows that Government, though its rights either in respect of cancelling the under-tenures or of enhancing the rent were not higher than those of an ordinary auction-purchaser, may have been at liberty to assert those rights by a procedure not open to a private individual.

Their first proceeding was, however, one which every zemindar is bound to make the foundation of a suit for enhancement of rent. It was the issue, on the 7th June 1836, of a notice under s. 9 Reg. V of 1812, claiming a rent raised at discretion to the sum of Rs. 5,000. This led to the proceeding of Mr. Allen of the 19th June 1837.

Great stress has in the argument for the appellant been laid upon this proceeding. Their Lordships, however, feel that in considering its effect they should look to its nature, and not to expressions loosely used in it, such as "it be ordered that the talook be set aside," or the like. And if this be done, it will be found that it is nothing but an ordinary proceeding for the enhancement of rent against a person admitted to be in occupation of the lands. On such a proceeding it is open to the defendant to contest either the right to enhance at all, or the reasonableness of the rent claimed, or both ; without, however, admitting the reasonableness of the rent claimed if he expressly contests only the right to enhance. The talookdar in this case adopted the former course by asserting that his talook was one at a fixed rent, incapable of enhancement even by an auction-purchaser. And the proceeding determined this point against him. It is in fact such a proceeding as Mr. Colvin in the 56th paragraph of his letter assumes to have been already taken.

Again, it appears that in July 1836, and therefore between the date of the notice and that of Mr. Allen's proceeding, the Government had given orders for the measurement and survey of the lands. This shows that the rent of Rs. 5,000 was a mere arbitrary claim made in order to try the right to enhance : and that the proceeding of 1837 determined neither the rent to be fixed nor the person with whom the settlement was to be made.

The measurement and survey were not completed until the Bengal year 1245 ; and on the 3rd September 1839, the Commissioner wrote to the Collector that notice was to be issued to the talookdars to appear within fifteen days and make settlements for twenty years at the pergunnah rates, and that if they did not appear ijarah settlements would be made *after annulling their right*. These directions clearly imply that up to that time the intention of Government was still not to destroy the talookdaree tenures, unless the talookdars should finally refuse to engage at the pergunnah rate.

Accordingly the notice at page 37 of the record was issued to the heirs of Bishonath on the 5th December 1839. It invited them to come in and make a talookdaree settlement within fifteen days, in default of which they were to be held not to have any rights as putnee talookdars of the late zemindar, or of possession.

From Mr. Money's proceeding it appears that the respondent Obhoy Churn did not come in under this notice to accept the settlement ; that he still struggled either for a settlement at the old rate or for delay ; and that Mr. Money accordingly as Collector granted an ijarah for twenty years to a stranger, Sheikh Aeenooddeen. This arrangement, however, was subject to confirmation by higher

authority, and from the recital at page 107 we learn that on the 24th November 1840, the Commissioner refused to confirm it *in integro*, and reduced the lease for twenty years to one for a single year. And at page 42 we have a further notice to the heirs of Bishonath, dated the 23rd February 1841, calling upon them once more, in anticipation of the expiration of the one year's lease to Aeenooddeen, to enter into a talookdaree settlement at the pergunnah rate, under pain, in case of default, of losing all right to the talook.

The appellant relies much on the interruption, or assumed interruption, of the respondent's possession by the grant of this lease to Aeenooddeen; and if the original lease for twenty years had been confirmed, and possession had followed thereon, the inference that the old talookdaree tenure had been cancelled would have been strong.

The Commissioner's letter of the 24th November 1840, was not, however, produced *in extenso*; and it is to be presumed that the appellant, who derives title from the Government, would have found means to produce it, had it supported his case. Its effect, as stated on the record, coupled with the fact of the subsequent notice to the heirs of Bishonath, which treats their talookdaree tenure as still subsisting, leads their Lordships to the conclusion that the lease for a year to Aeenooddeen was nothing but one of those temporary arrangements pending negotiations for a final settlement of the revenue which the Revenue authorities were, under Reg. IX of 1825, competent to make. Certain it is, that the result of this second notice was that, in 1841, the respondent Obhoy Churn entered into the first engagement for one year; and in 1842 made the engagement for twenty years; and the kuboolents and other documents executed on both occasions support the conclusion that those settlements were talookdaree and were made with him as representing the persons entitled to the hereditary possession of the lands under the old talook granted to Bishonath, although their continuing tenure may not be described with strict accuracy as a putnee talook.

It is further to be observed that, if the Government had not effectually annulled the tenure before 1842, it had then lost its statutory right to do so; since Reg. XI of 1822, upon which that right depended, was repealed by Act XII of 1841; and that it is therefore unnecessary to consider the subsequent proceedings. The conclusion, then, to which their Lordships have come upon this part of the case, is that the Government, whatever may have been its powers, did not, in fact, cancel or destroy the tenure, but left the talookdars in the position in which they would have been, as of right, under the old law; reducing their tenure from a talook at a fixed to one at a variable rent. And it follows from this that the appellant, though he has the right to bring a suit properly framed for the further enhancement of the rent, is not entitled to disturb the possession of the talookdars, or to let the land over their heads to the highest bidder.

Upon the last question their Lordships think it sufficient to say that the suit being one between under-tenants claiming a right to the possession of lands of which they have been dispossessed, and their zemindar who disputes their right of possession, has, in their Lordships' judgment, been properly brought under cl. 6 s. 23 Act X of 1859.

Their Lordships, therefore, being of opinion that no ground for disturbing the decree under appeal has been established, will humbly advise Her Majesty to dismiss the appeal with costs.

The 22nd February 1870.

Present :

Sir James W. Colville, The Judge of the High Court of Admiralty,
Lord Justice Giffard, and Sir Lawrence Peel.

Partnership—Sleeping partner.

On Appeal from the late Sudder Court at Agra.

Bunarsee Doss

versus

Gholam Hossein, Muddun Mohun, and Lalla Bholanath.

Every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognized trading name of the firm for a transaction incident to the business of the firm, although his name does not appear upon the face of the instrument, although he be a sleeping and secret partner. In order to take a case out of these principles of the general law, it must be shown that the holder of the bill knew at the time he received it that the transaction was the private affair of a single partner.

This is an appeal from a decree of the late Sudder Dewanny Adawlut at Agra which confirmed the decree of the Principal Sudder Ameen of the City of Cawnpore. The decree was in favor of Hossein and Mohun, who were plaintiffs in the Court below; Palmer and Rampershad were defendants. Bholanath has since purchased the interest of Hossein and Mohun, and is in fact the only respondent: the representative of Rampershad is the only appellant.

Rampershad entered into partnership with Palmer on the 8th June 1861. Palmer at that time carried on business at Allahabad, Cawnpore, and other places; and on 6th October 1860 had entered into a contract with a Railway Company to supply them with a certain number of sleepers, and, in order to fulfil his obligation, entered into a subsidiary contract with the respondent Hossein and Mohun for the purchase of a certain number of sleepers. This contract was in fact only an oral one. The delivery of the sleepers began on the 15th January 1861 and continued till the 14th July. A considerable number were delivered after the 8th June, which was the date of the partnership between Palmer and Rampershad.

In December 1861, Hossein and Mohun applied to Palmer for payment of their account. Palmer thereupon gave them five hoondees or drafts, one for Rs. 10,000 and four for 2,500 each—20,000 in the whole—in part payment of their account. The drafts were dated, "Cawnpore, the 31st December 1861," and drawn by "Palmer and Co." upon "Palmer and Co. at Calcutta." These bills were all dishonored and protested; but, subsequently, it appears that the respondents received Rs. 10,000 on account. There was a further sum of Rs. 24,000 due to the respondents, the value of articles purchased from them by Palmer, while in partnership with Rampershad, in the course of business.

The total amount of the debt, therefore, from Palmer and Co. to Hossein and Mohun was Rs. 34,000-4-3. For this amount they brought their suit, on the hoondees and on a general statement of account, against both Palmer and Rampershad, and also against Ram Putt and Kalloo Mull (to whom, after the bills had been dishonored, the respondents had been referred for payment), in the Court of the Principal Sudder Ameen of Cawnpore and obtained a decree in their favor; from which an appeal was presented, by Rampershad alone, to the Sudder Dewanny Adawlut at Agra, which confirmed the decision of the Principal Sudder Ameen.

From these decisions the representative of Rampershad and guardian of his minor son has appealed to this tribunal. The principal grounds upon which th

that the partition was not acted on, nor designed to be so, being, in truth, a mere device of the family to protect its property from the creditors of one of its members, Gopeenauth, who had become insolvent,

The answer of the defendants Hurreenauth and those claiming under his title, viz., Isserschunder, the defendant Bose, and the Coal Company, on the contrary, assert (amongst other matters) the validity of this prior deed, that it was acted upon, that it was repeatedly established by decrees of several Courts of justice, that property has been distributed and titles derived and enjoyed under it. And they add that it was publicly registered.

Against the deed of 1838 they allege that it was not registered; that it was not stamped; that it had no original character of publicity; that Gopeenauth, an insolvent, is treated under it as equally entitled with the other sharers; that it makes no allusion to the previous deed; that it secularizes some property already devoted to the gods and incapable of such change or transfer; that, without any assigned reason, it constitutes the insolvent the sebaite, and sets up a divided and separate administration of trust for one common object; and for these and some other grounds, they declare this latter deed to be false and fabricated.

The contest, in the opinion of their Lordships, may be decided by declaring to which of these deeds effect should be given, for clearly they cannot both stand together.

The objections raised by the several answers to the case made by the plaintiffs, are compendiously and correctly stated at pp. 53 and 55 of the record, in the form of a statement of issues. The first, third, and fourth are those on which their Lordships will proceed to declare their opinion. A decision on these will render it unnecessary to consider the other issues.

The first, second, and third issues are, whether the case is affected by the Law of Limitation?

Whether the partition took effect in 1229 or 1245?

Whether the disputed villages were given in dewuttur or not?

The first issue was found by the Beerbhoom Court in favor of the plaintiffs, and by the High Court in favor of the respondents, the defendants.

As the plaint was originally framed, this issue was correctly introduced. When the plaint was re-formed and limited to a suit in the character of sebait against trustees, limitation of time afforded no bar. The decisions, therefore, of both Courts on this issue are formally defective; but, as in both Courts its decision involved one on the validity of the trust itself, the substantial question was, in truth, considered and decided on the merits.

The third issue involves the second, not necessarily indeed, but as the facts are pleaded and presented in this case.

The plaintiffs do not say that a partition once took place, but that the family re-united and then made a fresh and operative partition of its then joint property, and dedicated a portion of that joint property by common consent to the service of the gods, constituting the land dewuttur.

The case of re-union and subsequent partition is not made by the pleadings, and is unsupported by the evidence.

The plaintiffs' case assumes, and assumes rightly, that a valid partition acted on, would render the second deed inoperative. A Hindoo family, consisting of persons in this near connection, may re-unite; part also may re-unite; and such re-united members may impress on their united property by common family consent such trusts as their law will support; but neither of these cases is that before their Lordships.

The burden of proof is on the plaintiffs. The deed of 1229 has the ordinary legal presumption in its favor that it is honest, and is, what it purports to be, a deed of partition. It is also prior in time. It is *prima facie* a good and operative deed. It cannot be got rid of, except by the establishment of a case by the

plaintiffs, as part of their proof, which involves all the family at that time, including those under whom they derive title, in the perpetration of a gross fraud. The deed of partition is declared by their pleading to have been designed for the express purpose and object of defeating creditors. It is, however, said in the pleadings not to have been acted on. It is not clear in what sense this phrase is used, unless it be that all outward acts of the family in acting upon it disguised an inward design at variance with that which their actions declared. There is the most abundant and indeed uncontradicted proof, that his deed was by Hurreenauth and his vendees produced, established, and made the subject of various decrees. It is unnecessary to state the instances of this, which were brought to the notice of their Lordships by Sir Roundell Palmer in his exhaustive argument. Mr. Field, in reply, did not deny that such was the case in numerous instances, but he answered that these acts were all the natural and premeditated results of the original device; that as it was a deed to defraud creditors, it would, of course, be used as such, and that such proof did not exclude the supposition that it might be considered *inter se* by the members of the family as a mere writing, working no change of property amongst them. Without expressing any opinion upon the question, whether a plaintiff supporting his case against those in possession whom he seeks to evict can be admitted to allege the inoperative character of an instrument by which his recovery would otherwise be barred, on the ground of a fraud in its concoction to which all from whom he derives title are parties,—their Lordships, treating the question as one unaffected by such estoppel and one simply of evidence arising on the facts, have to observe that as all these public acts would equally attend the enforcement of an honest and valid deed of partition, when the estates derived under it are assailed, or rights derived under it have to be enforced, they furnish of themselves no evidence of *mala fides*, and should be rather ascribed to the character given to the deed by the defendants, than to that imputed to it by the plaintiffs.

Their Lordships, therefore, are of opinion that the issue whether the partition took place under the deed of 1229 or that of 1245, should have been found in favor of the respondents, which finding should, in their Lordships' opinion, have been followed by a corresponding finding on the third, whether the villages were given in dewuttur, or, that they were not so given.

Their Lordships desire to add that their conclusion, on the effect of the whole evidence as to the subsequent deed, does not materially differ from that of the Judges of the High Court, so far as that Court regarded it as insufficient to establish a trust of this character. The altered state of the family property, their increasing expenses and diminishing means, render it improbable that the family really deliberately resolved and effected that resolution to place out of their control, by a legal dedication, so large a proportion of their remaining property. When it is considered that in this case the plaintiffs have advanced, as a part of their case, that a solemn deed, registered and purporting to effect a valid partition of their property, was designed to have no such effect, but was merely a blind for a covert purpose, their Lordships must ask, what confidence can a Court of Justice repose in their statement that one less solemn and public, and accompanied by many most suspicious circumstances, was designed to be a real and effective instrument of endowment, assented to by the whole family? Whatever may have been the real intention of some of the members of the family amongst themselves, a fact almost impossible to discover amongst the windings of guile and fraud, purchasers, at least, have an undoubted right to bind them, by these their public acts, to the fulfilment of those obligations which such public acts cast upon them. Courts ought not to credit readily assertions of hidden and fraudulent intentions, which, made to-day for one purpose, may be abandoned or denied to-morrow for the assertion of another and inconsistent one.

Their Lordships do not mean to apply the above observations to any mere

benamée transaction, or in any way to shake the authority of the numerous decisions which have established, between the apparent and the real though concealed title, that a benamée transaction devoid of fraudulent design may be made the foundation of a decree in a Court of Justice.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed with costs.

The 18th December 1869.

Present :

Lord Chelmsford, Sir James W. Colville, The Judge of the Admiralty Court, Lord Justice Giffard, and Sir Lawrence Peel.

Religious Endowment—Sebait—Ryotwaree Tenure.

*On Appeal from the High Court at Calcutta.**

Maharanee Shibessuree Debia

versus

Mothooranath Acharjo.

Where land is dedicated to the religious services of an idol, the rents of the land constitute in legal contemplation the property of the idol, and the sebait has not the legal property but only the title of manager of a religious endowment, and cannot alienate the property though he might create proper derivative tenures and estates conformable to usage. The creation of a tenure at a fixed invariable rent would be a breach of duty in a sebait.

Quære.—Whether a transfer of a ryotwaree tenure can be effected without the consent of the zemindar or talookdar, as the case might be, the immediate successor in estate?

This appeal was heard before their Lordships *ex parte*.

The suit out of which it arose was brought in the Civil Court of Jessore by Mothooranath Acharjo, the sole plaintiff, against Maharanee Kestomonee Debia, described as sebait of a talook dedicated to the service of the deity, and against certain other persons named in the plaint. It was brought to establish a title to certain jummas and to recover possession of certain lands connected with them, which the plaintiff claimed by purchase from four of the defendants, Mahomedan ladies, who descended from one Gouromohun Biswas, a Hindoo, on whom, as the plaintiff avers, the right to the jummas transferred to him was originally conferred.

The present appellant represents the interests as guardian of her infant, which at the commencement of the litigation were represented by the Maharanee Kestomonee Debia, since deceased, his grandmother, appointed his guardian under the direction of his deceased father. The tenure, whatever its strict character, whether ryotwaree or of a higher degree, is one held under the infant's title as superior owner of the lands.

The jummas were claimed by the plaintiff as mourusee (hereditary), and also as held at a fixed invariable rent.

The appellant, the sebait, denies the hereditary character of the tenure, the invariable quality of the rent, and the purchase itself. She stated that the tenants of the jummas, from whom the plaintiff asserted that he had purchased, had not any hereditary tenure, and that they had surrendered such interest as they possessed to the appellant, before the time of the alleged sale to the plaintiff.

Of the four defendants, the alleged vendors, three denied the sale and affirmed

* From the judgment of Bayley and Campbell, *J. J.*, in Regular Appeal No. 233 of 1860: not reported.

the surrender; whilst the fourth affirmed the sale and denied the surrender, agreeing, three of them with the appellant, and one with the plaintiff. They all, however, insisted on the hereditary character of their tenure.

The talook itself with which these jummas were connected by tenure was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The seabait had not the legal property, but only the title of manager of a religious endowment.

In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage.

The sale under which the plaintiff claimed was established by the decree of Mr. Seton-Karr, the Judge of the Civil Court of Jessore, who tried the cause.

On appeal from his decision, it was affirmed by the High Court.

Two Courts, therefore, have established the sale to the plaintiff, and have decided against the validity of the alleged surrender.

Into the sufficiency of the evidence to support those several findings, their Lordships do not propose to enquire. Their judgment on this appeal will be confined to the question, whether a tenure held at a fixed invariable rent has been established by the evidence.

The appellant insisted on the authority of Prosonocoomar's case,* which she quoted in her answer and which was relied on in argument at the Bar, that a transfer of such a tenure as that set up in his case, which she termed a ryotwaree tenure, could not be effected without the consent of the zemindar or talookdar, as the case might be, the immediate successor in estate. The Judges in both Courts decided that this tenure was one at a fixed rent, and that the case in question did not apply. On the question of its vendible character without the condition of the superior's consent, they pronounced no opinion. A question of this latter character is likely to be one so much affected by modern and local usage that it would be unsafe for an ultimate Court of Appeal to express an opinion upon it as a mere dry legal question turning on the incidents of hereditary tenure. Their Lordships would be most reluctant to decide on an *ex parte* appeal any question of general consequence not absolutely necessary to the decision of the particular case.

If the decrees appealed against stood unreversed, the title to hold at a fixed invariable rent would, on the pleadings and especially on the judgments, be viewed as *res judicata* binding on the parties and those claiming under them.

Their Lordships think that there is no satisfactory proof in the cause that these jummas were ever held at a fixed invariable rent. One important element in this enquiry has been wholly lost sight of, viz., the nature of the seabait title and its legal inability to be the source of such a derivative title. To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a seabait, and is not therefore presumable. Where variability of jumma is the normal condition, the mere naming a sum certain in connexion with the grant of a descendible tenure does not impart of itself fixity to that sum, in the absence of positive words or of other evidence to show that such was the original design. In this case we start with a double presumption against the rent having been fixed, viz., that founded on the ordinary character of rents, and that derivable from the special character of the tenure. Another presumption arises in this case, that the rent was variable, from the circumstance that the only instrument which asserts positively that the jumma is to be at a fixed rent is one of the three documents on which the signature of Mr. Skinner, the Magistrate, was fabricated. This fraud in tampering with evidence throws additional doubt upon this part of the case.

The terms of the surrender relied on by the High Court do not state that the rent is fixed and invariable. That document, on which the High Court laid

* S. D. A. R., 1855, p. 14.

great stress, appears to their Lordships to afford but a slight presumption that the sebit adopted and admitted that description of the tenure on which the surrenderer relied, though by accepting the surrender she acquiesced in the use of that description by them; and as the instrument does not say that the rent was fixed as well as the tenure hereditary, the implied recognition of the right can be raised no higher than the actual language warrants. The tenure therefore at a fixed rent was, in the opinion of their Lordships, not proved. The acts of the plaintiff cannot be ascribed to a valid title to possession under the circumstances of this dispute, since the only title insisted on in the contest between him and the superior, viz., the right to hold at a fixed rent, is not established, and the general right of the zemindar or talookdar to receive the collections, subject to account, till a valid claim to an intermediate tenure be established must prevail, *ad interim* at least, until the plaintiff, if he think it for his interest to rely on the mourusee title at a variable rent, establish it by a suit founded on that title, in which suit the true nature of the tenure and its freedom from the conditions of the superior's assent to the transfer of the tenure, may be ascertained. Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed and the decision appealed against reversed, and in lieu thereof the respondent's suit be dismissed with costs, and their Lordships think that the appellant should have the costs of the appeal.

The 2nd February 1870.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and
Sir Lawrence Peel.

Succession—Impartible Estate—Separate Estate.

On Appeal from the High Court at Madras.

Stree Rajah Yanumula Venkayamah

versus

Stree Rajah Yanumula Boochi Venkondora and another.

The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession of separate estate.

The Shivagunga case explained.

The question on which the parties in the suit out of which this appeal arises, joined issue and went to trial, was whether the family of which the plaintiff and the appellant's husband were members was an undivided or a divided Hindoo family.

Both the Courts below, giving effect to the presumption of Hindoo law which the evidence failed to rebut, have decided, and in their Lordships' judgment have properly decided, that issue in favor of the plaintiff. The general *status*, therefore, of the family as an undivided family has been ascertained.

Accordingly, the strength of the argument of the learned Counsel for the appellant has been directed to show that this case should be governed by that in the 9th Volume of Moore's Indian Appeals, which is generally known as the Shivagunga case.* They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the Shivagunga case,

* 2 W. R. P. C. 31; 1 Suth, P. C. R. 520.

the succession to it is determinable by the law which regulates the succession to a separate estate, whether the family be divided or undivided.

The authority invoked, however, affords no ground for this argument. The decision in the Shivagunga case will be found to proceed solely and expressly on the finding of the Court that the zemindary in question was proved to be the self-acquired and separate property of Gowarry Vallaba Taver. It assumes that if this had not been so, the decision would have been the other way. At page 589, the judgment says:—

"Hence, if the zemindar, at the time of his death, and his nephews were members of an undivided Hindoo family, and the zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar, at the time of his death, was separate in estate from his brother's family, the zemindary ought to have passed to one of his widows, and falling his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible, but Gaurivallabha's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is, that even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the zemindary was to be treated as self-acquired separate property, or as part of the common family stock."

Again, at page 605, it is said:—

"The substantial contest between the appellant and the respondent is, as it was between Unga Mootoo and the respondent's predecessors, whether the zemindary ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—

"1. Were Gaurivallabha and his brothers undivided in estate, or had a partition taken place between them?

"2. If they were undivided, was the zemindary the self-acquired and separate property of Gaurivallabha? And if so—

"3. What is the course of succession according to the Hindoo law of the south of India of such an acquisition, where the family is in other respects an undivided family?"

And at page 606, their Lordships, dealing with the second of these questions, say:—

"The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the zemindary as the self-acquired property of Gaurivallabha. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's 'Hindoo Law.'"

It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India.

Has it then been shown that, though the family was undivided, this estate was in fact the separate property of the appellant's husband?

The evidence concerning the original grant of it, and the terms on which it was held, is extremely scanty. The most material document is the Exhibit A at page 10 of the record; which as the statement of the then zemindar, made on an official requisition at a time when he had no interest in giving, nor apparent motive for giving, any but a true account of the history of the estate and of the custom of his family, seems to be in every way worthy of credit. Looking at that document, their Lordships are of opinion that the estate was in its inception part of the common family property, though impartible, and therefore with certain qualifications enjoyable by only one member of the family at the time. It appears to have been substantially granted to the common ancestor of the family, the Dewan

whole subject of the grant was a congeries of unconnected plots of cultivated land scattered about the talooqua of which they formed part, and separated by forest retained by Government. Their Lordships can find in the passages relied upon nothing which warrants so violent and improbable a construction of the whole instrument. The words "according to the subjoined details" are followed by the words "purchased by Government," which support the hypothesis that what was granted was that which had been acquired by Government; and since these latter words make the subjoined details equally applicable to the estate purchased by Government, and to the estate granted by it, it follows that the schedule must be treated as an imperfect description.

The learned Counsel for the respondent have also dwelt much on the improbability that the Government of 1819 would have granted property of such extent or value in commutation of an allowance of Rs. 300 per mensem, and called in aid of their construction the official correspondence which preceded the grant. It was pointed out by one of their Lordships that this correspondence could not be legitimately admitted as a key to the construction of the sunnud. They may go further, and say that it does not to their minds establish the antecedent improbability that such a grant should have been made. The estate had been purchased for a small sum. The frequency of the prior auction sales suggests a doubt whether, in its then state, it was equal to the payment of the revenue assessed upon it. It was granted rent free only for the life of Kadir Buksh. There was at that time no stipulation that his heirs should hold it at a fixed rent; and the Indian Government, which was then, and for many years afterwards, notoriously careless about the forests, may at the time of the grant have contemplated that, as the forests were reclaimed, the estate in the hands of Kadir Buksh's successors would become subject to a progressive revenue. Be that as it may, their Lordships have no difficulty in coming to the conclusion that, upon the true construction of the sunnud, the whole of Talooqua Guneshpoor, as purchased by the Government, passed under it.

If this be so, it is necessary to consider whether there is any ground for holding that, by the Government letter of the 18th January 1822, the istmoraree jumma of Rs. 1,877 8 annas was fixed upon that part only of the jagheer which had before the grant been assessed to revenue, leaving the rest subject to the liability to future assessment. Many ingenious arguments founded on the principles upon which the land revenue is from time to time assessed in the Upper Provinces under the regulations were addressed to their Lordships. But they are of opinion that these are beside the present question. The act of Government in fixing a permanent revenue on any lands comprised in the jagheer was *ex concessis* an exceptional act of favor, and a departure from the general revenue law applicable to that part of India. The effect of the letter is to be determined by its language, and that seems to their Lordships to be conclusive. It expresses the determination of the Governor-General in Council that the lands comprised in the jagheer should, on the death of Kadir Buksh, be continued to his heirs, to be held by them at the istmoraree jumma. The jumma was to cover whatever was included in the jagheer. The grant may have been improvident; but if made by the Government of 1822, it is binding on the existing Government, and was properly so treated on the occasion of the settlement of 1837.

Upon the last point little need be said. If, as their Lordships think, the whole talooqua was granted and afterwards made tenable at the permanent jumma, it is clear that neither act of Government can be rectified in such a suit as this, upon a suggestion of mistake. But it is difficult to see how such a case could be successfully raised in any suit. How is it possible, at this distance of time, to enter, as it were, into the Council Chamber of Lord Hastings, to measure the motives which prompted an act of grace in favor of a particular family, or to determine that his bounty proceeded upon mistake and not upon an appreciation

of the facts of which all might, and, but for the assumed carelessness of his advisers, must, have been before him.

A good deal was said on both sides touching the conduct of Government in taking the proceedings which have led to this suit. Their Lordships fully concede that it is the right—nay, the duty—of a Government to protect the public revenue against unfounded claims to particular exemption from burdens to which the community is subject. But in the present case, their Lordships cannot but think that the rash views of Mr. White were too readily adopted by his official superiors, and that the Government was thus committed to dispute on insufficient grounds the effect of former grants, of which the more liberal construction was supported by an undisputed possession of forty years, and had been formally sanctioned by the settlement of 1837.

Their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the decree of the late Sudder Court at Agra, and to order that, in lieu thereof, a decree be made granting to the appellants the relief sought by their plaint with the costs of the proceedings in both the Courts below. The appellants must also have the costs of this appeal.

The 28th February 1870.

Present :

Sir James W. Colville, The Judge of the High Court of Admiralty,
Lord Justice Giffard, and Sir Lawrence Peel.

Partnership—Joint Adventure—Evidence.

On Appeal from the late Sudder Court at Agra.

Seth Lukhmee Chund and others

versus

Seth Indra Mull and others.

Two firms entered into a joint adventure which was to be conducted by an agent specially appointed by both firms. One of the firms brought a suit against the other to recover their share of the alleged loss upon the joint adventure. The evidence in support of the plaintiff's claim consisted, however, almost entirely of books of accounts kept by the plaintiffs themselves, and by two corresponding branches of the plaintiffs' firm. HELD, that these books of accounts could not be likened to books of a partnership to which all the partners in a firm have access, and which are kept by the servants of all, and that although the books corroborated each other, they were not sufficient evidence to entitle the plaintiffs to a decree, in the absence of evidence showing that the sums mentioned in the books as having been paid to the agent specially appointed for carrying on the joint adventure were really applied by such agent for the purposes of such joint adventure.

On the question of partnership, their Lordships do not think it necessary to say much. If the proof of the partnership had depended on the evidence given of the agency of Saliq Ram and of the circumstances which are alleged to have taken place at Muttra, their Lordships would certainly have been unable to find against the respondents that Saliq Ram, as their accredited agent, had made there a contract of partnership binding on them. The reason why the appellants in their plaint gave such prominence to the earlier negotiations and brought so much evidence to prove Saliq Ram's alleged character at that time, may possibly be that they then felt pressed by the difficulty of making the respondents amenable to the Court at Muttra, and thought that it was necessary to establish a contract made at Muttra, in order to found the jurisdiction of that Court. When the case came here on appeal from the Courts of India, which had found that there was no such jurisdiction, the view which this Committee then took was that the letter written at

Rutlam, if genuine, amounted either to a contract of partnership, or to a ratification of what had been previously done by Saliq Ram ; and that the partnership being one which was to be carried on principally at Muttra, any cause of action arising out of the balance resulting from the partnership transactions must be taken to have arisen at Muttra ; and the cause was accordingly sent back for trial on the merits in that Court.

Their Lordships now think that if there was a partnership at all, it was a partnership created, constituted, and defined by the letter written at Rutlam, the translation of which is found in the margin of Mr. Harrington's judgment. They are disposed to think that the evidence preponderates in favor of the genuineness of that letter, and, at all events for the disposal of this case, they will assume that that letter was written contemplating such a partnership as is there described.

The partnership so contemplated seems to have been a joint adventure of the two firms in opium speculations, to be managed principally by Saliq Ram, who was to buy up opium in Malwa and other parts of Western India and was to act with the consent of both parties. The capital with which those transactions were to be carried on was to be furnished by the appellants' firm at Muttra. They were to advance the capital and to be allowed interest at the rate of 6 annas per cent. Therefore, if that agreement were strictly carried out, the firm of Muttra would become accountable to their partners in the joint adventure, the respondents taking credit for the money which they advanced, and accounting for the returns of the opium when sold ; and, on the other hand, Saliq Ram would have to account either to both firms, or to the Muttra firm, as the gerents of the joint adventure, for the disbursement of all the moneys received by him and for his application thereof.

This being the relation of the parties, the appellants have brought their suit to recover from the respondents their share in the alleged loss upon this joint adventure, and have attempted to prove that loss by producing the accounts kept by them at Muttra, showing the gross amount of their advances, and giving credit for what they represent as the gross amount of the sum realized by the sales of the opium purchased. The accounts kept by Saliq Ram are not produced, though some such accounts must surely have been kept and rendered, in order to show what opium was purchased and for what it was sold.

Saliq Ram himself, who may have been alive when the suit was first instituted, though he is said to have been dead when it went back to India to be fully tried, is not examined. Punna Lall, the other agent, is examined, and is unable to give any account whatever of these transactions. Therefore, the whole evidence seems to consist of the accounts and books of account kept by the appellants.

The learned Judge who tried the case in the first instance allowed certain items of the sums which the appellants said they had advanced by way of capital for this adventure, and he disallowed other large items. The result was that, according to his mode of stating the account, there was a considerable amount of loss.

It appears, however, that he made what is clearly a mistake in the calculation of the amount advanced. He gave the appellants credit for the sum of twenty lakhs of rupees remitted to Mundesore, whereas they had taken credit in their own accounts for only seventeen lakhs sixty-six thousand and four rupees, the difference being the difference in value between the Company's rupee and the rupee current at Mundesore, calculated on the whole remittance. When the case went to the higher Court, that error was pointed out. It seems almost to have been admitted, and the result is that if that error is rectified and nothing more is allowed than the Judge below allowed, there is no proved loss, but as the account stands, an apparent profit on the speculation of upwards of a lakh of rupees.

The question, therefore, whether the appellants have made out a right to recover anything against the respondents, turns upon the question whether the sum which they have been allowed to charge against the respondents can be in-

creased by either of the disallowed items. Their Lordships have considerable doubt whether there was sufficient evidence to justify the charge against the respondents of even those items which have been allowed. It seems to rest entirely upon the books kept at Muttra by the appellants (which cannot be likened to books of a partnership to which all the partners of the firm have access, and which are kept by the servants of all), and upon the books kept by the kootees of the appellants at Mundesore and Indore. No doubt those Indore books and those Mundesore books carry the case, as to those two items, to this extent, that while the Muttra books show *prima facie* that remittances to the amount stated were made to those kootees, the books of those kootees show *prima facie* that those sums did find their way into the hands of Saliq Ram and Punna Lall. That those sums were really applied by those persons for the purposes of the joint adventure there is no evidence whatever. However, even this degree of proof is wanting as to the disallowed items. As to them, there is nothing more than the evidence of the appellants' servants, corroborated by the appellants' books at Muttra, that certain drafts were drawn—one upon the appellants' kootee at Bombay, and another on the appellants' kootee at Rutlam—in favor of Saliq Ram and Punna Lall; but that those sums ever passed from those kootees into the hands of those persons there is no evidence whatever.

Their Lordships, therefore, are clearly of opinion that the Judge of the Court of first instance was right in disallowing the latter items as insufficiently proved. Whether he was right in allowing the other items, their Lordships think is extremely doubtful; and they would not be disposed without further enquiry to charge those items, if the case turned upon them against the respondents. But, as the case stands, the appellants have failed to prove that there is any sum due to them from the respondents; and the only question is, whether the suit is therefore to be dismissed as having failed, or whether their Lordships are, after this twenty-one years' litigation, to send it back for further enquiry and investigation, and allow the appellants to amend their case. Their Lordships are of opinion that they would not be justified in adopting the latter course. The appellants seem to have had all the means they ever can have of proving their case. They had the benefit of all the machinery which the Courts of India afford for taking the account, and it is unreasonable that having failed to prove their case, they now should ask their Lordships to send it back for further investigation, there being, moreover, no reason to suppose that they would have any better proof than they had before.

Under these circumstances, their Lordships think it is their duty to advise Her Majesty to dismiss this appeal with costs.

The 1st March 1870.

Present :

The Right Hon. Sir James W. Colville, Sir Robert Phillimore, Lord Justice Giffard, and Sir Lawrence Peel.

Acts of Government Officials binding Government—Act IX of 1859.

On Appeal from the High Court of the N. W. Provinces.

The Secretary of State for India in Council

versus

Mussamut Khanzadi.

Where, by a decree of the Court of Special Commission established under Act IX of 1859, property was directed to be made over to a claimant, the proceedings of Officials making over that property were

followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the propriety of the decree, or to the making over of the bulk of the property under it, the Government was held bound as to the right of the decree-holder to the property.

The facts of this case were shortly as follows. Mahomed Abdoolla Khan died in 1852, leaving a son and two daughters. The son, Abdool Luteef Khan, allotted five villages to one of the daughters as her share of the father's estate, but nothing to the other daughter (the respondent), who sued for her share in April 1857. Pending the suit, Abdool Luteef was convicted of rebellion, and the property confiscated under Act XXV of 1857. In 1860 the respondent applied to the Court of Special Commission established under Act IX of 1859 for a revival of the suit against Government so as to establish her right to a share of her father's estate. The Court, in refusing to grant the relief prayed for, passed a decree which is set out at length in the judgment of the Judicial Committee. Thereupon, the Government authorities allowed her to select the five villages, and on her being put in possession, she received mesne profits from the time that the Government had taken possession of the property. Subsequently, on respondent's application for the mesne profits between the date of her instituting the suit and the date of possession of the property by the Government, the Government took exception to the decree of the Court of Special Commission as *ultra vires*, inasmuch as, in dismissing her claim to a share of the estate, it had no power to make a decree for maintenance. After some intermediate litigation, the respondent brought the present suit to establish her right to the property and for possession and mesne profits; and the Judge dismissed the suit in accordance with the defence of the Government that the villages had been made over to the respondent subject to the confirmation of Government which had not been obtained. On appeal, the High Court of the N. W. P. reversed that decision, adopting the principle of the Privy Council ruling in the Collector of Masulipatam v. Cavalry Vencatta Narainapah, 2 W. R. P. C. 61; 1 Suth. P. C. R. 476, that the Government was bound by the acts of an officer acting within the limits of his authority.

The judgment of the Judicial Committee was as follows:—

Their Lordships are of opinion that there is no ground whatever for this appeal. The respondent's title rests upon the decree of the Court of Special Commission, and it has not been alleged on the part of the Government, in their pleadings or otherwise, that the decree was other than a proper and binding decree. Their Lordships certainly see no reason why it should not be binding. The plaint on which it is founded is for actual possession of the land, but it is quite consistent with that plaint that a decree should be made, falling short of the extent to which the plaint went. The decree is in these terms:—"A decree is passed assigning to the plaintiff for her food and maintenance five villages in Zillah Boolundshuhar, equal in area, Government assessment, and income, to mouzahs (named) which were given in gift to Beebee Murriam (respondent's sister) agreeably to a deed of gift dated the 22nd July 1854. This decree is to be carried into execution, and the plaintiff put into possession of the villages; and she is moreover to receive the mesne profits from the date of action brought up to the date of being put into possession." At the date of the decree, the Government was in possession, and the proper person to give possession and to carry out this decree was the Collector. Their Lordships cannot at all come to the conclusion that the Regulation or the Circular to which reference has been made in any way affected the authority of the Collector. If the matter stood simply on the act of the Collector, their Lordships would hesitate long before they could accede to the view which has been advanced on the part of Government. But on turning to page 27 of the Appendix, what actually appears is that there were proceedings in the Civil Court founded on the decree,—that the Government appeared in the Civil Court, raised no objection whatever except as to a certain particular portion

of the land of which possession was given ; and that there was a decision by the Civil Court against the Government. Consequently the respondent's title was confirmed by the decree of a competent Court.

For these reasons, their Lordships are of opinion that the Government was much in the wrong in taking possession as they did, and that this appeal never ought to have been brought. Their Lordships will therefore humbly advise Her Majesty that it should be dismissed. The dismissal should be with costs.

The 9th March 1870.

Present :

Lord Westbury, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Succession—Construction—Will—Children—Accumulations.

On Appeal from the Judicial Commissioner of the Punjab.

Barlow

versus

Orde and others.

The succession of a Hindoo is, as a general rule, regulated by Hindoo law, of a Mahomedan by the Mahomedan law, and of an East Indian Christian by the English law ; but in every case, for the purpose of determining the *status personæ*, regard must be had to the mode of life and habits of the testator, and to the usages of the class or party to which he belonged. If no specific rule can be ascertained to be applicable to a case, it should be determined according to equity, justice, and good conscience.

Constructing a will according to the principles of natural justice, and applying to the word "children" the signification in which the testator used it as gathered from the will itself, the word "children" was held to include illegitimate children, the offspring of sons, when acknowledged or treated as his children by their putative father.

A devised his property in equal shares to his five sons. Considerable surplus rents of the property so devised were not drawn by the five sons, but were allowed to accumulate and were laid out in the purchase of additional landed property. B, one of the five sons of A, by his will, after leaving all his share of the landed and other interests devised to him by the will of A to his daughter (C) and son (D) in equal shares, devised to the said D "the whole of the villages, landed property, &c., &c., which have been purchased for the estate out of the accumulations of the surplus rents since the late Colonel Skinner's (his father A's) demise, and in which I have a fifth share." HELD, that the separate acquisitions were not accretions to the originally devised estates of A, and that they passed absolutely to D alone, to the exclusion of C, under the devise contained in B's will.

The question in this appeal depends on the construction and legal effect of the will of Colonel James Skinner, who was an officer in the service of the East India Company.

Colonel Skinner died in the month of December 1841, and at the time of his death he was resident and domiciled in the Delhi territory, which then formed part of the North-Western Provinces of India, but which after the Mutiny was placed under the administration of the Punjab Government.

The construction and effect of the will, therefore, must depend on the law of the domicile, if that can be ascertained. At the time of the Colonel's death there was no *lex loci* of the province in which he was domiciled, and the law applicable to the succession of any individual depended on his personal *status*, which again mainly depended on his religion.

Thus the succession of a Hindoo would, as a general rule, fall to be regulated

by Hindoo law, and of a Mahomedan by Mahomedan law, and of an East Indian Christian by English law; but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual and to the usages of the class or family to which he belonged.

If no specific rule could be ascertained to be applicable to the case, then the Judges administering justice in the province were to act according to justice, equity, and good conscience.

Such is the substance of the regulations (as explained in the case of *Abraham v. Abraham*,* 9 Moore's Indian Appeals, 195) which were made by the East India Company for defining the jurisdiction of the Courts of the Province in which Colonel Skinner was domiciled, and which were in force at the time of his decease.

There is little evidence from which the personal state of Colonel Skinner may be ascertained, beyond that which is afforded by the will.

It is stated, and there is proof, that he was illegitimate, being probably the child of a native woman by a European father. As a Commander of a corps of Irregular Light Horse, he acquired a great distinction in the military service of the East India Company, and, in consideration of his services, he obtained grants of large landed estates, situate partly in the North-Western Provinces and partly in the territory of Delhi.

The form of a renewed grant of some of these estates made to Colonel Skinner by the Marquis of Hastings when Governor-General may be material to be noticed. The grant was made to the Colonel in "Altumga," to take effect from the beginning of the year 1226, Fuslee era, and contained this special form of limitation, viz. :— "To Colonel Skinner and his heirs after him, or to such persons as he may devise by his last will and testament, or by any other valid instrument, with their heirs, in the proportions in which he may devise the same to them respectively, so that each holding and enjoying his own share, shall conform himself to the dispositions of the said will." Had the grant been simply to the Colonel and his heirs in "Altumga," the grant would have come to an end on the death of the Colonel without leaving lawful issue, and the superadded special power of testamentary disposition, therefore, is regarded as an indication that the grantee was conscious that he was not likely to leave lawful issue, and therefore obtained the grant of a power of disposition. This argument, however, is not of much weight. Colonel Skinner does not appear to have been ever married, but he seems to have kept several native women as part of his family, with whom he co-habited, and by whom he had several children.

There is nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages.

His origin is unknown: being illegitimate, he belonged to no family, and all that can be collected is that he was probably a soldier of fortune, who rose by his courage and military skill to a certain rank and distinction in the service of the East India Company.

It is impossible, under these circumstances, to affirm that any particular law is applicable to the construction of the Colonel's will or the regulation of his succession. Any questions that may arise respecting them must, therefore, be determined by the principles of natural justice.

In English law there is a technical rule of construction that under a testamentary gift of children as a class, illegitimate children, although recognized by a testator in his lifetime, cannot be permitted to share jointly with natural, lawful children; and the respondents contend that this rule is applicable to the construction of the will of Colonel Skinner: but for the reasons we have already given, we are of opinion that Colonel Skinner's succession is not to be administered according to English law, and that there is no room therefore for the application of this English rule of construction. The word "children" where it occurs in

* 1 W. R. P. C. 1; 1 Suth. P. C. R. 501.

Colonel Skinner's will, must be taken in that sense and receive that signification in which it is plain from the language of the will, and the dispositions it contains, that it was used by the testator, that is to say, its extent of meaning in the vocabulary and mind of the testator must be determined from the will itself.

The testator had at the times of making his will and of his death, five sons and two daughters, all of whom were illegitimate, for it seems to be certain that no rite or ceremony of marriage had ever taken place between the Colonel and any one of the mothers of these children.

All of these sons and daughters, however, appear to have been acknowledged by the testator during his life as his children, and they are expressly called by him in his will his "sons and daughters."

Thus the will begins with a general gift "to my sons Joseph, James, Hercules, Alexander, and Thomas," and after giving various pensions to servants, and others for life, the testator directs that they shall revert "to my sons."

The sons are again in a subsequent part of the will referred to under the term "male children," and afterwards they are called "my reputed children."

It appears that the testator had a brother, Major Robert Skinner, who like himself had never been married, but at the date of the Colonel's will was dead, leaving several illegitimate children, who had been treated and acknowledged by their father during his lifetime as his children.

It appears also from the will of the Colonel that he had been appointed trustee or guardian of these children, and must be taken to have been well acquainted with their real *status*, or condition of illegitimacy. It is important, therefore, that we find in the will a devise in certain events "to my late brother Major Robert Skinner's children and their issues in equal shares."

Here the illegitimate offspring of Major Robert are called his children and are associated as tenants in common with the testator's daughters and grand-daughter and their lawful issues.

The correctness of the interpretation which we put on the word "children" in this will, as denoting the offspring of sons, is much confirmed by the fact that there is a marked change of expression in the will when the Colonel speaks of the issues of his daughters.

It is natural to suppose that he would shrink from the thought of his daughters forming any other connections than those of lawful marriage, or of their having any but lawful issue. Accordingly, when he provides for the event of the death of all his reputed children (meaning his five sons) without issue or children, and directs that the property given to them shall devolve to his daughters Louisa and Elizabeth, and his grand-daughter Sophy (who was born in wedlock), or their *lawful issues*, we find a remarkable change of expression which is not to be found in any of the gifts to the children or issue of his sons.

It appears also from the evidence that the Colonel's eldest son Joseph (who died in the year 1855) had no lawful issue, but had one illegitimate son, named George, who was born some years before the death of the Colonel, and was always recognized and treated by the testator as his grandson; and it is also proved that on the death of his father, Joseph, George—this reputed son—was permitted to succeed his father, and has, in fact, taken the share devised to Joseph by the will.

The limited signification which in our law is put upon the word "children" when used as the designation of a class, and not as *descriptio personarum*, is probably the result of the Christian law of marriage.

According to natural law, the children of a man mean the issue begotten by him, and the criteria of this condition are, the being born of a wedded wife or wives, or, if born of other women, the being recognized and acknowledged as children by the father.

With regard to his sons, the Colonel probably felt the same indifference as to their being married or not, which he had shown in his own case.

The conclusion, therefore, at which their Lordships have arrived is, that the word "children" in the will of Colonel Skinner denotes and includes as well illegitimate as legitimate children, whenever such illegitimate children are acknowledged or treated as his children by their putative father.

We proceed to apply this conclusion to the case which is before us, and which arises on the following clause in the testator's will:—"I will and declare that it is my intention and meaning, that in the event of all or any of my afore-mentioned sons, Joseph, James, Hercules, Alexander, and Thomas Skinner dying and leaving issue or children, that the share of the fathers shall devolve on the issue or children, to be by them divided in equal shares." As has been already stated, the first son Joseph died intestate in the year 1855, without lawful issue, but leaving an illegitimate son George, who, with the assent of the majority of his uncles, succeeded to his father's share under the devise.

James, the second son, died in the year 1861, leaving one legitimate daughter, Sophia Orde, and an illegitimate son, James Skinner; and the question is whether the share of James the father, in the property devised to his five sons by the will of Colonel Skinner vests, as to the share of James, in his daughter Sophia exclusively, or in the said daughter and the son James as tenants in common. For the reasons we have already given, we are of opinion that the share of the son James belongs to Sophia Orde and James the son equally as tenants in common. James is named and described as his son in the will of his father James, and therefore there is a natural equality of *status* between him and his sister Mrs. Orde, and both take equally under the aforesaid gift made by the will of their natural grandfather.

The next and subordinate question in this appeal relates to the will and succession of James, the second son of the testator.

By his will, dated 10th November 1859, after devising all his share of the landed interests devised to him by the will of his late father, and which he particularly mentions, and after also bequeathing all sums of money due to himself at the time of his decease, and also all other debts, money bonds, or other securities, unto his daughter, Mrs. Sophia Evelina Orde, and his son James, to be equally divided, the will contains the following passage:—"As my son James is not educated or otherwise provided for, I leave and bequeath to him and to his mother, Fanny Barlow *alias* Villastee Begum, the whole of the villages, landed property, &c., &c., which have been purchased for the estate since the late Colonel Skinner's demise, and in which I have a fifth share, as also my house, out-offices, and other lands at Hausee."

The question between the appellants and respondents is, what property passed under this last devise?

The facts, although they are not very clearly stated, appear to be that whilst the estates devised by the Colonel to his sons were under the management of the executors or managers appointed by the Colonel's will, considerable sums, being surplus rents of the devised estates, but not drawn by the devisees, the sons, were laid out in the purchase of additional landed property; and it is contended by the respondents that these new acquisitions must be regarded in law as accretions to the original devised estates, and as passing with them under the gifts made by the will.

If this were so, the share of James, the son, in the purchased estates would be divisible, like his share in the original estates, between his daughter, Mrs. Orde, and his son James, under the Colonel's will, and would not pass under the devise contained in his own will.

But their Lordships find no ground for this conclusion, and they are of opinion that the purchased estates follow the ownership of the purchase-money, which

was the absolute property of the five sons in equal shares; and they are of opinion, therefore, that the testator James's fifth share in these purchased estates passed under the aforesaid devise in his will.

But another question was raised at the Bar by the respondents' Counsel, who stated that some leases granted to Colonel Skinner by the Government of certain villages and lands expired at the death of the Colonel, and that renewals were made by the Government to the Colonel's devisees, which renewed leases were, it was contended, obtained by virtue of the original ownership of the devised estates, and must therefore in equity be subject to the gifts made by the will of the devised estates.

It was incumbent on the respondents to have stated and proved the facts on which this claim is founded so as to have enabled their Lordships to decide the question; but this has not been done, and it does not appear to have been considered and determined by the Courts below.

If, however, Mrs. Sophia Orde requests, and is content to take at her own risk, an enquiry on this subject, their Lordships will recommend that such enquiry shall form part of the order to be made. Their Lordships will humbly recommend Her Majesty to reverse the decree appealed from, and to declare that Mrs. Sophia Orde and James, the son and daughter of Major James Skinner, are entitled in equal shares by virtue of the will of Colonel Skinner, to one equal fifth part of all the estates and property thereby devised and bequeathed to the testator's five sons in equal shares, and also to declare that one equal fifth part of all the estates and property purchased or acquired after the death of the Colonel by means of the rents, profits, or income arising from the estates and property devised and bequeathed to the said five sons of the testator, belonged absolutely to his second son, James Skinner, and passed, under the will of the last-named James, to Mrs. Fanny Barlow and his son James absolutely in equal shares; and at the request and risk of Mrs. Sophia Orde, let an enquiry be made by or under the direction of the Court from whose decree this appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his lifetime were made or granted by the Government or any other persons to the executors or managers of the Colonel's will, and under what circumstances and for what consideration the same were made.

There remains the subject of costs.

On the first hearing of the cause no costs were given to either party. From the decision of the first Court on the matters in question, Mrs. Orde appealed and obtained a judgment with costs, from which the present appeal is brought. In the opinion of their Lordships, Mrs. Orde was wrong on both points; and further, in contending that the fifth share of her father belongs to herself exclusively, she is claiming inconsistently with what was done by the family in the case of George, the illegitimate son of Joseph. Their Lordships see no reason, therefore, why the ordinary rule should not prevail. The difficulty has arisen, not from any uncertainty in the language of the Colonel's will, but from the contention of Mrs. Orde that it ought to be interpreted by English law, which has no application. Their Lordships, therefore, condemn Mrs. Orde to pay the appellant's costs in the Court below, the judgment of which is hereby reversed, and also to pay the appellant's costs of this appeal. No order is made as to the costs of the respondent Alexander Skinner.

Orders in Council for the establishment of certain Rules to be observed by Proctors, Solicitors, Agents, and other Persons admitted to practise before Her Majesty's Most Honorable Privy Council.

At the Court at Windsor, 31st March 1870.

Present :

The Queen's Most Excellent Majesty in Council.

Whereas there was this day read at the Board a representation from the Lords of the Judicial Committee of the Privy Council, dated 26th March instant, humbly recommending to Her Majesty in Council that certain Rules be established by the authority of Her Majesty, by and with the advice of Her Privy Council, to be observed by all Proctors, Solicitors, Attorneys, Agents, or other persons employed in the conduct of appeals, petitions, or other matters pending before Her Majesty in Council, Her Majesty having taken the said representation into consideration, and the Schedule of Rules hereunto annexed, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution.

ARTHUR HELPS.

Schedule annexed to the foregoing Order.

I. Every Proctor, Solicitor, or Agent admitted to practise before Her Majesty's Most Honorable Privy Council, or any of the Committees thereof, shall subscribe a declaration to be enrolled in the Privy Council Office, engaging to observe and obey the rules, regulations, orders, and practice of the Privy Council ; and also to pay and discharge, from time to time, when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council ; and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such Declaration in the following terms :—

Form of Declaration.

We, the undersigned, do hereby declare, that we desire and intend to practise as Solicitors or Agents in appeals and other matters pending before Her Majesty in Council ; and we severally and respectively do hereby engage to observe, submit to, perform, and abide by all and every the orders, rules, regulations, and practice of Her Majesty's Most Honorable Privy Council and the Committees thereof now in force, or hereafter from time to time to be made ; and also to pay and discharge, from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any appeal, petition, or other matter in and upon which we shall severally and respectively appear as such Solicitors or Agents.

II. Every Proctor, Solicitor, or Attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing Declaration, and to practise in the Privy Council upon the production of his certificate for the current year ; and no fee shall be payable by him on the enrolment of his signature to the foregoing Declaration.

III. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors by the High Courts of Judicature in India or in the Colonies respectively, may apply, by petition, to the Lords of the Judicial Committee of the Privy Council for leave to be admitted to practise in the Privy Council ; and such persons, if admitted to practise by an order of their Lordships,

shall pay annually, on the 15th November, a fee of five guineas to the fee fund of the Council Office.

IV. Any Proctor, Solicitor, Agent, or other person practising before the Privy Council, who shall wilfully act in violation of the rules and practice of the Privy Council, or of any Rules prescribed by the authority of Her Majesty or of the Lords of the Council, or who shall wilfully misconduct himself in prosecuting proceedings before the Privy Council, or any Committee thereof, or who shall refuse or omit to pay the Council Office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee of the Privy Council, upon cause shown at their Lordships' Bar.

The 28th June 1870.

Present :

Sir James W. Colvile, The Judge of the High Court of Admiralty,
Lord Justice Giffard, and Sir Lawrence Peel.

*Mitacshara Law—Succession—Great-Great-Great-Grandson—Exclusion from
heirship—Preference among heirs.*

On Appeal from the late Sudder Court at Agra.

Bhyah Ram Singh and another

versus

Bhyah Ugur Singh and another.

Under the Mitacshara law, a great-great-great-grandson of a common ancestor is not *excluded* from inheriting as a Gentile to a great-great-great-grandson on the ground that he is too remote in descent from the common ancestor.

When a question of *precedence* among heirs arises, as precedence is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. No ground of entire *exclusion* exists if the opposing parties confer inferior benefits or benefits in equal degree only; but where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy, is inapplicable to the solution of that question of precedence.

The suit out of which this appeal arose was brought in the Court of the Principal Sudder Ameen of Goruckpore, by the plaintiffs, as heirs, after the death of his widow, who survived him, of one Jaskurun Singh, to recover certain moveable and immoveable estate, the property of the deceased at his death.

The title as heirs was described generally in the plaint, but the course in which it was derived appeared by a pedigree exhibited by the plaintiffs, and filed with the plaint. It thus appeared that the plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, Chuttur Bainee Singh.

By the pedigree it appeared that the plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his great-great-great-grandsons. The appellants contended that the plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the widow's death the heirs of the husband at that time alive were the legal heirs. The property claimed was at that time in the possession of the defendants under alleged alienations by the widow. Into the validity of their titles, respectively, no enquiry could be made by the Appellate Court in India from the mode in which the case was submitted to it; and the appellants may be

treated simply as parties who had a right to put the plaintiffs to proof of their title. It was conceded on the argument that they were not descendants of the common ancestor.

The defendants denied the plaintiff's title. Admitting the pedigree to be correct as far as it went, and assuming, for the purpose of raising their objection to the title, all that the pedigree stated to be true, they contended by their answer that the plaintiffs were not within the line of heirs. They raised also two other objections in bar of any enquiry into their own title, viz., that the suit was barred by limitation of time, and that the matter of the plaintiff's title was *res judicata* and had been adjudged against parties in privity of title with the plaintiffs. As these two objections were not insisted upon on the argument of this appeal, it is unnecessary to state the facts as pleaded on which they rested.

The suit did not proceed in the Zillah Court beyond the framing of issues, at which stage the Judge framed three issues in bar involving the three points above stated. Deciding all three against the plaintiffs he dismissed their suit. On the title he took the opinion of the Pundit of the Court, whose Bywustha was to the effect that the plaintiffs were beyond the line of heirs, and was in direct affirmance of the objection raised by the answer.

From this decision the plaintiffs appealed to the late Sudder Court of the North-Western Provinces, which reversed the decisions of the Court below on all the three issues in bar, and remanded the case to the Court below for trial. The correctness of this decision on the second and third issues in bar admits of no dispute, and it is unnecessary to notice them further.

As no decision was given in the suit below except on the issues in bar, as the Sudder Court remanded the suit for trial, and as the appeal to Her Majesty is limited necessarily to the decree reversing that of the Court below on the issues in bar, their Lordships will be careful to limit their observations as well as their decision in this case, strictly to the matter on which the decree under appeal proceeded.

The decision in the Sudder Court, as well as that in the Court below, may be viewed as in the nature of a demurrer, on which any consideration of possible title on other assumed states of facts would have been irregular. The decision of this case involves the consideration of a most important part of that vexed and difficult subject,—the Hindoo Law of Succession. It must be limited to the validity of the title pleaded.

The title pleaded is that of some in the class termed Gentiles, asserting priority in that class. The derivation of title to the succession of the deceased opening on the death of his widow who survived him, is made necessarily from a common ancestor who is named, and from whom the lines of the deceased and the claimants are respectively traced. The pedigree, if it be full and true, establishes community of family, kindred, and priority, unless the objection of the defendants be sustained; and nothing more is needed to be pleaded or proved in support of that title if valid. If it be not a good title of inheritance by the Hindoo law, the plaintiff's suit must fail. The issue in bar submits the objection to decision. The pedigree for the purpose of the appeal must be taken to be both full and true.

No objection founded on alleged facts not apparent on the face of the pedigree can be urged against a decree which did not proceed upon, and could not have proceeded upon, grounds not raised by the issue in bar. The question, then, is reduced to this, whether the plaintiffs, being great-great-great-grandsons of the common ancestor, were too remote in degree to be heritable as Gentiles.

The subject is important: it is beset by difficulties raised by varying opinions, decisions, and comments on a text clear enough, if interpreted by the principles of the Hindoo law according to the Benares school, which is the most orthodox of the different schools. The governing authority of that school is the Mitacshara.

The compiler of the Mitacshara is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindoos is likely to have flowed. The Hindoo law contains in itself the principles of its own exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies. Approaching this somewhat delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of Hindoos, their Lordships observe that the case furnishes no evidence whatever that the decision under appeal disturbs that harmony. On the contrary, the Judges of appeal overrule a former decision given in their own Court, which, in their opinion, had disturbed it.

The Mitacshara, in the fifth and sixth sections of the second chapter, recognizes two successive classes of heirs: first "Gentiles;" next, bundhoos; after them it places certain special persons, and after these last the State, the *ultimus hæres*.

Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The "family" is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of commentators on the Hindoo law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connexion derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession, from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the fifth and sixth sections of the second chapter of the Mitacshara is in the strictest conformity to these principles. The Gentiles, or gotraja, from the gotra, are described as descending from one common stock a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the gotra. These conditions are all that are stated as necessary to the constitution of the class of Gentiles.

As regulating preference of succession amongst them, the law of succession amongst Gentiles classifies them further, as sapindas and samanoducas. The first it treats as prior to the second, but excludes neither, within limits wide enough to include the present plaintiffs. As the plaintiffs then in this case show a common ancestor, a gotra, a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds and strictly conforms to the language of the Mitacshara, it follows that it must be affirmed unless it can be shown that the plain language of the Mitacshara has received some qualification by usage or judicial construction.

The decision of the present case does not require that the Court should distinguish sapinda from sapinda, nor define where sapindas cease and samonaducas begin. This is not a case of priority between two persons claiming as heirs, or between two classes of heirs; it is one of asserted exclusion from inheritance raised by persons not competitors in the prescribed degrees of heirs.

The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty. It obtains properly when a succession opens to a deceased, when the question mooted is a real one (at least in the contemplation of pious Hindoos), viz., who best can

confer on the deceased and his ancestors not fully benefited, the benefits which the grades of oblations offer in differing degrees. Where no sexual or personal incapacity exists, no ground of entire exclusion from inheritance exists if the opposing parties confer inferior benefits, or benefits in equal degree only. In such a case what reason could justify a sentence of exclusion from inheritance on a claim to put a limitation on language which declares the whole class heritable, and not simply some persons found in it? Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence.

Had a course of decisions, or had the actual practice of Hindoos confirmed the view, which some framers of genealogical tables appear to have taken of this subject, it would have been the duty of the Courts of Justice to interpret the language of the Mitacshara by the aid of this modern light: but such is not the case, the weight of opinion and of decision is against the appeal.

The Sudder Court observed that the judgment below had followed a case which had been overruled in two succeeding cases in the same Court. It treated the overruled case as one which broke in upon the uniformity of the law. The Sudder further supported its opinion by the authority of two cases decided in the Privy Council. The case in the 4 Moore, p. 292,* was governed by the law of the Mitacshara, but the point as to the calculation of the degrees for which it was cited as an authority was rather assumed than decided, for the decision proceeded on the ground that the Bengal School was the one to be followed in that case. In the case in 2 Moore, p. 132,† the very passages of the Mitacshara, and that from Menu which has been relied on in this case and in the Court of Appeal in India, referring to the "seventh person" and the limits of the line of sapindas, received an authoritative exposition. That case, it is true, was one to which the doctrine of the Mithila School was applicable, but the interpretation of the text was unaffected by that distinction.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. Harrington be carefully studied, it will clearly appear that the preponderance of the opinions of the various Pundits then consulted, was greatly on the side of the literal construction of the Mitacshara. The judgment of the Privy Council concludes that the Bundhoos do not inherit "till those on the father's side to the seventh degree have been exhausted." As the judgment is founded in a great degree on that of Mr. Harrington, and expresses no dissent from his method of arriving at the seventh person, by taking six degrees in the descending or ascending line, the Sudder Court was justified in treating this point as settled by authority, and the plaintiffs as Gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindoo people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of sapindas, there is no reason for supposing that the plain construction of the language of the text of Menu, and of its authoritative comment, will clash with the religious feeling of Hindoos.

Their Lordships are of opinion that the decision appealed from, on the materials before the Court, on the issues in bar was correct, and they will humbly advise Her Majesty that the appeal be dismissed with costs.

* Ranee Srimutty Dabea, *appellant*.—7 W. R. P. C. 44; 1 Suth. P. C. R. 182.

† Rutcheputty Dutt Iha, *appellant*.—See p. 1 *ante*.

The 28th June 1870.

Present:

Lord Cairns, Sir James W. Colville, the Judge of the High Court of Admiralty,
Sir Joseph Napier, and Sir Lawrence Peel.

Usufruct—Suit—Account.

On Appeal from the High Court at Agra.

Nawab Mahomed Ameenooddeen Khan

versus

Mozuffer Hossein Khan.

Where a widow was put in possession of the property of her husband, in order to obtain by that possession payment of her dower (Rs. 10,000), and she, and after her death, her heir, continued in possession for fifteen years, it was held that there was a very strong presumption that the dower was paid off; in a suit to recover possession of the property from the heir of the widow, the proper course would be to direct an account to be taken with a view to see if the dower had been paid; and in that event, to make the heir repay the difference; or if otherwise, to order plaintiff to pay the difference as the terms of obtaining possession of the estate.

In this case, so long ago as the year 1855, the widow, who has been termed in the proceedings the Begum, was, by a decree of the Court, put into possession of the property of her husband, in order to obtain by that possession payment of her dower, which was fixed by the decree at a sum of Rs. 10,000; and she, during her lifetime, and after her death, her heir, who is the present appellant, have continued in possession of the property ever since that time.

Whatever might have been the presumption as to payment by means of possession at the end of a year or two years after possession was taken, certainly at the end of fifteen years there would be a very strong presumption either that payment of Rs. 10,000 had been effected by means of the possession, unless (as does not appear to have been the case) the value of the property was extremely inconsiderable, or, at all events, that justice would not have been done unless an account were taken for the purpose of seeing whether, by means of possession, payment had been effected.

Therefore, when the present plaint, out of which this appeal originates, was brought before the Court, the course to be taken, according to our ideas of what is proper to be done in such a case, would have been to have directed an account (which indeed was asked by the plaint), for the purpose of seeing what had been the amount of receipts by the Begum and her heir during the time they were in possession, and of finding whether she had in point of fact been overpaid her dower, and, in that event, making her heir repay the difference; or, if it was found that she had been under-paid, to order the plaintiff in the suit to pay the difference as the terms of obtaining possession of the estate.

Now, that has not been done; but the plaintiff has been ordered to pay the exact sum representing that proportion of the whole of the dower of the Begum which corresponds to the share of the estate which he claims. If an appeal had been brought, not by the appellant, but by the respondent, complaining that scant justice had been done by that form of decree, their Lordships would have been under the necessity of considering whether there had not been a miscarriage of the Court, and whether less of justice had been done to the plaintiff in India than ought to have been done to him.

But no such appeal has been brought. The form of the decree abroad has dismissed the whole of the plaint, except that part of it in respect of which relief has been given, and therefore has, in effect, dismissed the plaint so far as it asked for an account of mesne profits.

There has been no appeal against that; and their Lordships, with some regret, find that in disposing of this appeal, they are unable even to leave open the question of whether in India a decree could hereafter be made for an account of mesne profits.

But now, turning to the grounds of complaint made by the appellant with regard to this decree, their Lordships find them to be these.

The appellant, in the first place, complains that this second suit was unnecessary; and that the respondent, resting upon the former decree, the decree of 1855, might, on tendering his share of the dower, without more, have obtained possession of his share of the estate. It is sufficient on that point to observe that when brought into Court, the appellant assumed no such attitude; on the contrary, he contested the whole right of the respondent; and although if he had, upon being brought into Court, said to the respondent that the only complaint he had was that the suit was unnecessary, and that, on receiving his share of the dower, he would be ready to give up possession, such an argument might have been urged now as that the suit was unnecessary, their Lordships think, that after the resistance offered by the appellant to the suit in India, it is impossible for him now to take an objection, which, after all, is only an objection on the score of costs.

The next objection is of the same kind. The appellant complains that before instituting this suit, the plaintiff in the suit should have settled with the Government, or the agent of the Government, the question whether there had been any confiscation of the property of this respondent. That, again, is simply a question of costs. It is simply that a plaint with a greater amount of costs has been thrown upon the appellant, than would have been thrown upon him if these preliminary proceedings had been taken. Their Lordships are not prepared to say that the form adopted was an improper form, or that it was by any means inconvenient in proceeding for the recovery of this property in the same suit, to call on the Government Collector to clear away any cloud upon the title that might exist by reason of the argument, that the confiscation awarded against Hossein Khan might extend to the property of the present respondent.

The next objection made by the appellant is that the money—the Rs. 3,750—was not tendered before this suit was instituted. Their Lordships think that the decree has done full justice to the appellant on this score. The decree has ordered payment to be made as the terms of the respondent obtaining possession of the property. Then as to the claim for some expenditure upon a mosque, that was hardly urged at the Bar before their Lordships; and no right whatever is shown to add that sum by way of charge upon the estate before the estate is given up. Then as regards the two villages, which, it appears, were given to the present respondent by the Begum, it is said that those villages ought to have been taken into account in diminution of the share of the property awarded now to the respondent. Their Lordships are unable to see how that could properly be done. It is scarcely credible to suppose that when those two villages were made over by the Begum to the present respondent, the Begum intended to make them over simply as liberating them from her claim and security for dower, for that is the result that would arise from the view taken by the appellant. They were made over by the Begum to the respondent, apparently, by way of gift; and if so, they must have been made over, not out of the portion in dispute, but out of the other portion of the estate to which the Begum was entitled.

Under these circumstances, their Lordships are of opinion that the appeal fails on all the grounds urged by the appellant, and all they can do with it is humbly to recommend Her Majesty to dismiss it with costs.

The 11th July 1870.

Present :

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James,
and Sir Lawrence Peel.

Alluvion lands—Accretio nReg. XI of 1825.

*On Appeal from the High Court at Calcutta.**

Lopez

versus

Muddun Mohun Thakoor and others.

Plaintiff sued for the recovery of alluvion lands which originally formed a portion of his estate, which had been washed away by the Ganges, but which subsequently re-formed. The defendants relied on s. 4 Reg. XI of 1825, and contended that the plaintiff's land having been wholly submerged so as to make the defendant's land the river boundary, the subsequent recession of the river caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been re-formed on the ascertainable and ascertained site of the plaintiff's mouzah.

Held that s. 4 did not apply to this case, and that that section refers only to cases of gain by acquisition by means of gradual accession, to the gain which an individual proprietor might make from what was part of the public territory, not from a private person's property.

Romanath Thakoor *versus* Chunder Narain Chowdry (Marshall, p. 136), approved, and 3 Weekly Reporter, Civil, p. 51, disapproved.

The plaintiff in this case, Felix Lopez, was the proprietor of a very considerable estate, a mouzah, on the banks of the Ganges. By the year 1840, by reason of the continued encroachment of that river, it was wholly submerged, and it was, to adopt an expression used in this class of cases in India, "diluviated;" that is, the surface soil, the culturable soil, was wholly washed away. After the lapse of some years, and after one temporary recession and re-encroachment which has occurred in the interval, the water has ultimately retired, and the land, having been for some time in a state described as admitting of only temporary cultivation by hand-sowing, has become hard and firm soil, capable of being cultivated in the usual manner. The plaintiff says, "This was my property. The Ganges, which swallowed it, has again yielded it up, and I claim my property, which, having been buried and lost to sight, has again re-appeared."

The rule of the English law applicable to this case, is thus expressed in a work of great authority (Hale, "De Jure Maris," p. 15):—"If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so yet that there be reasonable marks to continue the notice of it, or though the marks be defaced, yet if by situation and extent of quantity and boundary on the firm land, the same can be known, or it be by art or industry re-gained, the subject doth not lose his property. If the marks remain or continue, or the extent can reasonably be certain, the case is clear." And in another place, p. 17, he writes thus:—"But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, for he cannot lose his property of the soil, although it for a time becomes part of the sea and within the admiral's jurisdiction while it so continues."

This principle is a principle not merely of English law, not a principle peculiar to any system of Municipal law, but it is a principle founded in universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by

* From the judgment of E. Jackson and Glover, J.J., in Regular Appeal No. 126 of 1865, dated 28th November 1865: not reported.

the sea or by a river, the ground, the site, the property, remains in the original owner.

There is, however, another principle recognized in the English law (derived from the civil law), which is this,—that where there is an acquisition of land from the sea or a river by *gradual, slow, and imperceptible means*, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land (Lord Yarborough's case, 2 Bligh, N. S., 147). And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (the Hull and Selby Railway case, 5 Meeson and Welsby, 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined.

The principle of law, so far as relates to accretion, has, to some extent, been made part of the positive written law of India, and it is on the operation of such positive written law that the defendant's case is based. This law is to be found in the Regulation No. XI of 1825, a Regulation for carrying out the rules to be observed on the determining of claims to lands gained by alluvion or by the dereliction of a river or the sea. There is a recital in that Regulation as to disputes which had arisen with regard to such claims, and the necessity of having some definite rule laid down with regard to several matters, only one of which is material or relevant to the present case; and that is the case provided for by s. 4 of the Regulation. By that section it is provided that "when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether the land be held immediately from the Government or from any intermediate landowner." And the defendants' contention is, that the plaintiff's land having been wholly submerged, so as to make their (the defendant's) land the river boundary, the subsequent recession of the river has caused a gradual accession to their land, and an increment by annexation to their estate, notwithstanding that the land has been reformed on the ascertainable and ascertained site of the plaintiff's mouzah.

It is to be observed, however, that that Clause refers simply to cases of gain—of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says—"I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person." And in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another.

In truth, when the whole words are looked at, not merely of that Clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense; that is to say, the sea belonging to the

State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was, in a state of nature, neither valuable nor usable.

And on the very words of the section itself, if the ownership of the submerged site remained as it was (and there seems nothing to take it away), it is difficult to see why a deposit of alluvion directly upon it is not at least as much an accretion and annexation vertically to the site, as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property.

If we had then to consider the question for the first time, we should have come to the conclusion that s. 4 did not govern the case, and that the question would have to be determined by the general principles of equity, to which all cases not in terms provided for are referred by s. 11. Those principles would not give the plaintiff's property to the defendant. But the question is not raised for the first time. The very point came for consideration in India before a Court comprising Sir Barnes Peacock, Mr. Justice Bayley, and Mr. Justice Kemp; * and after full consideration it was decided that lands washed away and afterwards re-formed on an old site, which could be clearly recognized, are not lands gained within the meaning of s. 4 Reg. XI of 1825, viz., they do not become the property of the adjoining owner but remain the property of the original owner.

And the same point arose in a case in this Court of Mussamut Imam Bandi and Wajid Ali Khan, appellants, and Hurgovind Ghose, respondent, reported in 4 Moore's Indian Appeals.† It is there said—"The whole of the district adjoining the land in dispute, as well as that land itself, is flat and very liable to be covered or washed away by the waters of the Ganges, which river frequently changes its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801, and then became partly dry, until in the year 1814 it was again inundated. After this period it once again re-appeared above the surface of the water; and by the year 1820 it became very valuable land." That is a state of things very singularly like what has occurred in this case.

In that case it was held as follows:—"The question then is, to whom did this land belong before the inundation? Whoever was the owner then, remained the owner while it was covered with water and after it became dry."

This authority appears to their Lordships conclusive in the present case.

In a subsequent case, however (*Kattemonee Dossee v. Rane Monmohinee Dabee*, *Weekly Reporter*, 26th May 1865,‡), it was held by a Court comprising Justices Trevor, Loch, Bayley, and Morgan, that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river. Their Lordships, however, are unable to assent to any such distinction between surface and site. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.

Their Lordships, however, desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to emerge again, like any other derelict

* See Sutherland's Full Bench Rulings, p. 45.

† 7 W. R. P. C. 67; 1 Suth. P. C. R. 208.

‡ 3 W. R. 51.

land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation.

But in this case not only did the parties themselves take the proper, prudent, and honest means of preventing the necessity of any dispute arising by interchanging the Tanabundee which has been put in evidence, but the plaintiff, as between him and the State, did also take the most effectual means in his power (having the description and measurement of the submerged mouzah recorded, and continuing to pay rent for it) to prevent the possibility of any question of dereliction or abandonment being raised against him. Their Lordships are, therefore, of opinion that the property now being capable of identification by means of that Tanabundee and otherwise, the property having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property; and they will therefore recommend to Her Majesty to reverse the decision of the Court from which the appeal has come, to affirm the decision of the Principal Sudder Ameen, and that the costs of the litigation, both below and here, should be given to the appellant—the plaintiff.

The 12th July 1870.

Present :

The Master of the Rolls, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Purdah woman—Deed—Death-bed disposition.

*On Appeal from the High Court at Calcutta.**

Grish Chunder Lahoree

versus

Mussamut Bhuggobutty Debia and others.

Where a deed purports to have been executed by a purdah woman, the Court should see that it was fairly taken from her, and that she was a free agent and duly informed of what she was about. When the disposition is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed and expresses his real intention.

The appellant in this case is the heir-at-law of Sarodapershad, who was the adopted son and heir of Kali Kant Lahoree. The respondents are the sisters of Mirnamoye Debia, deceased, who was the widow of Kali Kant. The suit which has given rise to this appeal was a suit in the nature of an ejectment brought by the respondents, claiming under a deed of gift from Mirnamoye, to recover from the appellant three several parcels of land. Their case was that these lands, which, on three different occasions, had unquestionably been purchased in the name of Mirnamoye, were part of her streedhun or peculiar property; that she had, therefore, the power of disposing of them, and had effectually exercised that power by the deed of gift in question. The case of the appellant was that the lands, though purchased in the name of Mirnamoye, were purchased by Kali Kant with his own funds in the name of his wife, and formed part of his estate in which, under his will, she had only a life interest; and further that the alleged deed of gift was either a forgery, or, having been procured from Mirnamoye by the fraud and contrivance of her brothers, was not an effectual disposition of the pro-

* From the judgment of L. S. Jackson and Levinge, *J. J.*, dated 8th December 1863, passed in Regular Appeal No. 227 of 1862: not reported.

perty. It lay, therefore, upon the respondents, who were seeking to disturb the possession of the appellant, to establish both that the property was the *streedhun* of Mirnamoye and that she had effectually conveyed it by this deed of gift. If either of these issues be determined against them, it follows that, on the death of Mirnamoye, the title to the lands in question passed to Sarodapershad, who was the heir-at-law of both his adoptive father and his adoptive mother; and that the appellant as his heir is entitled to retain possession of them. Both issues were however determined, first by the Zillah Court, and afterwards on appeal by the High Court, in favor of the respondents; and the present appeal is against those decisions.

Their Lordships are of opinion that, upon the evidence before them, they ought not to disturb the finding of the Courts below upon the first of these questions. They do not adopt all the reasons assigned by either Court for coming to this conclusion. They desire to state in particular that they are not satisfied that ss. 20 and 21 Act I of 1845 raise a presumption of law fatal to the case of benamee purchase set up by the appellant: and they observe that this objection, if well founded, would at most apply only to one of the three parcels of land in dispute (*Somashpara*); and not, as is stated by the learned Judges of the High Court, "to all the denominations of lands claimed by the defendants." They find, however, that Mirnamoye has certainly some *streedhun*. They find that Kali Kant in his lifetime solemnly and deliberately admitted that these purchases were made out of her funds, and for her benefit as well as in her name. The evidence no doubt fails to show satisfactorily that her peculiar funds amounted to a sum which would cover all the purchases which she is said to have made. But it cannot be said conclusively to prove the contrary.

Again, though the extracts from Kali Kant's books afford some evidence in support of the allegation that these purchases were made out of his funds, and were therefore presumably taken benamee for him, they are not absolutely conclusive. Their Lordships are unable to say how the separate funds of the husband and wife may have been intermixed by them. We know by his own statement that he did on one occasion take and employ Rs. 8,000 belonging to her. It seems, therefore, to their Lordships that this evidence cannot fairly be taken to outweigh the positive admissions of Kali Kant himself. It is argued, however, that credit is not to be given to those admissions, because they may be assumed to have been made falsely, with the object of defeating the claim of the present appellant to share in the self-acquired property of Kali Kant, including these parcels of land. But looking to the remarkably fair and open character of the pleadings in which the statements in question were made, and considering that the defence of Kali Kant (a defence which proved successful), was that the plaintiff in that suit (the present appellant) was not entitled to share in any part of his self-acquired property, whether held benamee or otherwise; and that those pleadings admitted that some of the purchases then in question had been taken benamee; their Lordships feel that they would not be warranted by the evidence before them in imputing to Kali Kant that he had been guilty in a judicial proceeding of deliberate falsehood. It is, therefore, unnecessary to consider how far a Court of Justice is at liberty to disregard admissions so made in favor or for the benefit of a person claiming as the heir of him by whom they were made.

Assuming, then, that the Courts below have correctly found that the property in question was the *streedhun* of Mirnamoye, their Lordships have to consider whether the respondents have established that the deed of gift was, under the circumstances of its execution, a valid disposition of it in their favor.

It cannot be said that this issue has been fully or satisfactorily tried in the Courts below. It does not appear on the record whether there was any formal settlement of the issues; or, if there was any, in what terms this particular issue was framed. The statement of the Zillah Judge that the conveyance by Mirna-

moye to her sisters is not denied by the defendant, implies either that he mistook the effect of the defendant's written statement, which unquestionably disputed the validity of the deed, or that he never addressed his mind to try an issue on which nevertheless both sides had put in a considerable amount of evidence. The Appellate Court observed on this part of the case that the Judge below had apparently by inadvertence taken for granted that the conveyance was not denied, and had passed no opinion except inferentially on its validity. But instead of sending the case back for the trial of the issue on which the Court of first instance had thus failed to pass any satisfactory judgment, the learned Judges of the High Court proceeded to dispose of it on the evidence which had been taken in the Court below. It follows, therefore, that the only Court which has really tried the question was equally with their Lordships under the disadvantage of having to determine it on the written depositions, and without an opportunity of seeing the witnesses.

What are the undisputed facts of the transaction? About the end of May 1856, Mirnamoye, labouring under the disease of which she died, left her house in Rajshahye, and went for the sake of medical advice to Shoyabad near Moorshedabad, where she took up her residence in the house of the Pundit Gobind Kant. She was accompanied by her sisters (the defendants), her dewan, Krishonath Sannyal, and other servants. Early in the following July, her brothers, Ram Kristno and Doorgadoss Chowdry, came to her from Rajshahye. The hibba, or deed of gift, bears date the 16th, and was produced for registration on the 18th, and actually registered on the 19th July under a mookhtarnamah purporting to have been executed by her contemporaneously with it. Early in August 1856, other mookhtarnamahs and a petition purporting to have been also executed by Mirnamoye were produced; the first in the Collectories of Rajshahye and Bogra; the last in the Court of the Judge of Zillah Rajshahye. Their object was to give publicity to the hibba, and to cause the properties comprised in it to be transferred in the books of the Collector into the names of the respondents. The Zillah authorities required that these documents should be verified. On their requisition the Principal Sudder Ameen of Moorshedabad appears to have sent a paishkar to take Mirnamoye's deposition at the house of the Pundit, and on his report to have declared them to have been verified. The order to that effect was passed on the 19th August, and on the 25th August 1856 Mirnamoye died. Nothing further was done between these dates to give effect to the hibba, or deed of gift. After her death the validity of the deed, as well as the power of Mirnamoye to dispose of the property, was disputed by the guardian of Sarodapershad, and a contest for the mutation of names was carried on in the Revenue Courts, which was finally determined by the Board of Revenue in favor of Sarodapershad whose possession was confirmed, the respondents being left to assert their title by a regular suit in the Civil Court.

Their Lordships now proceed to consider more particularly the evidence by which the respondents have attempted to prove the due execution of the hibba by Mirnamoye. Their principal witnesses are the Pundit Gobind Kant, whom the learned Judges of the High Court seem to have considered a respectable witness, the dewan, and Ram Kristno Chowdry, one of the brothers of Mirnamoye. The Pundit seems now to be employed as Pundit in one of the Civil Courts; but at the date of the transaction he did not hold that office, but stood in some kind of spiritual relation to the two brothers (the Chowdries), they being his "Jujman." His story is that early in July 1856, Mirnamoye expressed to him an intention to give all the property over which she had a disposing power, to her brothers; and desired him to write to them and request them to come to Shoyabad. He did so write, but the letters are not produced. He goes on to state that Ram Kristno came to the place several days before Doorgadoss, who accounted for the delay in his coming by saying that it had been occasioned by his having caused a draft of the instrument for which he had been brought to be prepared at Rampoor.

From the cross-examination of the Pundit it appears that finally Mirnamoye

was made to execute two hibbas, viz., the one in question in this suit, and one by which she gave other part of her streedhun to her brothers in the names of their wives ; that the actual form of this disposition, varying as it did from the intention said to have been expressed by her to the Pundit, was prompted by the brothers, one of whom brought the draughts from which the instruments executed were prepared with him. He also states a conversation which supports the allegation of the defendant, that the gift in question though nominally made to the sisters was for the brothers. To the actual execution of the instrument this witness does not speak. He accounts for his absence by saying that he was suffering from fever, and unable to bear the press of the crowd which assembled on that occasion ; that he retired to the house of one Prem Baboo, situated at a short distance from his own, and was informed from time to time of what was going on by his disciples ; that he made one short visit to his own house, where he saw the dewan writing with stamped paper before him, but could not stay there.

Their Lordships are compelled to say that this absence of the Pundit begets a suspicion in their minds, which the story told by him of its cause does not dispel. It is by no means improbable that a person in a respectable position in life, knowing that a deed was about to be unfairly obtained, would take care not to be personally present, and would contrive to give only such corroborative evidence of the transaction as he might think he could safely give. In the present instance, the only legal proof which the Pundit gives of the actual execution of the document, is the subsequent and verbal admission of Mirnamoye Debia in a conversation with him. The learned Judges of the High Court laid some stress on this admission. But their Lordships need not remark upon the danger of trusting to that kind of evidence, unless the witness is wholly above suspicion.

Doorgadoss Chowdry deposes that he has no interest in the deed of gift, and treats it as made for the benefit of the respondents. He does not confirm the account given by the Pundit of the change of intention on the part of Mirnamoye ; he does not speak of having brought any draft with him, or give any account of the preparation of the deed, or show how it came to be made in the names of the two sisters ; or who gave the instructions for it.

The dewan who wrote the hibbahnamah says that the gift was intended to be in favor of the brothers ; that he cannot tell why it was executed in the names of the sisters ; and he does not state from what draft or under whose instructions he wrote the deed in the form in which it was executed. He says that the respondent Ram Soondery put Mirnamoye's seal to the document at her request. The brother and the subscribing witnesses say that Mirnamoye sealed it herself.

Of the testimony of the subscribing witnesses it is unnecessary to speak at length. They are either cultivators living at a distance from the place of execution, or menial servants. It is not satisfactorily explained why some of them were there at all. And the testimony of the dewan makes it, to say the least, extremely doubtful whether they were in fact there ; and whether, according to a reprehensible practice not uncommon in India, their names were not afterwards written on the deed. Only one of them professes to have written his own name. They were not examined when the deed was registered, and the subscribing witnesses who were then examined were not produced at the trial of this cause. Some of them speak of Mirnamoye as present in the verandah amidst a crowd of men, giving her own instructions and describing the property verbally, and personally asking the witnesses to become subscribing witnesses.

It is further to be observed that, although the Pundit says he heard of the execution from the Kobiraj and other respectable persons, and although Doorgadoss names several persons far more respectable in station than the subscribing witnesses as present at the execution, none of those persons either subscribed the instrument or have given their testimony in support of it. Again, if it had been clearly proved by the officer sent to verify the execution of the mookhtarnamahs

by Mirnamoye that she had acknowledged those instruments to be hers, that would have been an important corroboration of the respondent's case. But that officer was not called as a witness; his actual report is not forthcoming; and the testimony of the dewan leads to the conclusion that he performed his duty in the most perfunctory manner and was satisfied on the report of a maid-servant, not called or examined, that Mirnamoye had admitted the execution of the mookhtarnamahs.

Is then the evidence adduced by the respondents, and considered without reference to any conflicting testimony on the part of the appellants, sufficient to establish the due execution of this deed of gift? Their Lordships, differing respectfully from the Judges of the High Court, have come to the conclusion that it is not.

The disposition is one by a purdah woman, made not very long before her death and whilst she was labouring under a mortal disorder. Their Lordships consider that it is not open to the objection of inofficiousness. Her preference of her own blood relations to a son adopted by her husband, and otherwise provided for, was not unnatural. But this Committee and the Courts in India have always been careful to see that deeds taken from purdah women have been fairly taken; that the party executing them has been a free agent, and duly informed of what she was about. Again, when the disposition, as in this case, is in the nature of a death-bed disposition, the Court that upholds it ought, from whomsoever it proceeded, to be satisfied that it was the free voluntary act of the party by whom it purports to have been executed, and expresses his real intentions. In the present case the respondents' evidence is conflicting as to the party intended to be benefited, and leaves it uncertain, to say the least, what were the instructions for the deed and from whom those instructions emanated. Evidence so untrustworthy, so uncertain, and so conflicting, is not such as enables their Lordships to declare affirmatively that the hibba was in any sense the act and deed of Mirnamoye, or even that she herself put her hand and seal to it.

Their Lordships, therefore, have come to the conclusion that the respondents having failed to prove a material link in the title upon which alone they can recover, the decrees under appeal ought to be reversed, the suit dismissed with costs in the Courts below, and that the respondents should pay the costs of the appeal. And they will humbly advise Her Majesty accordingly.

The 12th July 1870.

Present:

The Master of the Rolls, Sir James W. Colville, Sir Joseph Napier,
and Sir Lawrence Peel.

Benamée transactions—Succession.

On Appeal from the late Sudder Court at Agra.

Nawab Azimut Ali Khan

versus

Hurdwaree Mull and others.

The law as to benamée conveyances taken by a father in the name of a son, whether in Hindoo or Mahomedan families, should be considered in all Courts in India as conclusively settled by the decision of the Privy Council in *Gossain v. Gossain*, 6 Moore.

That case, however, was not applied to the present case, in which it was found that a father, who had purchased property with his own funds, had had the conveyance drawn up in his son's name with a view to affect the interests of his daughters and to vary the rule of succession between sons and daughters in his family.

The Nawab Rooknoodowlah, the original appellant, has died pending this appeal, and is now represented by his son, the Nawab Azimut Ali Khan. The original appellant will, to prevent confusion between them, be called the Nawab in the observations of their Lordships on this case. This appeal is brought from a decision of the late Sudder Dewanny Adawlut at Agra, affirming a decree of the Judge of the Zillah Saharunpore, who had affirmed on appeal to him a decree of the Principal Sudder Ameen of that place, dismissing the suit of the Nawab against the present respondents.

The respondents, by trade bankers, were creditors of a deceased son of the Nawab, named Ruhmut Ali Khan. The debt was evidenced by an instrument in writing in the usual form there of a bond ; but this instrument does not appear to have been a mortgage bond hypothecating any property of the debtor. The respondents obtained a decree in the Civil Court of Saharunpore for the amount of their demand against Ruhmut, who died before execution was had on that decree. The respondents, after the death of Ruhmut, proceeded, agreeably to the law and practice of the Court, to attach the property of their debtor, in order to obtain payment of their debt. They were proceeding to bring to sale the property which is the subject of the present appeal, when the Nawab intervened in the execution, proceeding as an objector, claiming the whole property as his own absolutely, and stating the deceased Ruhmut to have been merely a fictitious or benamee holder of the property for his father, the Nawab. The Judge of that Court, for reasons which it is unnecessary here to state or consider, refused to allow the Nawab to proceed on that objection, and referred him to a regular suit. The Nawab accordingly preferred his claim by a civil suit against the respondents, viz., the original suit before referred to, in the Court of the Principal Sudder Ameen of Saharunpore. The properties sought to be recovered are named respectively Bhensee and Babree.

The whole contest in this suit was whether Ruhmut held these properties benamee for the Nawab. No case was made by the Nawab that the son had a postponed interest or estate in the property. Such a case, even if substantiated, would not have enabled the Nawab, as an opponent of the sale, to defeat by intervention the claim of the creditors wholly. The ordinary mode of conveyance under such a judicial sale, viz., of the right, title, and interest of the debtor, would have enabled the creditors to realize their debt or some portion of it by a sale of the interest, whatever it might prove to be. The Nawab instituted no suit to protect any alleged life interest in himself against a title derived under the judicial sale. The Court, therefore, had in the Nawab's suit simply to decide whether he had proved his son Ruhmut to have been from the time of the conveyance to Ruhmut until the death of the latter a benamee-holder of these properties for the Nawab.

The title to Bhensee was one derived originally by mortgage. The owner Wuzeer Ali mortgaged this with fifteen other mouzahs to one Bhuwanee Pershad for a certain sum, which, by a second advance and charge, amounted to Rs. 26,400. Bhuwanee Pershad, as the Nawab alleged, sub-mortgaged the whole sixteen mouzahs to him for the same sum ; and he, according to his statement, had the conveyance taken benamee in the name of two of his infant sons, of whom Ruhmut was one. The other of these two sons died young ; on his death, the Nawab, who was his heir, substituted another son. This son died young, unmarried, and without issue ; his father was his sole heir. The interest therefore of Ruhmut, if real, was to a moiety of this share of Bhensee originally conveyed to the two sons. The title to Babree was by conveyance, as upon an ordinary purchase, for a money consideration, and the conveyance was in the name of Ruhmut. Some contest has been made about the real facts of this purchase, and the respondents deny that it was, what it purports to have been, a purchase at all ; but in the view which their Lordships take of this case, it will be unnecessary to advert further to this head of contention, or to distinguish further between the title of the respective proper-

ties, since the explanation of the Nawab as to the reasons for the conveyance to his sons applies alike to both properties.

The case made by the Nawab at the hearing of this appeal before their Lordships was, that the funds which purchased both properties were exclusively the funds of the Nawab; that a legal presumption thence arose that the proprietary right was the Nawab's, and that the respondents, who have no better title than that of Ruhmut, have not rebutted this presumption. The Counsel for the Nawab relied on the case of *Gossain v. Gossain** in 6 Moore, which they contended had been disregarded in the decision of this case in the Courts below.

Had this appeared to their Lordships to have been so, they must necessarily have recommended to Her Majesty to reverse the decisions under appeal, since the law as to benamée conveyances taken by a father in the name of a son, whether in Hindoo or Mahomedan families, should be considered in all Courts in India as conclusively settled by that decision.

It becomes necessary, therefore, to see what were the real grounds of the decision in the Court of the Principal Sudder Ameen. It appears to their Lordships that that Judge found as a fact that the Nawab purchased the property with his own funds; a conclusion which, on the evidence before him, and in the absence of all evidence of property at that time in the sons, their Lordships think a reasonable and proper conclusion. Had this fact received no other addition than that the conveyance was taken in the names of the Nawab's sons, the case would have fallen within that of *Gossain v. Gossain*, and the argument for the appellant must have prevailed with their Lordships: but the Principal Sudder Ameen remarks, and relies on a very important addition to these facts, in the Nawab's own explanation of the cause of the conveyance to his sons. The Court thence inferred that a motive existed for it in the state of his family, the existence of daughters, and his desire, as expressed, to vary the rule of succession between sons and daughters in his family. The Sudder Dewanny Adawlut also, in their judgment, rely on these additional facts.

If the conveyance to the sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between sons and daughters, it could not be designed as a mere naked benamée conveyance, because, as Mr. Bell correctly observed, a mere benamée conveyance would in no way affect such succession. But if, as the Nawab himself represented the transaction, it was designed to affect the daughter's claims or interests, it could only so operate as a real transaction; that is, by a conveyance of interest to the sons. It is immaterial in this case to consider whether the legal effect of the arrangement would be to confer a resulting life-estate on the Nawab or not, since the only contest made in the suit was whether it was an absolute benamée transaction. The case admitted certainly of being viewed thus, that the conveyance was merely colorable, to be treated as real should it become necessary to defeat a daughter's claim, but fictitious as between father and sons. It is to be observed, however, that this view of the case was not presented to the Judge; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against creditors of the son made after the son's decease in favor of the father, alleging his own fraud. Their Lordships, therefore, think that the Principal Sudder Ameen was justified in regarding the whole evidence before him as not sufficient to establish the case of benamée ownership, which the Nawab advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of creditors against property of which their debtor was allowed for many years to have, at least, the ostensible ownership, it is one which their Lordships would not disturb, unless it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the objector

* See p. 13 ante.

to the rights of creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were not exhibited, for a family to place the family property out of reach of creditors. If the father became indebted, the titular right would be then stated to have conveyed the real interest; but if the son were indebted, then the claim would take the form to which this suit is adapted. Views of these dangers to the rights of creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed with costs.

The 12th July 1870.

Present :

The Master of the Rolls, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Redemption—Mortgage—Accounts.

On Appeal from the late Sudder Court at Agra.

Nawab Azimut Ali Khan

versus

Jowahir Singh and others.

The plaintiffs in this suit were purchasers of the equity of redemption in a portion of certain mortgaged premises which were sold in lots, and they brought this suit against the mortgagees who were also purchasers of the equity of redemption of several of the lots. They made the purchasers of the other lots parties to the suit and sought to redeem their own portion of the estate and to recover possession of their own portion and the portion purchased by the purchasers other than the mortgagees, on payment into Court of a sum sufficient to cover the proportion of the mortgage-debt attributable to the said parcels. The mode of applying the whole of the mortgage-debt between the different mouzahs of the mortgaged estate in such a case pointed out.

The principle of Construction No. 359,—that when a creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the principal) he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand,—is not applicable to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption and the final settlement of the account.

The original appellant in this case was in April 1846 the mortgagee of an estate comprising sixteen different mouzahs, and known as talook Bhainsee. The estate had been originally mortgaged (it is said by way of usufructuary mortgage) by its then owner, Vuzeer Ali, for Rs. 26,400 to one Bhowany Pershad, who may be taken to have transferred, in 1822 or 1823, his interest as mortgagee to the appellant. Further sums, amounting to Rs. 15,700 in all, were afterwards advanced by the appellant on the security of the estate, upon terms which will be afterwards considered. In 1839 the representatives of the mortgagor brought a redemption suit, which was finally dismissed by the Sudder Court of the North-West Provinces on the 1st August 1843, by a decree which is one of the exhibits in this cause. On the 8th April 1846, the estate was sold, subject to the mortgage, under process of execution in satisfaction of decrees against the original mortgagor or his representatives. It was sold in different parcels. One mouzah (Hosseimpore) was purchased by Jowahir Singh and the four other persons who, with him, are the plaintiffs in this cause; mouzah Jeetpore was purchased by Buhai Singh

and Bustee Ram; mouzah Rookunpore by Hossein Ali Khan and two other persons; and one-fourth of mouzah Chundharee by Mussanut Imaamee Begum. The residue of the estate was purchased by the appellant; and the result of the sale was, consequently, that whilst he retained the rights of mortgagee over the whole property, he became the owner of the equity of redemption in twelve and three-quarters of the sixteen mouzahs of which it was composed.

In 1862 the plaintiffs, as the owners of the equity of redemption in mouzah Hosseinpore, brought a suit against the appellant for the redemption of their mouzah on payment of Rs. 4,737 7 annas, which they alleged to be the rateable share of the mortgage-debt payable by them. The suit was tried first by the Principal Sudder Ameen, and afterwards on appeal by the Zillah Judge. The latter held that the plaintiffs were entitled to redeem their mouzah on payment of an additional sum of Rs. 1,212 13 annas. But his decision was reversed, and this suit finally dismissed by the Sudder Court on special appeal on the 29th April 1864, principally, if not wholly, on the ground that the purchasers of the other three parcels of lands should have been made parties, and that the plaintiffs should at least have offered to redeem those parcels by paying their proportionate part of the mortgage-debt attributable to them. The decree affirmed the principle established by a previous case in the Court, that the plaintiffs were at liberty to redeem their mouzah without bringing into Court that portion of the mortgage-debt which was attributed to the mouzah wherein the equity of redemption had been purchased by the mortgagee.

On the 22nd December 1864, the plaintiffs instituted their present suit. It was framed in the manner indicated by the last stated decree. The purchasers of the parcels other than those purchased by the appellant or the plaintiffs, were made parties on the record; and the plaintiffs having paid into Court a sum which they alleged to be sufficient to cover the proportion of the mortgage-debt attributable to those parcels, as well as to their own village, claimed absolutely to redeem the latter, and to recover possession of that and the three other parcels with mesne profits, from the date of the institution of the suit. This suit, like the former one, was tried in first instance by the Principal Sudder Ameen, who decreed in favor of the plaintiffs; and his decision was affirmed on regular appeal by the Zillah Judge, and afterwards on special appeal by the Sudder Dewanny Adawlut at Agra. The present appeal, which has been heard *ex-parte*, is against these decrees.

The appellant does not, as their Lordships understand, contest the proposition that the plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of *some* proportion of the mortgage-debt. His objections to the decrees may be divided into three classes:—first, objections to the mode in which the rateable share of the debt payable in respect of Hosseinpore has been calculated; secondly, objections to the mode in which the gross amount of the mortgage-debt to be apportioned has been ascertained; and, thirdly, to the mode in which the decrees deal with the villages whereof the equity of redemption belongs, or is alleged to belong, to the other defendants on the record.

Under the first head of objection it was strongly argued that the principle upon which the debt was apportioned amongst the different villages was erroneous; that the apportionment should have been made according to the actual and ascertained values of the several mouzahs, and not according to the amount of revenue assessed on, and payable in respect of such mouzahs to Government.

Their Lordships do not deny that there is some force in this objection.

The proportion of the debt chargeable on each village ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value.

On the other hand, there might be a difficulty in applying the principle contended for by the appellant to cases in which the amount payable by a mortgagor

seeking to redeem, is not ascertained as in this country by enquiry and account; but must be calculated and tendered or brought into Court by him before the commencement of the suit. Their Lordships, however, do not feel called upon to affirm the correctness of the principle adopted in the Court below, or to give any opinion which may have the effect of sanctioning its adoption in other cases, because they are clearly of opinion that the objection is not one which this appellant is now entitled to take. They cannot find any trace of its having been taken in the Courts below. The written statement of the appellant does not raise the question. On the contrary, he seems, in coming to the conclusion that Rs. 27,387 6 annas 6 pies was the amount which the plaintiffs ought to have brought into Court, to have adopted the same principle of apportionment, as will be seen by referring to his own petition and the account annexed thereto at pages 5 and 6 of the record; though the latter account claims something more than the Rs. 27,387 6 annas 6 pies as the sum payable in respect of all the four villages.

It is questionable whether the appellant has lost anything by reason of the principle of apportionment of which he now complains; but it is certain that by yielding to the objection now for the first time taken and re-opening the whole account, their Lordships would do great injustice to the respondents, and make a very dangerous precedent.

It is true that the appellant's written statement did object to the particular application of the principle, on the ground that the revenue assessed on Hosseinpore was taken at somewhat less than its real amount; and contended that consequently the amount brought into Court by the plaintiffs was less by a few rupees than even on their calculation it ought to have been. But this objection does not seem to have been pressed in the Courts below, certainly not in the two Appellate Courts. And their Lordships are of opinion that the decrees, if otherwise correct, ought not to be disturbed on that ground.

The next question is whether the gross amount of the debt to be apportioned has been correctly ascertained in the Courts below. Mr. Leith, in the course of his argument, remarked strongly on the scantiness of the evidence on which those Courts have proceeded. It is, however, to be observed that for this and any consequences that may have followed from it the appellant is chiefly responsible.

The plaintiffs are mere purchasers of the equity of redemption in a portion of the estate at an execution sale, and are not likely to have a single document relating to it except the bill of sale of their particular village. On the other hand, almost every document of title relating to the property or to the mortgage-debt incurred upon it is presumably in the possession or power of the appellant, who has been in actual possession of the estate since 1823. In truth, both the parties and the Courts have been content to proceed upon certain findings in the decree of the 1st August 1843, which dismissed the redemption suit of the representatives of the original mortgagor. On these findings it has been taken as proved that the principal money secured by the mortgage amounts to Rs. 42,100 and that that sum consists of Rs. 26,400, advanced in two sums on two different occasions to Vuzeer Ali, upon usufructuary mortgages of the property, of a sum of Rs. 5,000 advanced to his representatives, and bearing no interest on condition of their agreeing not to sue for redemption for twenty years, and of a number of different sums advanced to several of those representatives on their respective bonds at interest, and aggregating Rs. 10,700. These were all held by the decree of the 1st August 1843, to be charged on the estate; and the suit in which that decree was made was dismissed on the ground that the plaintiffs had not tendered or deposited a sum sufficient to cover those charges.

The following is the manner in which the Courts below have dealt with the questions of interest on these items. They have treated the interest on the Rs. 26,400 as satisfied by the rents and profits of the property of which the mortgagee has been in possession, no account of those rents and profits having been

required from or rendered by the mortgagee. They have held that no interest ran upon the Rs. 5,000 ; and that under s. 5 Reg. XXXIV of 1803 no larger sum could be recovered in respect of interest on the Rs. 10,700 than the amount of the principal. The result of taking the account would be to make the whole mortgage-debt apportionable amongst the different villages Rs. 52,800.

The original contention, however, of the appellant seems to have been this,—He treated the decree of the 1st August 1843 as having conclusively determined, as between the mortgagors and the mortgagee, that the mortgage-debt from that date was to be taken to be Rs. 42,100, carrying interest at the rate of 12 per cent. per annum. He calculated the amount of such interest for twenty-one years and some months at Rs. 108,093 12 annas, and insisted that the amount due on the mortgage at the date of the commencement of this suit must be taken to be Rs. 150,193 12 annas, of which the proportion attributable to Hosseinpore and the other premises sought to be redeemed was Rs. 27,387 6 annas 6 pies. This mode of calculation, which does not give credit for one rupee in respect of the rents and profits realized from the property during more than 21 years, is obviously erroneous.

Moreover, the whole argument is based upon a misconception of the nature and effect of the decree of the 1st August 1843. That decree, in fact, did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage-money had not been deposited (the sums tendered being only Rs. 26,400 and Rs. 400). According to the course and practice of the Court in India, the only point to be determined in such a suit is whether the mortgage-debt has been fully satisfied after taking into account the sum tendered or deposited ; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit. But in truth this decree, after dismissing the suit, merely said that the plaintiffs would not be entitled to redeem until they should liquidate the whole of the money due to the appellant, both on account of the past and the present, according to the conditions set out in the various deeds. If, therefore, according to the terms of the original contract no interest was to run upon the Rs. 5,000 this decree would not convert that loan into a loan bearing interest. Nor would it alter the rights or liabilities of the parties in respect of the other sums which made up the Rs. 42,100.

The question now under consideration, viz., the amount of the whole mortgage-debt to be apportioned between the different mouzahs, may be treated without reference to apportionment, and as if it arose between a sole mortgagor and the mortgagee. It is also to be considered with reference both of the sufficiency of the tender or deposit, and to the actual sum payable on redemption.

It was clearly not necessary for the mortgagor to deposit anything by way of interest on the Rs. 26,400, if, as seems to be assumed, that sum was secured by usufructuary mortgages. He had a right to assume until the contrary was shown, by taking an account, that that interest was covered by the rents and profits. Again, he was under no obligation to deposit anything in respect of the Rs. 5,000 if no interest was chargeable on that loan. The question of sufficiency is, therefore, reduced to this,—Was he or was he not justified to recover by way of interest on the Rs. 10,700 more than the principal, and in limiting the deposit in respect of interest to that sum ?

The contracts on which this liability arose were entered into long before the passing of Act XXVIII of 1855, and *prima facie* fall within the rule enacted by s. 4 Reg. XXXIV of 1803. The contention on the part of the appellant is that they are taken out of the scope of that rule by the application of Construction No. 359 to the facts of this case, and in particular to the two former suits for redemption which were dismissed by the decrees of the 1st August 1843 and the 29th April 1864. Their Lordships are, however, of opinion that the Courts below have correctly held that the Construction in question does not

apply to this case. The effect of it is that when the creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the amount of principal), he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand. Neither the rule nor the reason of the rule seem to their Lordships to apply to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption, and the final settlement of the account.

Their Lordships are, therefore, of opinion that the sum to be apportioned between the different villages has for the purposes of deposit been correctly taken to be Rs. 52,800.

With respect to the final adjustment of the account, their Lordships have to observe that if the suit had been conducted in the ordinary way the mortgagee must have accounted for the rents and profits received by him whilst in possession. The result of such an account would not improbably have been considerably in favor of the mortgagee, who does not, however, complain that it has not been taken. But, however that may be, the mortgagee, whose duty it was to render such an account, who has the best means of knowing what would be the result of such an account, if taken, and who does not suggest that he has been prejudiced by the omission to take it, cannot be heard to complain of these decrees in so far as they treat the interest on the Rs. 26,100 as satisfied by the rents and profits. And what has been already stated shows that in their Lordships' opinion he is not entitled to claim any interest in respect of the Rs. 5,000, or interest on the Rs. 10,700 in excess of the principal.

The remaining question is what, upon the facts found by the Courts below, ought to have been their decree. The appellant now complains that the plaintiffs have been allowed to redeem as against him the villages other than their own village of Hosseinpore, *i. e.*, to put themselves in his shoes as mortgagee in respect of these villages; and further, that the decrees were wrong in refusing to treat him as the owner under a subsequent purchase of three-fourths of Rookunpore.

The first objection does not come with a good grace from the appellant, who defeated the plaintiffs' former suit on the ground that they had not offered to redeem the villages in question, and who in this very suit has included in his calculation of the amount, which, as he alleges, ought to have been brought into Court, the shares of the mortgage-debt which he said were chargeable on those villages. The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that the plaintiffs were bound to offer to redeem the villages in question; it did not rule that they were entitled to do so, or to acquire the interest of the mortgagee in them against his will. It is unnecessary to determine in this suit whether in the peculiar circumstances of this case the former proposition is correct. Their Lordships are of opinion that the latter cannot be supported. They think that the appellant, if desirous of retaining possession of these villages as mortgagee, is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represents the portion of the mortgage debt chargeable on that village. On this view of the case, it is unnecessary to consider whether the appellant had or had not given sufficient evidence of his alleged purchase of three-fourths of the equity of redemption in Rookunpore.

Their Lordships are nevertheless of opinion that the appellant was properly condemned in the costs of the suit, and ought not, any variation in the decree notwithstanding, to be relieved from them. His defence in the former suit, which is inconsistent with his present contention, defeated that suit, rendered the present suit necessary, and invited the claim on the part of the plaintiffs which he now resists. In this suit he ought at the earliest stage to have submitted to the

redemption of Hosseinpore alone, on payment of that portion of the sum deposited which represented the debt due in respect of that village. Instead of doing so, he raised issues touching the sufficiency of the deposit, which have been determined against him. It is the course of practice in India that the costs of this kind of suit follows the result of the finding on such an issue, and are not, as in an English redemption suit, added to the mortgage-debt. And their Lordships are of opinion that this rule has, in the present case, been most properly applied to a mortgagee who has so long, and by so many expedients, inequitably and vexatiously resisted the right of redemption. Their Lordships will, therefore, if the appellant desires it, humbly recommend to Her Majesty that the decree of the Principal Sudder Ameen be varied by declaring that the appellant is entitled to receive Rs. 5,947 1 anna, part of the Rs. 9,654 deposit, and that the balance of that sum be returned to the plaintiffs; and that the plaintiffs are entitled to redeem and recover possession of the village of Hosseinpore with mesne profits, from the date of the commencement of this suit until the date of the delivery of possession; and that the appellant should pay his own and plaintiffs' costs in the Court below. The plaintiffs have not appeared on this appeal, and their Lordships give no costs of the appeal.

The 14th July 1870.

Present :

Lord Cairns, Sir James W. Colville, Sir Joseph Napier, and
Sir Lawrence Peel.

Execution—Bond fide proceeding—Limitation.

*On Appeal from the High Court at Calcutta.**

Maharajah Dheraj Mahtab Chund

versus

Bulram Singh and others.

Where the original judgment-debtor died, and there was a dispute as to whether any estate of the judgment-debtor had passed into the hands of his heirs, and that dispute was *bond fide* prosecuted and contested, it was held that the proceeding in question was sufficient to keep the decree in force within the meaning of s. 20 Act XIV of 1859.

The Full Bench Decision in *Ram Sahaye Singh v. Degun Singh*, 6 W. R., Miscellaneous 98, approved.

The question in this appeal is the proper construction of s. 20 Act XIV of 1859, which enacts that "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce any such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." Was there, at any time within three years preceding the application for execution made in the Court below, any proceeding which had been taken to keep in force the judgment, decree, or order originally made in favor of the present appellant?

What took place was this—The original debtor died. The appellant desired to have the benefit of his judgment against the heir or heirs-at-law. In this state of things he applied to the Judge for process of execution against the respondents as heirs, and on the 26th December 1861 this application was made to assume the

* From the judgment of Loch and Macpherson, *J.J.*, in Miscellaneous Appeal No. 415 of 1866, dated 20th August 1866.—6 W. R., Miscellaneous, 68.

form of a cause. It was marked and described as 106 of 1861, and was sent by the Judge to the Principal Sudder Ameen, who directed the usual notices to issue. It is the history of that cause which we have to trace for the purpose of seeing whether it was kept alive, or whether it became at any and what stage inoperative.

On the 24th January 1862, the officer of the Court made his report that another officer, a peon, had gone to the place stated, and searched for the judgment-debtors, but was unable to find them and had affixed the notice in a particular way, and served it upon the village watchman. Then, in February 1862, the next month, the respondent filed a petition of objections before the Principal Sudder Ameen, not disputing the service of the notice, but objecting to execution proceeding on the grounds that it was barred by limitation and that no estate of the judgment-debtor had come into their possession. There was, therefore, a *litis contestatio* between the parties to this suit, the defendant to the suit appearing, and contesting the right of the plaintiff to have the benefit of the execution against the defendant. In March 1862, without any delay, the appellant put in a petition by way of answer to the petition which the respondent had put in, contesting the allegations in point of law that the respondent had made. In that state of things, both parties having placed their view of their respective cases upon record, as it were, on the 4th March 1862, the Sudder Ameen ordered that on the last petition, if there were no objection, the notice of sale should be drawn up in due order; and it appears that following upon this, on the 29th November 1862, a species of hearing was brought on before the Principal Sudder Ameen, for the purpose of discussing all or some of the allegations which had been made in these petitions; and it was then, upon that day, the 29th November 1862, that the Sudder Ameen pronounced his opinion: "Whereas the heir of the judgment-debtor is a respectable woman, the final process cannot be issued against her. Let the number of the suit be struck off from this record at present."

Now I pass by the question whether that was meant to be a final judgment, or only a temporary delay interposed in the proceeding of the suit; and I will suppose, for the purpose of argument, that it was meant to be a final judgment. It was at this point, and at this point for the first time, that the suit which up to that time had been pending was disposed of by any order of the Court, and up to that time there appears certainly to have been no delay on the part of either side. It was prosecuted, and prosecuted *bond fide*, and defended, and defended *bond fide*; and it appears to their Lordships that so long as that process was going on, so long as there were these allegations and counter-allegations as to the right to revive and prosecute the decree, there was a pending proceeding, and it would have been out of the power of the appellant to have done anything but wait for the result and the order of the Court upon that pending proceeding.

Their Lordships, therefore, were the case not affected by any authority or by any prevalent course of practice in India, would have no hesitation whatever in holding that there was here a proceeding to keep in force a judgment, decree, or order originally made; that that proceeding was pending every day of the time, and every hour of every day, until it was disposed of on the 29th November 1862, by the order to which I have referred.

But it has been suggested in the judgment of the Court, in the present case, that the matter is affected by former decisions of the Courts in India, which had led to a conclusion different from the one which we have expressed. Their Lordships have referred to the case * which was cited upon this head, and they desire to say that they see no reason whatever to find fault with the decision in that case. That case appears to have laid down this rule, that all acts done either by the Court, or by an officer of the Court, or *bond fide* by the applicant for enforcing the decree, or keeping it in force, would satisfy the term "some proceeding"

* Ram Sahaye Singh v. Degun Singh, 6 W. R., Misc., p. 98.

in s. 20; but then the Court goes on to qualify that by saying, that there might be things done by the Court, or there might be things done by the party, which might appear at first sight to be steps taken in execution and prosecution of his right, but which really might be done in such a way as so far from showing diligence or vigilance on his part, might be so tainted with want of good faith, that they would lead to a totally opposite conclusion; and in the particular case before the Court, they found that there had been an application made to execute the decree, that that had been pending for a considerable time before the Court, and had ultimately been dismissed by the Court itself by an act of the Court for want of prosecution; and applying other general observations to that case, they appear to have arrived at the conclusion that the circumstance that there had been a want of diligence which obliged the Court to dismiss the cause for want of prosecution, made the act of the Court there not to be an act which could satisfy the expression "some proceeding" within the 20th Article.

Their Lordships see no reason whatever to disapprove of that decision. It would, as it has been pointed out, be a very strange result if the mere chronicling or recording by the Court of the fact, that there had been delay and laches on the part of the litigant, such as obliged them to strike the suit off the file, if that act of the Court done under such circumstances were to redound to the benefit of the litigant, and to enable him to say that he had been using due diligence within the period of three years. Not in any way disapproving, therefore, of the decision to which we have been referred, their Lordships are of opinion that, in the present case, the proceeding which has been taken now was taken in the period of three years, because it was taken within three years after the order of the Principal Sudder Ameen of the 29th November 1862 was made. We, therefore, will humbly recommend to Her Majesty that the order should be reversed, and that the appellant should have his costs of the appeal.

The 15th July 1870.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Execution—Mesne profits.

*On Appeal from the High Court at Calcutta.**

Rajah Leelanund Singh

versus

Maharajah Lakchmissar Singh.

Where in a suit by *L* for recovery of certain lands with mesne profits, a decree was given by the Privy Council declaring *L* absolutely entitled to two mouzahs, and also to certain other lands with regard to which the High Court was ordered to institute certain enquiries, it was held that he might have waited the result of these enquiries before applying for execution in respect of the two mouzahs.

HELD, further, that although the decretal order of the Privy Council did not specifically mention anything about the mesne profits of the said two mouzahs, the right to mesne profits was consequential on the declaration for possession contained in the decree and upon possession: and the High Court was accordingly directed to proceed to ascertain the mesne profits of the said two mouzahs.

The appellant in this case originally sued to recover from the respondent certain villages and lands, alleging that on a true adjustment of the boundaries

* From the order of L. S. Jackson, J., in Regular Appeal No. 299 of 1855, dated 15th March 1866: not reported.

they belonged to the Nizamut Mehals and not to Havailee. He claimed also mesne profits. The suit was dismissed by the Court of first instance, and that dismissal was confirmed by the Sudder Dewanny Adawlut.

Their Lordships, on whose recommendation the order * in question was made, thought that this dismissal was wrong; and in an ordinary case they would have made the final decree which the Appellate Court in India ought to have made. Not having materials for doing this they suggested the order in question, which declared the appellant absolutely entitled to the villages of Goremahee and Goruckpore, and to all the rest of the land in dispute which was not comprised in the settlement of Havailee. By declaration it limited Havailee to 123,207 beegahs, including 129 beegahs and 19 biswas, part of Beadon settlement, and so much of the land in dispute as belonged to or was attributable to the Bunker and Boondee Mehals. It then directed the High Court of Calcutta to make the enquiry necessary to understand what this last-mentioned land was, and to proceed in the suit as upon the result of such enquiry might seem just,—dealing with the whole question of costs, including the taxed costs of the appeal.

Now, in this state of things, their Lordships are of opinion that the appellant might well have waited the result of those enquiries and accounts before applying to the High Court in Calcutta, for the execution of the earlier part of the decree with reference to those villages to which he was declared entitled; and their Lordships also are of opinion that the High Court at Calcutta might well have declined, if they had been so minded, to execute the earlier part of the decree until they had completed the whole of the enquiries and accounts. However, the appellants did apply to the Court for the execution of the part of the decree which related to the two villages of Goremahee and Goruckpore, to which his title had been declared, and the single Judge of the High Court on whom appears to have devolved the duty of answering the application was willing to execute and proceeded to execute the decree, so far as regards possession of these two villages. He stated his opinion to be that with regard to mesne profits, inasmuch as the order of Her Majesty in Council had not specifically mentioned anything about mesne profits, it would not be proper for the Court in India, in executing a decree, to make any order with regard to the mesne profits.

That order standing would of course be an impediment hereafter, even after the enquiries directed by the other part of the decree were completed, in the way of any application by the appellant on the subject of mesne profits from those two villages; and inasmuch as their Lordships are of opinion that had the first part of the decree stood alone, it would have been one of the consequential directions proper to be given to ascertain the amount of mesne profits at the time that possession of the villages was given, they think that inasmuch as one part of the decree, namely, that with regard to possession has been executed by the High Court, everything connected with that possession should be executed at the same time.

Their Lordships are of opinion that the right of mesne profits is consequential on the declaration in the decree, and upon possession. They, therefore, think that the High Court should proceed to ascertain, either itself or by an issue properly framed to be answered by the local Court, what the amount due to the appellant for mesne profits upon these two villages is. They will therefore humbly recommend to Her Majesty that an order should be made to that effect; but, inasmuch as the difficulty has arisen partly by the application of the appellant to execute the decree piecemeal, and partly by the erroneous apprehension which the Judge appears to have entertained of the effect of the decree of their Lordships, their Lordships think it a case in which there ought to be no costs of the appeal.

* 3 W. R. P. C. 19, 30; 1 Suth. P. C. R. 578, 591.

The 21st July 1870.

Present :

Lord Cairns, Sir James W. Colville, Sir Joseph Napier, and Sir Lawrence Peel.

Account—Practice—Evidence.

*On Appeal from the High Court at Calcutta.**

Mulka Mukhdra, Begum of the ex-King of Oude
versus
Tekaeth Roy.

In a suit for a sum of money on an unadjusted account, plaintiff filed a memorandum (A) with her plaint, from which the amount claimed in the plaint could not be made out. In her examination by the Court, the plaintiff put in another memorandum (C) to explain memorandum A. Defendant admitted that memorandum C was signed by him. It had reference to a period immediately preceding that for which the suit was brought. HELD that memorandum C was rather evidence to support the originally stated cause of action, than an amendment of the claim or the substitution of one claim or cause of action for another. The case was one which should have been decided not merely on the discrepancy between the two statements made by the plaintiff, but on the whole of the evidence.

The mere omission of an accountable party, framing his own account, to carry forward into a new account a balance against himself existing in a former one, can constitute no evidence in his own favor. To prove the existence of the balance, such omission might be considered in conjunction with other evidence in the cause.

Upon the hearing of this appeal on the 8th July, their Lordships intimated that they would report to Her Majesty in favor of the appeal. They now proceed to state the reasons of their judgment.

This is an *ex-parte* appeal brought by the Begum of the ex-King of Oude from a decision of the High Court at Calcutta, which reversed in part a decree of the Principal Sudder Ameen of the 24-Pergunnahs in favor of the appellant, by disallowing a large item of her demand, amounting to nearly one lac of rupees. The defendant was her cashier.

The plaintiff stated in her plaint that the defendant had been for a long time employed under her as a servant in the capacity of her cashier, in consequence of which about Rs. 100,000 were due to her, "as per Schedule given below."

The Schedule referred to is headed "Detail of the Account." It mentions a sum of Rs. 145,204 3 annas 2 pies as an amount in deposit with the defendant, as per account dated the 26th Rujjub 1271, Hijree, given by the defendant. The plaint states the amount claimed on a conjectural estimate as one lac of rupees, and asks for the adjustment of the account. The Judge, on an objection made that the documents were not stamped, rightly declared the claim to be for a sum on an unadjusted account.

The plaintiff filed with her plaint two furdas or memoranda, one of which is described as A. In the commencement of her first examination in Court, the plaintiff stated that the other memorandum had been filed by mistake; it was accordingly withdrawn by her, and is treated in the judgment under appeal as so withdrawn, and as immaterial. The introduction and withdrawal of this latter paper are, however, so far important, as showing that some mistake had occurred, and that the vakeels had in fact not fully understood the case at that early stage. The document A mentions the same sum, Rs. 145,202 3 annas 6 pies, which is stated in the detached statement, annexed to the plaint; but no possible explanation of the contents of A, without the introduction of other items of charge or discharge, can reconcile it with the plaintiff's statement that she is entitled to recover a lac of rupees.

The defendant in the third head of his statement, at page 3 of the Record

* From the judgment of Trevor and Campbell, *J.J.*, in Regular Appeal No. 560 of 1865, dated 30th June 1864 : not reported.

remarks on and excepts to the confusion and uncertainty of this paper A. In no part of the proceedings did the plaintiff abandon or qualify her statement that she was entitled to recover a lac of rupees. This state, then, of the proceedings at this stage of the cause certainly shows the necessity of some explanation of the proceedings on the part of the plaintiff, which indeed the exception of the defendant was calculated to elicit. The explanation was given by the plaintiff herself on her examination in support of her case. It is to be found in a statement of the Court itself set forth in the body of her examination at page 5 of the Record, line 30.

At this time the furd or memorandum C was first introduced by the plaintiff, who proved it to be in the handwriting of the defendant, as he subsequently admitted it to be, and to refer to the years 1267, 1268, and 1269, the years immediately preceding that to the balance of which the paper A related. The Judge received the document and permitted it to be filed. Viewed in its proper light, it was rather evidence to support the originally stated cause of action, than an amendment of a claim or a substitution of one claim or cause of action for another. If it were inconsistent with any other evidence in the cause, or with the statements in the plaint, the due consideration of those difficulties or objections, as well as its claims to belief, would have to be considered by the Court when it proceeded to deal with the proofs of the issues of fact.

The claim as originally prepared was for what might prove to be due on adjustment of an account continuous in its nature, as connected with continuous receipts and disbursements in the plaintiff's service. The plaintiff, whilst her examination was being proceeded with, having produced in support of her claim the document C, which showed the defendant accountable to her and charged with certain sums by his own admission derivable from this document, it is difficult to conceive how the Court could have rejected it in that or any other stage of the cause, or have refused to give due weight to it as evidence on the trial of the issues of fact. Had it been open to any just exception as an amendment of the plaint, this should have been proposed to the Judge who allowed it to be filed; and if in any way inadmissible as evidence, this should have been urged on the hearing of the issues, if not at an earlier stage. Its general value was taken into account by the Court below in considering the whole of the evidence.

Their Lordships cannot find in the proceedings before them any ground for such special exception or objection. The defendant admitted the document to be in his handwriting. The issues were framed so as to include the ascertainment of the balances for the years which this document covered. No objection was made to this framing of the issues. The defendant went into evidence to discharge himself from the items of charge which the balance, evidenced by this document C, constituted.

His case on this point was, that the balance which C showed had been subsequently liquidated and had not entered into A. It lay upon him to substantiate his discharge. On the whole account he claimed to be a creditor of the plaintiff to the amount of about Rs. 8,000. It was common ground that the balance of C did not enter into A.

The plaintiff and the defendant were both examined, cross-examined, and re-examined. Her evidence, if trustworthy, established her case. The case turned on a conflict of evidence. Several witnesses for the defendant were examined, some under Commission, others before the Court itself. Each litigant had full opportunity of presenting her (or his) whole case to the Judge, and of answering and commenting upon the case opposed to it. The matter was substantially one of account, the decision one upon evidence. The defendant was necessarily well acquainted with the sources and extent of the plaintiff's income; he must be presumed to have been well acquainted with the ordinary expenditure, and any special deviations from it would not be likely to have escaped his notice.

or to have been unknown to him. Her case, as originally framed, was either mistaken in point of statement or details, or false as the defendant represented it. No Court could properly decide such a case without a full examination of the whole evidence on both sides. The plaintiff's suit, if false, must have been false to her knowledge.

The Principal Sudder Ameen made a careful and exact abstract of the whole case and of the statements on each side; he then carefully examined the whole evidence: he commented on the conduct of the parties and the probabilities which the case afforded of the truth of the claim.

The defendant had objected that the plaintiff's demand belonged to a foreign forum—that of Oude; the Judge described the claim as a continuous claim, existing after the extinction of the Kingdom of Oude, and the subject of the jurisdiction of his own Court, for the reasons which he assigns in support of that jurisdiction. The very objection treats the demand as extending over a considerable time, and makes no distinction between the years covered by C and the subsequent time. On the merits of the case, he remarks on the defendant's conduct as evasive and inconsistent; he considers the credit due to the witnesses, and adjudges the case against the defendant for the full balance claimed.

Amongst the grounds of this decision are the following:—That the document C was in the defendant's handwriting, and constituted certain items of charge against him; that the document A also constituted items of charge and discharge; and that there was no reasonable evidence that either document was imperfect, or superseded by any subsequent account; that the defendant stated himself to be a creditor of the plaintiff on the whole account; and that his written letter E was inconsistent with that statement; that he declared certain vouchers to be in his possession, and said that he would produce them, but failed to do so, and did not account for this omission; that he had gone into evidence to prove that the balance shown by the document C was covered by subsequent payments on account of the plaintiff by defendant, but that the evidence was unsatisfactory to the Court on several grounds which are fully and particularly detailed in the judgment. The largest of these items in discharge of the balance shown by C, viz., Rs. 50,000 given to the Begum Amanee, the defendant admits must have been directed by a written order of the plaintiff, whilst one of the witnesses professes to know that an oral order was given. The Begum Amanee herself is not examined as to this, and nothing is urged to explain this omission: the order is not produced, and it is not shown that the payment of so large a sum was not proveable by better evidence than that produced, of the value of which the Ameen must have been a competent judge. The Begum's receipt also was not produced. The Court added that the item as to the gold utensils was advanced for the first time at a late stage of his examination, and was supported by very meagre evidence. The witnesses whom the defendant adduced the Judge described as mean persons, and on examining the evidence, most of these witnesses, it will be seen, give no dates, and the absence of dates to the transactions to which they depose fails to point sufficiently the items of discharge to the times and items of charge. The mere statement of an accounting party that his vouchers are destroyed was not readily to be credited. The conclusions, therefore, of fact, of the Principal Sudder Ameen seem to their Lordships to be fully sustained by the evidence.

The judgment of the High Court has failed to alter this opinion.

The question for decision in the High Court was one of fact. The Judges state that the question principally urged before them was the inconsistency of the plaintiff's then present case with that first set up by her. In support of this objection on appeal, the discrepancy between the documents A and C seems to have been pressed on the attention of the High Court. If the case could be viewed as one limited to what these documents alone disclose on a comparison

between them; if the memorandum C were, as the High Court describe it, a loose memorandum; if the acts of the plaintiff in producing C were fit to be viewed as a substitution of a new case, as an after-thought, and not as a production of evidence always in her favor in support of her case as she meant to prefer it: then the conclusion of the High Court, respecting that part of the finding which disallowed the balance established by document C, would be one the correctness of which could not be impeached. In coming to its conclusion, the High Court seems to have based its decision on a distrust engendered by the inconsistency between the first and the amended statements of the plaintiff,—that is to say, on a part only of the whole evidence.

The High Court thought it highly improbable that a lady of her rank, a person competent herself to the transaction of business, and having competent persons in her service, should in an honest case make so erroneous a statement of her case as that which it presented according to her evidence. But the Court failed to remember that this lady was a purdah-nusheen; that she and her immediate servants were new to Bengal and its Courts; that between a purdah-nusheen lady and her vakeels there is intermediate agency; and that mistakes may thence arise, and that one mistake had certainly occurred. It might further be urged that the hypothesis that her case was a false one, and her use of C an afterthought, involved much more serious blundering in support of a false case usually not preferred without previous concert and deliberation; for as the document itself was genuine, and showed a balance in her favor, and was throughout her mainstay, that rather than A was likely to have been put forth.

The defendant answered to C as to a correct document charging him in the usual course of dealing, but insisting that it was discharged. The High Court did not review the finding of the Court below on this part of the evidence of discharge, or declare any opinion of its own that the items of discharge were established. The mere omission of an accountable party framing his own account, to carry forward into a new account a balance against himself existing in a former one, could constitute no evidence in his own favor. To prove the extinction of the balance, such omission might be considered in conjunction with other evidence in the cause. Their Lordships cannot support the reversal of the finding of the Court below on the presumption which the High Court acted on in this case, and treated as fatal to the plaintiff's recovery, viz., that founded on the inconsistency between the original and the subsequent statement of the case. Unless the defendant's case of discharge be true, the imputations on that of the plaintiff fail. The Court of first instance thought that case of discharge untrue; and the Court which reversed its judgment has left its remarks unanswered and its conclusions unrefuted. It has reversed on suspicion, founded on only a part of the case, without a review of the whole evidence, a judgment carefully prepared on a searching examination of that evidence, and apparently supported by it. Their Lordships, therefore, think that the original judgment should be restored; that the judgment of the High Court should be reversed, with costs, including those of her appeal; and they will humbly advise Her Majesty accordingly.

The 26th July 1870.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Resumption—Chakeran or service lands—S. 41 Reg. VIII of 1793.

*On Appeal from the High Court at Calcutta.**

A. J. Forbes

versus

Meer Mahomed Tuquee and others.

The lands, the subject of this suit, being certain mehals comprised in a zemindaree, were granted by the Government before the permanent settlement to the ancestors of the persons through whom the defendants claim, as a hereditary jagheer tenure, in consideration of services which they rendered to the Government in repressing the incursions of wild elephants upon the cultivated lands of the zemindaree. The plaintiff, in 1851, purchased the zemindaree from an auction-purchaser at a sale for arrears of Government revenue, and he sued to resume the lands in the jagheer, which had been held rent-free by the defendants, and those from whom they claim, for nearly a century.

HELD that, notwithstanding that the lands were the subject of assessment when the zemindaree was permanently settled by the Government with the zemindar in 1802, the plaintiff had no right to assess these lands.

The settlement between the Government and the zemindar could not affect the rights of the jagheerdars, whose rights were derived, not from the zemindar, but from the supreme authority in the State. The lands held on this tenure, even if chakeran, differ from the ordinary chakeran lands contemplated by s. 41 Reg. VIII of 1798. The jagheerdars are bound, if occasion required it, to protect the pergunnah from the incursions of wild elephants, and may forfeit the tenure if they wilfully fail in the performance of that duty, but are not liable to have their lands resumed because there is no longer any occasion for the performance of the particular service.

The appellant is the owner of the zemindary right in Pergunnah Sultanpore and Talooqua Remae in Zillah Purneah. These mehals were purchased by him, in April 1851 from one Pertab Singh, who, on the 24th July 1850, had purchased the estate of which they then formed part at a sale of arrears of Government revenue; and the estate so purchased by Pertab Singh had once been part of a far more extensive zemindary which, in 1802, was first permanently settled with one Ranees Indrawatee.

In July 1862, the appellant commenced the suit which has given rise to this appeal, in which he claimed against the respondents, first, the right to resume 9,000 beegahs of land held by them upon the tenure which will be afterwards considered; and secondly, the right to recover from them 2,000 beegahs of land described as Towfeer or excess, being lands which, he alleged, they had wrongfully acquired under color of their tenure by gradual encroachment or otherwise.

The Court of first instance allowed the first of these claims but rejected the second. On appeal and cross-appeal, the High Court of Calcutta rejected both claims, reversing the decree of the Court below on the first and affirming it on the second, and dismissed the suit. This appeal again raises both questions.

The claim of Towfeer may be shortly disposed of. It was very faintly pressed at the Bar. Mr. Leith, it is true, relied upon a passage in the Ameen's report at page 73 of the record; but the Principal Sudder Ameen was of opinion that, on the Ameen's report, taken as a whole, no excess of land was shown to be in the respondent's possession; but that, on the contrary, they appeared to hold less than 9,000 beegahs in all. The High Court has confirmed that decision, and no grounds have been laid before their Lordships which would justify them in disturbing the concurrent finding of the two Indian Courts on what is, in fact, a mere question of boundary and measurement.

In dealing with the question of resumption their Lordships desire to state, in the first place, the conclusion to which they have come touching the origin and duration of the tenure on which the lands sought to be resumed are held.

The following is its history:—In 1775 the lands in question were granted by the sunnud at p. 100 of the record to Meer Syud Ally, a Persian, who had done, and was doing, good service in repressing or preventing the incursion of wild elephants coming from the Morungs or Terai upon the cultivated lands of Per-

* From the judgment of Bayley and Phear, *J.J.*, in Regular Appeal No. 313 of 1864, dated 31st March 1865: not reported.

gunnah Sultanpore. This first sunnud contained no words of inheritance. In 1786, the Meer being then dead, the Government granted the second sunnud in favor of Meer Abdool Hossein Khan and Meer Ally Rezza, who represented themselves to be the elder brother and nephew of Meer Syud Ally, and, as such, his heirs. This sunnud does contain words of inheritance, and made the grantees and their descendants fixed jagheerdars. It is not shown what, if any, interruption of possession took place between the death of Meer Syud Ally and the date of this second sunnud. In February 1804, Mirza Mahomed Saduk Goolstana and others brought a suit against Meer Ally Rezza and the widow of Meer Abdool Hossein, alleging that they were the two heirs of Meer Syud Ally, and that the grantees under the second sunnud had falsely pretended to be his brother and nephew. The first decree in this suit declared the plaintiffs to be the true heirs of Meer Syud Ally, and directed the defendants to relinquish the possession and enjoyment of the jagheer to them, treating, apparently, the former as trustees for the true heirs. On appeal the Provincial Court affirmed this decree and dismissed the appeal. But considering, apparently, that it could not, without the sanction of Government, transfer the benefit of the second sunnud from the persons named in it to the true heirs of Meer Syud Ally, it directed that the possession of the former should remain undisturbed "until an order should be issued from headquarters,"—meaning the Governor-General in Council.

In consequence of these decisions, the third sunnud was granted on the 10th January 1807. It recited the two former sunnuds, and that by the decrees in the last-mentioned suit the heirship of the plaintiffs had been proved, and the said jagheer continued to the plaintiffs. And it went on to state that, under these circumstances, the Government had, on the application of Meer Mahomed Saduk, confirmed the said jagheer lands to the plaintiffs, from whom the present respondents derive their title.

Under the three sunnuds, the lands comprised in the jagheer have been held rent-free for nearly a century.

One of the questions raised in this suit is, however, that, under the circumstances above stated, the title of the respondents must be held to have been first created by the third sunnud in 1807; and that inasmuch as the zemindary, of which Sultanpore was then part, was permanently settled in 1802, the appellant, who claims through an auction-purchaser, is entitled under Act I of 1845 to set aside the tenure as one created within his zemindary since the perpetual settlement.

Their Lordships are of opinion that this contention cannot be supported. It is perfectly clear that the effect of the second sunnud was to create, sixteen years before the settlement of the estate in 1802, an hereditary jagheer tenure; and that the settlement was made upon the assumption of the subsistence of that hereditary jagheer. The grant was perfectly good against the zemindar, who could not have come into Court to set aside the second sunnud on the ground that the grantees had obtained it from Government by fraud or misrepresentation. Nor, in fact, has any Court or any authority ever revoked or set aside that second sunnud. The decrees in the suit between the real and pretended heirs of Meer Syud Ally made (subject to the sanction of Government) the latter trustees for the former, and directed them to relinquish the enjoyment of the lands accordingly. And the Government by the third sunnud sanctioned that arrangement, and confirmed the title of the true heirs. On this view of the transaction, the action of Government, and the inaction of the zemindar in 1807, become intelligible. For it is not to be presumed that the Government would have assumed the power of granting a new tenure in a settled zemindary, or that the zemindar would have submitted to such an invasion of his rights. Their Lordships, therefore, concurring on this point with the High Court of Calcutta, are of opinion that the jagheer of the respondents must be

held to be a tenure created before, and subsisting at the time of, the Decennial Settlement; and consequently that it is within the exception of s. 26 Act I of 1845, whether the appellant has or has not in respect of his estate the powers of an auction-purchaser under that Act (as to which their Lordships express no opinion), and whether the lands comprised in it were or were not part of the zemindary settled in 1802.

Has, then, the appellant established his right to resume the lands comprised in this ancient jagheer? His case is, that they are within the limits of the zemindary settled in 1802; that as between the Government and the zemindar they were then treated as *mâl* or revenue-paying lands, and a revenue assessed upon them, although they were then, and have ever since been, held rent-free as between the zemindars and the jagheerdars; that under these circumstances they must be deemed to be *chakeran* or service lands; and that the services on which they are held being no longer required or performed, the right of the zemindar to resume them has accrued.

Some attempt has been made on the part of the respondents to show that the lands comprised in the jagheer are not even within the geographical limits of the settled zemindary, or, at least, have not been proved to be so. But, looking at the pleadings and the evidence, their Lordships are of opinion that upon this point the appellant has established his case. He has given strong *prima facie* proof of the fact, and there is no evidence at all to the contrary.

If this be so, the next question is, how were the lands dealt with on the occasion of the settlement? They were then unquestionably held rent-free under a subsisting *sunnud*, and the presumption is that they would be treated as *lakheraj*. In that case no revenue would be assessed upon them. Nor would the zemindar acquire any right to question the validity of the title on which *lakheraj* land of that extent was held? That question could only be raised by Government; and having been decided adversely to Government in 1845, the title of the respondents would now be indefeasible.

On the other hand, it seems to follow that if on the occasion of the settlement revenue was assessed on these particular lands as between the Government and the zemindar, they must, since they produced no money rent payable to the zemindar, have been treated as in the nature of *chakeran* lands within the meaning of s. 41 Reg. VIII of 1793, upon the notion that the services to be performed by the tenant were equivalent to rent payable to the zemindar. It is therefore a very material issue whether, in point of fact, these lands were, on the occasion of the settlement, treated as part of the *mâl* assets of the zemindary.

Their Lordships are not prepared to say that the appellant has established the affirmative of this issue beyond reasonable doubt.

He relies mainly on the evidence afforded by the Quinquennial Register, and the proceedings in the resumption suit brought by Government against the respondents, or those through whom they claim, which was finally determined in 1848.

Their Lordships do not concur with the High Court in thinking that the first of these documents has not been properly authenticated. The learned Judges of that Court seem to have confined their attention to the extract at page 92 of the Record, and to have taken no notice of the fuller document at page 122, which not only bears the Collector's seal, but is shown by the indorsements upon it to have been the identical paper produced by the jagheerdars in the resumption suit. The appellant's case is that the lands in dispute are included in the villages Talooka Ramgunge and Mouzah Gurka, part of Talooka Remae, on which a revenue of Rs. 850 appears to have been assessed.

Their Lordships cannot assent to the proposition of the learned Counsel for the respondent, that Talooka Remae is something different from Pergunnah Sul-tanpore, and that the appellant is bound to show that the lands in question are

mâl lands within Sultanpore Proper. They think it is proved that Talooka Remae was part of Pergunnah Sultanpore in the larger sense of that denomination. Nevertheless, if the appellant's case depended solely on the Quinquennial Register, their Lordships would doubt whether it had been sufficiently proved that the lands in question were subject to the assessment. For even if it be assumed that the different villages or divisions of land mentioned in the Chuckbund and Ameen's Report are comprehended within the denominations of Talooka Ramgunge and Gurka, it seems consistent with that register that those mouzahs may have included the 9,000 rent-free beegahs in excess of the 5819 beegahs mentioned in it, as the lands in respect of which the revenue of Rs. 815 was assessed. But it is argued that the identity of the jagheer lands with the mâl lands in Talooka Ramgunge, &c., has been admitted by the respondents, or those through whom they claim in the resumption suit. The question then arises, what is the weight to be given to that admission?

Their Lordships cannot agree with the learned Judges of the High Court in treating it as a mere admission or argument at the Bar by a mookhtar whose authority to make it is not proved. It seems to them to be the foundation and substance of at least one of the defences deliberately pleaded by the jagheerdars in the resumption suit to the claim of Government. It was not the sole defence, nor can the ultimate decision of the case be said to proceed upon a finding by the Collector that the lands were mâl and not lakheraj. For he seems to have held that the proof of the sunnud was of itself a bar to the claim of Government in that proceeding. Nevertheless, the admission appears to their Lordships to be one of a grave character; and though it is not to be treated as an estoppel, it at least casts upon the respondents the burden of explaining it and of showing that what was then deliberately asserted was not the fact. The onus then of showing that the jagheer lands are something distinct from the mâl lands of Talooka Ramgunge and Gurka is shifted upon them. And this fact they have not attempted to establish by direct evidence. They have been content to rest on the alleged insufficiency of the proof on the other side. Their Lordships, therefore, are constrained to say that though the evidence before them is not conclusive, the preponderance of it is in favor of the allegation that the jagheer lands were made the subject of assessment in the settlement between the zemindar and the Government in 1802.

But is it a necessary consequence of this finding that the appellant is entitled to resume these jagheer lands? His right to do so must depend on the nature of the tenure; and it is worthy of observation that, so little value did the zemindar in possession between the years 1835 and 1845 attach to this supposed right of resumption, that he did not intervene, as undoubtedly he might have intervened, to resist the then claims of Government.

The settlement between Government and the zemindar cannot affect the rights of the jagheerdars. The lands held on this tenure, even if then treated as in the nature of chakeran lands, differ widely from the ordinary chakeran lands contemplated by s. 41 Reg. VIII of 1793. They seem hardly to fall within the description of "lands held by a public officer or a private servant in lieu of wages." Neither Meer Syud Ally nor his descendants were by the sunnuds appointed to an office known as "elephant hunter for the pergunnah," or by any like description. Still less ground is there for saying that they were the private servants of the zemindar. Their right, whatever it be, was derived not from any zemindar, but from the supreme authority in the State.

Their Lordships have carefully considered the various authorities cited at the Bar, but they can find none which expressly govern the case.

Of those which have been decided by this Committee, it is sufficient to say that in the Madras case, in 7 Moore I. A., p. 128,* the question really discussed

* 4 W. R. P. C. 121; 1 Suth. P. C. R. 300.

and decided was, whether the tenure in question was enam or amaram, it being established and almost admitted that, if it were the latter, it was resumable at pleasure; and the case in the 10 Moore I. A., p. 16,* decided that lands held in lieu of remuneration by a village chowkeedar, though unquestionably chakeran within the meaning of Reg. VIII of 1793 s. 41, were not resumable at the pleasure of the zemindar, if the public, or the Government representing the public, had an interest in the appointment of the chowkeedar.

The Indian authorities are not quite consistent with each other; but taken altogether, they do not appear to their Lordships to establish the right for which the appellant contends in this case.

In the case of the 11th May 1857,† the chakeran lands had been assigned for the maintenance of a chowkeedar, and the existing chowkeedar had no connection with them being otherwise remunerated. Other provision had, therefore, been made for the service to be rendered in return for them.

In the case of the 30th November 1857,‡ the tenant whose services had been dispensed with or had otherwise ceased, was clearly the mere private servant of the Maharajah (the zemindar). He was the person bound to perform all the leather work required in the family.

The case of the 11th December 1857§ was one of Ghatwallee tenure; and one of the learned Judges who decided it (Mr. Justice Trevor), in the subsequent case decided by him and Mr. Justice Campbell, 3 Weekly Reporter, p. 87, and again in the case decided by the Full Bench, 6 Weekly Reporter, p. 203, concurred in the ruling that all that was laid down in the first-mentioned case, beyond the decision that the zemindar was entitled to resume when the Ghatwal had actually failed to render the service which he was bound to render, was mere *obiter dictum*. Both these cases in the Weekly Reporter support the contention of the respondents rather than that of the appellant. Both also relate to Ghatwallee tenures. The case decided in 1868, 1 Bengal Law Reports, p. 120,|| is to the effect that the Government having concurred in the suppression of the office, the son of a Ghatwal, who had held his office, not by hereditary right, but on the appointment of the zemindar (though practically the son had continually been appointed in succession to the father), could not successfully sue to recover lands which the zemindar had resumed.

Their Lordships do not think it necessary, for the determination of this case, to examine minutely these decisions touching the Ghatwallee tenures. And they abstain the more willingly from doing so, since it was stated at the Bar that some of them are likely to be brought regularly before this Board by appeal. But they cannot but express their concurrence in many of the general principles laid down by the Chief Justice in the case in the sixth volume of the Weekly Reporter.

Another case cited is that at p. 84 of the Sudder Dewanny Adawlut Decisions for 1858. The property, as in this case, was a jagheer. The decision did no more than remand the case for re-trial, with the following intimation of opinion:—“The issue raised by the plaintiff is not solely whether the grant to the ancestor of the defendant is hereditary, but also whether it has any condition of service annexed to it or not; and if it has, whether that service be still performed. Should a condition of service be annexed to the grant, the hereditary nature of the grant will not be the test of its present validity but the performance of the required service; and if this service be not performed then, notwithstanding its hereditary nature, the tenure will be liable to resumption.”

To this ruling, if it be understood to mean only that where continued performance of certain services is upon the true construction of the grant the condition on which the lands are to be held, their Lordships conceive no exception can be

* 1 W. R. P. C. 26; 1 Suth. P. C. R. 542.

† S. D. A. R., 1857, p. 786.

‡ S. D. A. R., 1857, p. 1772.

§ S. D. A. R., 1857, p. 1812.

|| 10 W. R. 179.

taken. But if it means that whenever service enters into the motive or consideration for a grant, the grant will become void if for any reason the service ceases to be performed, their Lordships think that the proposition is far too wide.

The conclusion which they would draw from the decided cases, as well as from the reason of the thing, is that in every case the right to resume must depend in a great measure upon the nature of the particular tenure, or the terms of the particular grant.

They agree with the observation of Mr. Justice Jackson, 6 Weekly Reporter, p. 209, that there is a clear distinction between the grant of an estate burdened with a certain service, and the grant of an office the performance of whose duties are remunerated by the use of certain lands.

They have already stated that, in their opinion, the grant in question does not fall within the latter category.

Assuming it to be a grant of the former kind, their Lordships do not dispute that it might have been so expressed as to make the continued performance of the service a condition to the continuance of the tenure. But in such a case, either the continued performance of the service would be the whole motive to, and consideration for, the grant, or the instrument would, by express words, declare that the service ceasing, the tenure should determine.

It appears to their Lordships that neither the first nor the second sunnud is a grant of the kind last mentioned. Each proceeds in part upon the past services of Meer Syud Ally; nor is the consideration so far as it is unexecuted wholly the keeping up of a body of men to repel the incursions of the elephants, for the grantees are also to cultivate the waste land. The latter stipulation was probably designed to protect the already cultivated districts of Sultanpore, by interposing a further belt of cultivation between them and the forest. Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services. Again, neither sunnud contains any words which expressly import that the tenure shall cease if and when any of the services cease to be performed. Such a provision is something very different from one which merely casts upon the grantee the performance of certain duties so long as they are necessary. The former makes the grant determinable when there is not further occasion for the services. But, in the latter case, if the operation of any natural cause (as, e.g., the progress of cultivation which has caused the wild elephants to cease out of the land) removes the necessity for the services, the grantee will hold the lands practically freed from the condition originally imposed upon him. Their Lordships are therefore of opinion that upon the true construction of these sunnuds, the grantees though bound to protect the pergunnah from incursions of wild elephants so long as those incursions lasted, and though still bound to do so should, by any chance, those incursions be renewed, and though they may be liable to forfeit the tenure if they wilfully fail in the performance of this duty, are not liable to have their lands resumed because there is no longer any occasion for the performance of this particular service, "there being now no fear of the depredations of elephants in those places."

Had this been a grant reserving to the zemindar a small money rent, as well as the services, if indeed the latter are reserved to the zemindar, their Lordships would have had no doubt upon the case. But it seems to them that the unexplained anomaly of making māl lands rent-free in the hands of the jagheerdars, does not affect the construction of the sunnud or the rights of the parties.

It emphatically lay upon the appellant,—who is seeking to dispossess or to rack-rent the respondents, who by themselves or their ancestors have brought these lands into cultivation and enjoyed them for so long a period; who must have been permitted by former zemindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become mere matter of tradition,—to make out a clear title to resumption. In their Lordships' opinion

he has failed to do so; and therefore, though they dissent from the particular grounds on which the High Court has dismissed the suit, they think its dismissal was right and ought to be affirmed. They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

The 29th July 1870.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Hindoo law—Hindoo family—Compromise.

On Appeal from the High Court at Madras.

Sri Gajapathi Radhika Patta Maha Devi Garu
versus

Sri Gajapathi Nilamani Patta Maha Devi Garu;
and

Sri Gajapathi Radhika Patta Maha Devi Garu
versus

Sri Gajapathi Hari Krishna Devi Garu.

The principle laid down by the Privy Council in *Abraham v. Abraham*, that a family ceasing to be Hindoos in religion may still enjoy their property under the Hindoo law, is applicable, *inter se*, to the members of a Hindoo family entering into possession of an estate under a compromise by which the members divided the estate among themselves on certain terms.

This is an appeal from a decree of the High Court of Judicature at Madras.

The property which is the subject of litigation is called Tekaly talook. This property was acquired by purchase by one Pathmanaba, described hereafter as the common ancestor. A lady, described as his principal wife, by whom he had no issue, survived him. He left also two sons by different mothers. Between the elder of these sons, named Gopinada, and his father a quarrel of long standing existed, which continued to the time of the death of the latter. Gopinada was at that time thirty-six years old; he did not live with his father and was absent at the time of his death.

The common ancestor left also a younger son, named Krishna, who, at the death of his father, was a child about seven years of age. This boy appears to have been treated by his father as legitimate. The legitimacy of both sons was doubted by the Collector of the district, who, at the death of their father, placed the above-described widow in possession of the talook by way of a temporary arrangement for the management and protection of the family estate, and with a view to the interests of the Government in the collection of the revenue.

The doubts about the legitimacy of these sons, which the Collector entertained, may have had their origin in the nature of the marriages contracted by the common ancestor with their respective mothers, which were in the Gandharva form, and in the alleged difference of caste between the common ancestor and his wives, the mothers of these sons. This irregularity was supposed by some persons to render the progeny of such marriages illegitimate.

Whatever was the origin, and whatever the weight of these doubts concerning the legitimacy of the sons, or of either of them, it is at least certain that they were grave enough to lead to the family arrangement about to be stated.

Supposing the sons, or either of them, to have been legitimate, the widow

would have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case (which is not in proof), would have been to maintenance only. In this last-named case, the widow would have had the ordinary estate of a Hindoo widow.

As each son asserted his own legitimacy and denied that of the other, the dispute, unless adjusted and settled amicably, would probably have led to litigation; and as the estate was already an embarrassed one, the Collector, not without reason, represented such litigation as likely to involve the ruin of the family.

The management of the estate under the widow was not prosperous. The Collector proposed to her to place the estate under the management of the elder son, of whom he appears to have entertained a favorable opinion. The widow is described as at enmity with the elder, and favorable to the younger son. The Collector's advice, which was undoubtedly directed to the preservation of the family property, was adopted; and if reluctantly adopted, it was nevertheless acted on by the members of the family. The Collector had advised a compromise, and in consequence of this advice and suggestion, the lady addressed a petition to the Collector, dated the 26th November 1838, which is set out in the third page of the case of the appellant A, the sole appellant before their Lordships.

In her petition she states that she has that day made a settlement, reconciled both her sons, and caused an interchange of agreement, between them to the effect that they are equally entitled to the talook which belonged to her husband. Her petition then proceeds to state further terms of this arrangement to the effect that the management should be held by Gopinada until Krishna attained his majority; that on the younger attaining his majority, the elder should give up a moiety to the younger as his own and retain a moiety for himself. It prays that the sale of the zemindary may be stayed, and possession be given to Gopinada of the talook. The petition also contains a statement of the allowances to be made to herself and the sons, and of some minor matters not material to the decision of this appeal.

This agreement constituted the basis of the compromise suggested; it amounted to a family arrangement entered into for the preservation of the estate; and though the younger son was a minor at the time, he ratified it at full age and became bound from its date by all its terms.

The construction and effect of this agreement will be afterwards considered.

The agreement was acted upon until the younger son reached his majority. That was the period originally fixed for the actual division of the estate, and its separate possession in moieties. At that time, the actual division of the estate was judged by the sons to be inexpedient, and it was further postponed. Another document was at this time executed between the two sons, bearing date the 24th July 1844. This document states that disputes existed between them respecting the ancestral property in cash, the division of the talook, and the accounts of receipts and disbursements of the talook. It states that they had addressed several urzees (petitions) to the Collector, that he had explained to them the circumstances, and then it proceeds to state "the terms for our future guidance."

This document does not state any new compact or agreement to have been formed to vary the essential terms of the original compromise, but seems rather to have been designed as supplemental to it, and made with a view to carry out its provisions conformably to the Collector's explanations with such variations of detail as the convenience of the parties required. After stating certain inconveniences which would result from an immediate division of the talook, it provides "that the division should be postponed at present;" but the reason assigned is to avoid the probability of loss from a present division. Consequent on that postponement it contains some provisions as to equality of rank and dignity between the sons whilst the elder retained the ostensible headship; but it provides that the affairs of the talook or zemindary should be managed by both unanimously.

A document of this character between natives should not be construed

narrowly, by a strict interpretation of the literal meaning of the words. Its object and general spirit are the best keys to the interpretation of language probably not very carefully studied.

The second clause of this document, if it were construed literally, would appear to give the talook, in the event of the death of the younger son, to such of the lawful widows as shall have male issue ; but as such a disposition would at once contravene the ordinary rules of devolution of Hindoo property, and not be in accordance with the usages of Hindoos, and as there is no mention of any change of intention as to the proprietary right, a construction which would postpone male issue to their mothers is obviously inadmissible.

The document provides also that Krishna after the death of his elder brother shall be recognized as the zemindar of the whole talook.

This provision might take effect without any substantial alteration of the terms of the first agreement. It is consistent in its terms with a custom prevalent in some properties in this part of the country. The headship in such cases is constituted in one member of a family, whilst the beneficial enjoyment of the proceeds may be shared with the other members. It by no means follows, even from the literal terms of that section, that either brother deliberately agreed to exclude his own male issue, if he had any, as sharers, during the survivorship of the other brother. This clause contains a further provision, about which considerable doubt has been entertained both as to the true translation of the words and its legal effect. This clause states an alternate contingent provision consequent on the failure of legitimate male issue by the widows of both sons ; it provides that the talook shall be divided in equal shares, if there be sons born out of wedlock. This agreement further provides that Rs. 100 a-month shall be paid out of the zemindary to the family which shall have no title to the talook ; but it contains no declaration of the cause of cesser of interest, so as to show in what event they thought such exclusion might arise. It is to be observed further that there is no express gift to illegitimate issue, and that the time of the division of the talook on that contingency is not defined.

The younger predeceased the elder son. The elder retained the headship and property of the family. There was no one entitled to dispute it with him as Krishna left no male issue, unless the family had been a divided one, in which case the widow of the latter would have been entitled to her husband's share. She does not appear to have preferred any claim to it during the elder son's lifetime ; but no inference unfavorable to her subsequent claim should be drawn from that circumstance alone, as Hindoo females are often ignorant of and unable to assert their rights.

On the death of the elder son, a dispute arose as to the possession. His widow was placed or preserved in possession of the estate. This step decided nothing as to her proprietary right. As the widow of the surviving brother, apparently the sole proprietor, she was rightly placed in possession.

Her title to retain and enjoy the sole possession and usufruct was disputed by the widow of Krishna, who claimed a moiety as the widow of a deceased brother in a divided family. She preferred her suit numbered 72 of 1861, against the present appellant, the widow of the elder son.

Another suit was brought about the same time by Hera Krishna against the same defendant, which suit is numbered 62 of 1861. The title was stated to be as son of the last owner, the elder son. He claimed the whole property, stating his title, either as a legitimate or as an illegitimate son, to be preferable to the alleged title of either widow.

In No. 72, the plaintiff stated the property to be divided, and that allegation was one necessary to her recovery.

In No. 62, the plaintiff declared the property to be joint, and to have become solely owned by his father by survivorship.

The Judge dismissed both suits.

Both plaintiffs appealed to the High Court. The present appellant, the original defendant in both suits, was respondent in both appeals.

The appeals were allowed by the High Court, which reversed both decrees below, and made a decree declaring each widow and the son Hera Krishna, whom it found to be illegitimate, to be entitled in equal shares, together with any other illegitimate sons of either brother. It directed the suits to proceed as an administration suit, and directed enquiries as to the illegitimate issue. The result of this enquiry has been that two other illegitimate sons having been reported to exist, the estate has been decreed to be divided into five shares, to be enjoyed equally by the two widows and three illegitimate sons respectively.

From this decree the widow of the elder son, the original respondent in each suit, has alone appealed.

Much of the evidence which engaged the attention of both Courts below may be dismissed from the consideration of their Lordships.

The evidence as to the nature of the marriages, and the rules or laws of caste, together with the consideration of the effect on legitimacy of irregular marriages between persons of unequal caste, is in the view which their Lordships take of this case, unnecessary to be stated or observed upon.

The litigation was confined to persons, all of whom claimed under the sons respectively. The estate was taken possession of, and enjoyed by these sons, under the compromise or family arrangement before stated. That compromise proceeded on the basis of legitimacy.

Whether both sons were legitimate, or only one legitimate, and to whichever of the two that status might really attach, was a question no longer material to the consideration of the rights devolving to persons taking under that compromise and family settlement, by which the assumed was to be taken as the real state of the family.

The case of *Abraham v. Abraham** shows that a family ceasing to be Hindoos in religion, may still enjoy their property under the Hindoo law; and the same principle is applicable, *inter se*, to the members of a Hindoo family entering into possession of an estate under such a compromise as that which took place in this family.

The widow, though in one passage she terms the zemindary her zemindary, as in a certain sense it was, did not intend to convey, and did not in fact convey, the property to the sons; she executed no deed nor instrument of gift whatever. Neither son admitted his illegitimacy, nor consented to take a gift on that admission. The widow accepted maintenance and surrendered possession. Possession was taken by her sons upon her abandonment of the estate; and this possession was taken also under their own agreement, which, as well as her petition which referred to it, proceeded on an acknowledgment common to all three of an antecedent right in both the sons whom she describes as "her sons." She had no estate entitling her to be an absolute donor, in any view of her position. Whatever effect this transaction might have as against heirs of the common ancestor, after the death of the widow, it bound her and the sons and all claiming under them.

These instruments do not purport to give any new quality of descent to the talook, even if such quality were capable of being derived from the agreement of two or more owners. There is no evidence to show that the nature of the estate and its descendible character were meant to be affected by this transaction.

The case depends entirely on the construction of the petition and the agreements before referred to. The talook itself is not the sole subject of the arrangement. A reference is made to one item—ancestral cash, as forming an element of dispute, and to other articles of property. The decision appealed

* 1 W. R. P. C. 1; 1 Suth. P. C. R. 501.

against has given neither widow a preference over the other. In the opinion of their Lordships, the High Court erred in making the illegitimate sons sharers with the widows, and their Lordships have now to consider the more difficult part of this case,—whether the widow of the elder and surviving son has a title by survivorship to the whole talook.

If this case could rightly be viewed, as it was viewed in the Court of first instance, as one governed by the ordinary presumption in Hindoo law, that family property is joint, and by the ordinary law of the place where this talook was situate, as to the devolution by survivorship under such failure of male issue as occurred in this case, the decision of it would be attended with no difficulty, and the decree of the Court below dismissing the widow's suit would have to be restored; but, upon this subject, though not for the reasons assigned by the Judges of the High Court, their Lordships think such conclusion inadmissible.

The property was held under a family arrangement which silenced disputes, but contained no admission that such disputes were without foundation.

Neither son admitted that they were, *inter se*, antecedently heirs to each other in the then state of the family, nor admitted a right of succession of either to the other beyond that which this arrangement itself specifies.

It is not stipulated in terms that the property shall be enjoyed as that of a joint undivided Hindoo family; nor is any succession by widows on the true construction of the instruments provided for. The documents in question contain terms some of which are consistent, and others inconsistent, with the rights to the possession, use, and enjoyment of undivided estate.

The first agreement contains in the first condition words that import division and consequent management. This division is not in terms referred to a time subsequent to the commencement of the management spoken of. The next sentence clearly points, on the majority of the younger son, to an actual division and a possession in moieties. It provides for each son (the younger being a mere child) an equal present income by way of maintenance, and further, that each should pay out of his own income his own expenses of maintaining his own servants and relations; and by the last article it provides for an equal division from that time of such surplus as might exist after defraying all the outgoings spoken of, which are to fall on the common money. These provisions are not such as would be applicable to a joint Hindoo family property. On the other hand, it seems to have been supposed by both sons that a survivorship by one would or might exclude the family of the other, and there are several other provisions which, though not absolutely inconsistent with mere managership, more resemble that of the constituted manager of a joint Hindoo family.

The second agreement recites that disputes had arisen concerning the ancestral property in cash, the division of the talook, and the accounts of the receipts and disbursements of the talook; it proceeds to state that "the Collector having sent for both of us to the nuzar, and communicated the circumstances to us, we understand the same; and the terms for our future guidance are hereunder specified." This language is certainly more consistent with disputes arising out of the existing arrangement than with a substitution for it by the sons alone, of their own authority, of some new terms of compromise. The disputes seem also to imply some precedent division of property constituting rights in a surplus after receipts and disbursements are accounted for. So far they are consistent with the provisions of the first agreement as to the division of any surplus. Again, the 5th Article, which relates to future debts; the 6th, which provides for the division of future surplus profits of the talook; and the 7th, which refers to a settlement in respect to the ancestral money and the money already acquired from the talook, and implies a division of these funds, are all inconsistent with the hypothesis that the brothers were or considered themselves to be members of an undivided Hindoo family.

Nothing is stated to show that the talook must be regulated by one law of succession and the rest of the property by another. It seems, therefore, to their Lordships, more proper to consider the provisions as to the talook as regulated by its peculiar nature, and influenced by the necessities of its proper management, and the maintenance of the dignity attached to it, rather than as furnishing alone the rule for the solution of the difficult question to be determined between the two widows.

The construction of these documents is beset with considerable doubt and difficulty, but their Lordships are, on the whole, of opinion that although they postpone indefinitely the actual division of the talook by metes and bounds, and provide for its joint management, and, in certain events which have not happened, for its devolution otherwise than by the law which regulates the succession to separate property, they nevertheless contemplate its enjoyment in other respects by the two brothers as by members of a divided family, and the actual division of other family property. Their Lordships accordingly think that the finding of the High Court that the brothers were not members of a joint and undivided Hindoo family must be taken to be correct. It follows that at least wherever the agreements have not specifically provided for the contrary—even assuming that they could so provide—the succession to this property must be governed by the law which governs the succession to separate estate. How, then, is the law which makes each widow succeed to her husband's share affected by the terms of the particular instruments?

Equality between the two widows is consonant to the expressed desire to maintain, as far as possible, equality between their respective husbands. The exclusion of widows by male legitimate issue, is an exclusion which would prevail equally in a divided, or undivided, family. The agreement provides, by language not apt nor correct, for the devolution on sons of lawful widows: in case one has male issue, and the others none, a preference is declared; but where each is childless, the agreements prefer neither. In such a case, then, the law alone can regulate the succession. The instruments do not support, by any clear expression of intention, the claim of the widow of the elder son to exclude the other. There is no ground for confining the estates of the sons to life-estates. The mortgage is inconsistent with that view. The provisions as to the possession of the talook alone may refer merely to titular dignity and ceremonial usage. The equal division between widows and illegitimate sons is not likely to have been conceived by the framers or advisers of this compromise.

Their Lordships will, therefore, recommend to Her Majesty that the decree (or decrees, if separate decrees have been made in the two suits) of the High Court of the 22nd April 1865, be reversed, and that in lieu thereof a decree be made in suit No. 62 of 1861, affirming the decree of the Zillah Judge of the 13th March 1862, and dismissing the appeal therefrom to the High Court with costs; and that in suit No. 72 of 1861 a decree be made declaring that, according to the true construction of the agreements of the 26th November 1838 and the 29th July 1844, the widow of Gopinada, the appellant, and the respondent, the widow of Krishna, upon the deaths of Gopinada and Krishna without male issue, became entitled from and after the death of Gopinada, as Hindoo widows, each to one moiety of the estate; and decreeing possession of the moiety claimed to the respondent, Nilamani Patti, but without costs. The High Court, in executing Her Majesty's Order, must take all necessary steps to undo whatever may have been done under the decree reversed inconsistent with the rights thus declared. Adverting to the difficulties occasioned by the instruments executed by the brothers, their Lordships think there should be no costs, as between the widows, either in the Courts below or here on appeal.

The 2nd December 1870.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Lunacy—Res-judicata—Act XXXV of 1858—Practice—Evidence.

*On Appeal from the High Court at Calcutta.**

Ajoodhya Pershad and another

versus

Omrao Singh.

Act XXXV of 1858 contemplates only the question of lunacy or sanity at the time of the enquiry; there is no provision in the Act that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind. The report of an officer on such enquiry has not the effect of *res-judicata* upon the issue between two parties who allege that the lunacy commenced at different times.

When evidence of doubtful admissibility has been received in a cause in India, the Privy Council will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail.

In this case an action in the nature of an ejectment was brought by the respondent, Omrao Singh, as the Committee, and in right of his wife (a lunatic), for the recovery of certain parcels of land which were admitted to be in the possession of the appellants. The plaint also asked that a certain *ikrarnamah* should be set aside. Their Lordships may at once dispose of the latter question by saying that it appears to them, as it appeared to the High Court of Bengal, to be one which cannot be disposed of in this suit; that it is a question which can only be determined between the appellants and the persons who are named as their co-defendants on the record. Their Lordships, therefore, will deal with the case as being nothing but an action in the nature of an ejectment for the recovery of the lands in question from the appellants.

The title upon which the plaintiff sued is based upon the fact that his wife, as the daughter of Indrabuttee, the last surviving widow of one Teijnarain, became on the death of the mother entitled to the property as the next heir of her father Teijnarain; and the principal issue raised in the cause is whether that lady had not lost her right to inherit by reason of her lunacy. It seems to be admitted on both sides (the point has not been argued here, nor was it argued in the Court below) that by the Hindoo law, if she was, when the succession opened to her (that is to say, on the death of her mother), insane, she did lose her right, and that it passed to the three persons who are mentioned in the record to be her sons.

The sole question, therefore, for their Lordships' determination is a question of fact,—whether the lady was or was not insane at the time of her mother's death, or whether, as alleged by the plaintiff, she became insane within two months after that event. This issue of fact was found in favor of the appellants by the Court of first instance, the Principal Sudder Ameen. His judgment was reversed by the High Court upon certain grounds, and it has been contended before their Lordships that those grounds are unsatisfactory, inasmuch as the Appellate Court has given undue weight to a certain document which had been admitted in evidence in the cause. Hence, there being two conflicting judgments, and a grave question touching the weight which ought to be given to a particular document, it has fallen to their Lordships to deal with this case according to their

* From the judgment of Steer and L. S. Jackson, *J.J.*, in Regular Appeal No. 581 of 1862, dated 10th December 1863: not reported.

own view of the evidence taken in the cause, and to form their own conclusions upon it.

It seems to their Lordships desirable in the first instance to consider whether by reason of the undue weight which the High Court gave to the document in question, the value of its judgment is destroyed. That document is the report of the Moonsiff, made upon the application for the appointment of the husband as Committee. It appears that within two months after the death of Indrabuttee, Omrao Singh applied to the Zillah Judge, under Act XXXV of 1858 of the Indian Legislature, to be appointed Committee of his wife, alleging her lunacy. The Act directs that in case the party lives at a certain distance from the sudder station, the Judge shall delegate the enquiry to a local officer; who in this case was the Moonsiff. The local officer has to report to the Judge who passes the final order in the case. The Act, however, contemplates only the question of lunacy or sanity at the time of the enquiry; there is no provision in the Act that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

In these circumstances the appellants, who had long been pressing their claims in respect of this property against the other branch of the family, thought it expedient to appear as objectors on this proceeding. It is not clear that the Judge passed any order allowing them to go before the Moonsiff, but in some way or other they appear to have been admitted before the Moonsiff. They did not attend throughout the enquiry, and they failed to produce witnesses to prove that the lady had been a lunatic from the time at which they alleged she became so, or at any time before the death of Indrabuttee. The result, therefore, was that they did not go into their case before the Moonsiff. The Moonsiff, on the other hand, took evidence on the part of the respondent who was seeking to be appointed Committee, and came to the conclusion that the lady was of unsound mind. His report is at page 89 of the record. It states what I have just said about his having taken the evidence, and then contains this passage:—"In this case both parties acknowledge the lunacy of Mussamut Sreebuttee; but the dispute between them is on this subject. The applicant writes that Mussamut Sreebuttee became insane in the month of Maugh 1267 Fuslee, subsequent to the death of her mother Mussamut Indrabuttee, and the intervenors state contrary to this,—that she has been a lunatic for a very long time, that is to say, from anterior to the death of Indrabuttee her mother. From the evidence of the witnesses which have been produced on the part of applicant (from No. 1 to 29), it has become known that Mussamut Sreebuttee, daughter of Mussamut Indrabuttee deceased, after her death, became insane, in the month of Maugh 1267 Fuslee, at mouzah Dinnaree, Pergunnah Kunhour, in the house of her husband, and that she continues in the same state up to this time. From the evidence as to the lunacy taken by me before the intervenors, it has been ascertained that the Mussamut aforesaid is quite insane. The intervenors have produced no proofs before me from which it may be learned that the Mussamut aforesaid has been insane for a greater length of time." This report having been made to the Judge, the appellants again objected before the Judge, but the Judge very properly held that he had no jurisdiction to decide the question between the parties; that the simple issue was whether Indrabuttee was a person possessed of any property, and if so, whether she was sane or insane and required the protection of a Committee; and accordingly he appointed the husband Committee. The learned Judge who delivered the judgment of the High Court seems to have thought that the evidence before him being conflicting, the scale was turned by the document to which I have just referred. He says:—"The evidence adduced by them (the appellants) is not only very far from satisfactory, but it is directly opposed to the recorded opinion of the Moonsiff deputed by the Zillah Judge in 1860 to investigate the matter of Sreebuttee's lunacy." It appears to their Lordships that if he meant to give to this finding

what we do not think he did mean to give, the effect of *res judicata* between the parties, he was clearly wrong. There was no adjudication by any competent tribunal upon the point in issue in this suit. The Moonsiff had no jurisdiction to decide it; nor had the appellants in strictness any *locus standi* before him. If, on the other hand, he meant to say that the conduct of the appellants, as evidenced by that proceeding, had been such as to lead to an inference that the case they afterwards made was untrue, he seems also to their Lordships to have given an effect to their conduct which it does not fairly bear. All that appears is that they went unnecessarily before a tribunal which could not have decided the question between them and the opposite party, and that being there they failed to produce their evidence. Their Lordships are of opinion that it is neither a necessary nor a legitimate inference from that fact, that the evidence which the appellants have produced in this suit ought not to be believed. That being so, their Lordships think that the judgment of the High Court, whether the Judges came to a right conclusion or to a wrong conclusion, has been put upon grounds which do not justify that conclusion.

Their Lordships have then to consider the effect of the whole evidence. The issue is a remarkably simple one; it is whether this lady, admitted on both sides to be a lunatic, became a lunatic between the death of her mother and the period at which the husband applied to be appointed Committee—that is to say two months afterwards,—or whether she had been a lunatic for some considerable period before the death of Indrabuttee. Now their Lordships will concede that the burden of proof may be on the side of the appellants,—that it may be sufficient for the other party, in proving his title, to prove that this lady, now a lunatic, but who certainly had not always been a lunatic, was the nearest heiress to Teijnarain; but it is evidently a burden which becomes of a much lighter character when the lunacy is admitted to have supervened within two months of the critical time, the death of Indrabuttee.

Then again the case of the respondents is open to the observation which has been made at the Bar, that if it is true far better evidence of it might have been produced than has been produced by the respondent. For instance if the woman became mad within two months of her mother's death, one would suppose that that madness must have been caused by some disorder which would require and receive medical treatment. We have, however, no medical evidence whatever. We have nothing to show that, having been sane up to a certain period, she became suddenly ill. Again, we have none of the near relations of the family produced. The mere fact that the husband verifies in the ordinary way the truth of the allegation in the plaint, is no answer to the suggestion that, if he had a true case, he, the nearest relation of this party, might have come forward and shown how the madness came on and all the circumstances relating to it. He, again, has within his power all her family and female domestics; but there is not a single witness produced on that side, except the witnesses of the character so common in the Indian Courts, viz., male menial servants, dependents, and ryots living in the neighbourhood, who are all obviously persons less likely to have the circumstances deposed to within their knowledge, and to be far less trustworthy than the members of the family who might have been produced. On the other hand, it is said that the evidence produced by the appellants is of no better character. It does not seem to their Lordships that this observation is altogether just. There is certainly, at least, one person produced by the appellants who does stand to the parties in near relationship. No doubt his testimony is open to the observation that, though the uncle of the lunatic, he is also the father-in-law of one of the appellants; but still he is a man of position; he is a man who from his relationship must have had the means of knowing what he deposes to, and he seems upon the whole to be the most trustworthy witness that has been produced to give direct evidence as to the date of the lunacy on either side.

Again, there are the other witnesses mentioned by Sir Roundell Palmer, viz., the two servants, one of whom was employed to take care of her, and they seem to have had more peculiar means of knowledge than those possessed by most of the witnesses on the other side. Then a great deal has been said touching the evidence of the witness upon whom the Principal Sudder Ameen seems, from the expressions in his judgment, to have placed the greatest reliance—I mean the evidence of Mr. Duff. It has been argued that Mr. Duff's evidence being mere hearsay was not admissible at all. Their Lordships are not prepared to admit that this evidence is properly described as mere hearsay. The witness speaks of his own knowledge to the fact that at a particular period the insanity of Mussamut Sreebuttee was rumoured and generally believed in the district with which he was conversant. Their Lordships do not feel it necessary to decide whether that testimony, if objected to, would have been receivable on the trial of such an issue as this in an English Court of Justice. It has been received in India; and their Lordships conceive that they ought to deal with it according to the principles enunciated by Dr. Lushington in the case mentioned in the course of the argument (see* 7 Moore's Indian Appeals, 137) as those which govern this Board, viz., that when evidence of doubtful admissibility has, under the looser practice of the Indian Courts, been received in a cause, their Lordships, sitting as an appellate Court, will deal with the case as they think substantial justice requires, and will not allow any merely technical objections to prevail. In the present case their Lordships think that they ought not wholly to reject Mr. Duff's testimony. The next question is, what effect can legitimately be given to it. If we had to deal here with the broad question of sanity or insanity,—whether Mussamut Sreebuttee were now sane or insane,—Mr. Duff's evidence would be of little or no value. But when it is an admitted fact that the woman is insane, and the question is whether she first became so before or after the date of the death of Indrabuttee, the testimony of a trustworthy witness, that long before that period she was, to his knowledge, reputed insane, is an important corroboration of the direct testimony given in the cause to the fact of her insanity at the time.

Their Lordships, moreover, deem it right to observe that if Mr. Duff's deposition was struck out of the record, they would nevertheless be of opinion that the preponderance of the evidence is in favor of the conclusion—that the lady was insane at the time of Indrabuttee's death. And they are confirmed in that opinion when they come to consider the *res gestæ* of the case. This family was originally a joint family, and there was an attempt at a partition as early as 1802. From that time forth however, the two branches of the family represented by the appellants seem to have contended that the estates were to a certain extent joint, and that the descent of them was to be governed by the rules regulating the descent of joint property. Their Lordships do not say whether they were right or wrong. In the lifetime of the two widows there seems to have been an arrangement by which the widows were left in possession of the property, but it is said on some understanding that on their death it was to go as if it were joint estate to the male heirs. Whatever may be the merits of that contention, it seems to their Lordships impossible to resist the conclusion that the punchayet which is alleged to have been held was held. Possibly the circumstances which led to it may have been circumstances of violence tending to a breach of the peace, but with that we have nothing to do. In point of fact their Lordships believe that the punchayet was held, that the ikrarnamah was executed in pursuance of that punchayet, and that the possession of the lands, which is now admitted to be in the appellants, followed upon the execution of that instrument. It is unnecessary to consider whether that document was obtained by duress or fraud, or anything of that kind, for that is a question

* 4 W. R. P. C. 121; 1 Suth. P.C. R. 300.

which can only arise between the sons of this lady, who executed it, and the appellants; but if the transactions above mentioned did take place then, then it follows that at that time, which was immediately after the death of Indrabuttee, the sons, and not the mother, were held out to be and were dealt with as the heirs. If the lady had not then been insane, it seems most improbable that some person would not have put forward her interest, or that the appellants would have dealt with those as heirs who really did not possess that character.

Therefore, weighing all the circumstances, their Lordships have come to the conclusion that the Principal Sudder Ameen was right in the view which he took of the evidence, that Mussamut Sreebuttee was of unsound mind at the time of her mother Indrabuttee's death, and that consequently the plaintiff in the action has failed to make out his title. Their Lordships must, therefore, recommend Her Majesty to reverse the decision of the High Court, and to order that in lieu thereof the appeal to that Court against the decree of the Principal Sudder Ameen dismissing the appellants' suit be dismissed with costs. The appellants must also have their costs of this appeal.

The 3rd December 1870.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Question of fact—Onus on Appellant.

*On Appeal from the High Court at Calcutta.**

Gobind Soonduree Debea and others

versus

Juggodumba Debea and others.

Upon a mere question of fact which has been decided in the same way by both Courts in India, the appellant must satisfy the Privy Council, beyond all reasonable question, that there was some miscarriage in the Court below in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given, or in respect of something as to which they could see that there was a matter of principle involved which the Privy Council ought to set right for the guidance of the Courts of India in other cases.

This is an appeal from the decision of the High Court of Judicature at Fort William in Bengal, affirming a decision of the local Court. The question was a mere question of fact depending upon evidence, and depending upon the inferences to be drawn from the acts and conduct of the parties.

Their Lordships do not feel themselves called upon to go as minutely into the details of the evidence which has been given on the one side or on the other, as if they had been a Court of first instance, or to satisfy themselves that, if they had been such Court of first instance, they would have concurred in the judgment of the Court below, as that which the weight of evidence was in favor of. They consider that in accordance with the rule which has been more than once laid down at this Board, upon a mere question of fact, a question of fact which has been decided in the same way by both Courts in India, it is the duty of the appellant to satisfy them, beyond all reasonable question, that there was some miscarriage in the Court below, in respect of some principle which they acted

* From the judgment of Loch and Seton-Karr, *J.J.*, in Regular Appeal No. 393 of 1864, dated 29th May 1865. See 3 W. R. 66.

upon, in respect of some presumption to which too much weight was given, or in respect of something as to which they could see that there was a matter of principle involved which this Board ought to set right for the guidance of the Courts of India in other cases.

In this case the question was a mere question of fact, and both Courts seem to have gone very minutely into all the questions of evidence. The Court below gave a very long and very elaborate judgment. The Court at Fort William admits, in favor of the appellant, that abundance of oral evidence had been produced to prove the fact of the permission to adopt in question in the cause having been first given verbally and then in writing, but they say—"We entirely discredit the whole of the evidence except that of Dr. Elton, knowing how easy it is when family disputes arise to raise claims, such as is made in the present case, and to support them with any amount of oral evidence, even that of the nearest relatives of the family who generally range themselves on one side or the other, and who cast aside all regard for truth in order to secure the success of the party whose cause they have espoused; and our past experience tells us that such is particularly the case in suits to uphold or set aside alleged acts of adoption in Zillah Mymensingh," the particular Zillah in question. Now, their Lordships do not feel themselves at liberty to say that this was not a true statement of the practice and of a danger to be guarded against. The Court below goes on to say: "There are, however, reasons beyond this general one, which, in our opinion, render this testimony utterly worthless," and then they say—"We find that Woomesh Chunder died in 1256, that from that time till 15th Assin 1268, a period of twelve years, nothing was done by the plaintiff in furtherance of the permission to adopt which, as she alleges, she had received from her husband; no publicity was given to this instrument, no care was taken to register nor to keep it in her own custody, and the instrument itself is not to be found; but the plaintiff comes into Court with a plausible tale, that she was too young to take care of the paper when her husband died, and so made it over to her father-in-law, from whose custody it passed on his death to that of his son, and thus on his widow she casts the *onus* of producing it or the odium of having destroyed it. After the death of her father-in-law she allowed her brothers-in-law to take possession of the estate, made no attempt to make the adoption, an act which would have secured to her as guardian of a minor adopted son a large share of the family property, but she proceeded with her mother-in-law to Benares apparently with the purpose of spending the remainder of her life there, when the unexpected death of her youngest brother-in-law brought her back to the family residence, prepared to contest, with his widow, the right to the possession of the property, and supporting her claim by any amount of hard swearing which unscrupulous parties about her do not hesitate to put forward in her behalf. So long as any male member of her husband's family remained alive, she took no steps to carry out her husband's permission to adopt; but no sooner has the last male member deceased and the possession of the property devolved on his widow, than the plaintiff suddenly starts up from her long sleep and tries to get possession by an alleged dormant permission to adopt." The inference drawn by the Court below from that statement of facts, was that the whole conduct of the lady and the conduct of the family was inconsistent with the oral testimony which was given, and they preferred that inference so drawn from such conduct to the oral testimony. The Court then proceeded to deal with the evidence of Dr. Elton, which they considered to be the only oral evidence that might be entitled to credit. They came to the conclusion that it was mere hearsay testimony, in which opinion this Court also agrees.

Their Lordships are unable to see any sufficient ground whatever upon which they can say that the High Court in Bengal was wrong in preferring the conclusions to be drawn from these acts and the conduct of the parties to the oral

testimony, that testimony being of a kind which, in their Lordships' experience, is generally liable to be doubly suspicious, there being also an amount of conflicting evidence. There is also this fact which is not mentioned in the judgment, but which has struck their Lordships,—a document which is proved in evidence, which seems to be an authentic document, by which the father-in-law, years before his death, registers another deed or power of adoption in the same family, reciting in it that there was no power of adoption given in respect of his eldest son who is deceased,—a fact which apparently he had no reason whatever for inventing if it were not true.

On the whole, their Lordships are of opinion that there are no sufficient grounds for disturbing the conclusion which was arrived at by the High Court, and they will humbly recommend Her Majesty that this appeal be dismissed with costs.

The 5th December 1870.

Present :

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Benamée purchase—Onus probandi—Life-interest.

*On Appeal from the High Court at Calcutta.**

Rajah Chundernath Roy

versus

Ramjoy Mozoomdar.

Plaintiff sued for the recovery of certain property on the allegation that though the property was purchased by *A*, his adoptive mother, benamée in the name of *B*, yet that she purchased it out of her own separate income so as to make it her property, and that plaintiff, as her heir, was on her death entitled to the property. The defendant denied that the purchase was made with the money of *A*, and averred that the property was purchased with the money of *B*, the person in whose name the purchase stood.

HELD that the defendant's answer was substantially an argumentative traverse of the truth of the plaintiff's story, and that the material issue was, not whether the defendant's averment of purchase with the money of *B* was made out, but whether the plaintiff's story of purchase by *A* with her own money benamée in the name of *B* was true.

HELD, further, that even if *A* purchased the property with her own money, yet nevertheless if she purchased it with the express intention at the time that after her death it should go to *B*, in whose name she purchased it, that would not be a purchase benamée within the meaning of the real issue in the case, and that it would make no difference in point of law whether *A* did or did not reserve a life-interest and control over the disposition of the proceeds of the property during her life.

This was a suit brought by Rajah Chundernath Roy, as son and heir-at-law of the late Rajah Anundnath Roy Bahadoor, to recover certain properties, six in number, from Ramjoy Mozoomdar, the nominal defendant being the guardian of Chundernath, *alias* Ramchunder Chuckerbutty, who is an infant; and the ground on which the suit was brought was, that the plaintiff was the heir of the Ranee Hurreepreah, who had been one of the widows of his father, of whom he was the adopted son, and to whom he had made some very liberal allowances—the properties in question having been purchased by her out of the income which she enjoyed. There is no doubt that, under these circumstances, he was her heir. But the question in dispute was whether the properties in question had been

* From the judgment of Kemp and Pundit, *J.J.*, in Regular Appeal No. 454 of 1862, dated 2nd September 1863. See *Sevestre's Reports* (from August to December 1863), p. 150.

purchased by her, as it is called, benamee, that is to say, had been purchased in the name of other persons, but so as to be her property? The Court below have decided that they were not so purchased, but were purchased with an intention that they should go after her death to the defendant.

Now, the first objection taken by Sir Roundell Palmer was, that the defence relied on in the case was not open on the pleadings. For that purpose it is necessary shortly to refer to what the pleadings were. Now, the plaintiff states generally the circumstances under which the plaintiff says he became entitled, that Hurreepreah had purchased them in the way I have said, benamee, and accordingly as her heir they came to him. Then the defendant in his answer no doubt sets up a case which was not maintained by the evidence at all, that they had not been purchased with the Ranee's money, but had been purchased with the proper money of the persons in whose name the purchase was made. Then the material issue which was directed to be tried by the Court, being the first issue, was "whether Ranee Hurreepreah, the stepmother of the plaintiff, was entitled to, and in possession of, all the contested properties by acquiring them benamee of the persons alleged by the plaintiff; or whether they were acquired by the several persons alleged by the defendant, and accordingly held in their possession, and have afterwards come to the minor, Ram Chunder?" Now, it is obvious that this issue, in substance, is this—is the plaintiff's story stated in his plaint true, or is the defendant's story stated in his answer true? It is, of course, a possible thing that neither of the stories may be true, and the question then arises which of these two alternatives of the issue is the really material one? Their Lordships think that the really material one is the first part of the issue, viz., is the plaintiff's story true? It is not as if the defendant's defence was, as we should say in the common law, a plea in confession and avoidance—a plea which admitted that the plaintiff's story was true, and then avoided it. If that had been the case, and the defendant had failed to prove his case, of course the defendant must have failed and the plaintiff ought to recover. But it is substantially what at common law we should call an argumentative traverse of the truth of the plaintiff's story, for it does not admit that one word of it is true, but sets up certain things perfectly inconsistent with it. The real truth is that the second alternative of the issue ought to be rejected, and the real question is, "whether the Ranee Hurreepreah, the stepmother of the plaintiff, was entitled to"—which I think must mean was entitled to *at the time of her death*, because that is the material thing, "and in possession of all the contested properties by acquiring them benamee of the persons alleged by the plaintiff." If the plaintiff has failed to prove the affirmative of that issue, if it appears on his own evidence that they were not so purchased and did not so continue at the time of her death, the consequence is the plaintiff must fail, and the defendant may say—"It is wholly immaterial whether I prove my case or not; you have not proved yours."

Their Lordships are, therefore, of opinion that it was perfectly open to the Court to decide the case on the grounds on which they do decide it. Their Lordships are also of opinion that the Courts below have not at all miscarried in point of law; that if the real truth of the facts is this, that though these properties were purchased—as unquestionably on the evidence their Lordships think they were—with the money of the Ranee Hurreepreah, yet nevertheless, if she purchased them with the express intention at the time that after her death they should go, as to those which were purchased first to Sheeb Soonduree, and as to those which were purchased afterwards to Ram Chunder, that would not be a purchase benamee within the meaning of the issue; that would not be a purchase on the terms that the property was to be absolutely hers; but would be a purchase with the intention of benefiting the person in whose name the purchase was made; and their Lordships are of opinion that it would make no difference in point of law whether she did or did not reserve a life-interest and control over

the disposition of the proceeds of the property during her life. One may observe that on the evidence it would rather appear that she, during her lifetime, did bestow very considerable benefits on both the mother Sheeb Soonduree and the boy, so that practically in all probability she gave them quite as much as the proceeds of the property.

Well then the Court below not having miscarried in point of law, so far from having miscarried in point of fact, the evidence is very strong indeed that the purchase from the very beginning was made with the intention that the property should not go to her heir-at-law, but should go to Sheeb Soonduree, or if Sheeb Soonduree was dead should go to Ram Chunder. It is really quite sufficient to refer to a single witness at page 29. "The witness on hearing the deposition said that his answer to the question by the Court has not been taken down; my answer is that the Ranee used to say that all these properties were Ram Chunder's, and her care was that they remain as Ram Chunder's." It is perfectly plain that she had purchased them with the original intention of benefiting him in order that after her death they might go to him.

That being the case, their Lordships are of opinion that they must advise Her Majesty that this appeal should be dismissed.

The 6th December 1870.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

*Prejudice against party to suit—Transfer of suit—Application to Zillah
Judge.*

On Appeal from the High Court at Agra.

Mohur Singh

versus

Ghureeba and others.

Where there is a general feeling in a district against the party to a suit, and such party feels that he is not likely to have a fair trial before the local Judge with that feeling in the district against him, his proper course is to petition the European Judge to remove the case into his Court and to try it in the first instance.

This case has been before three Courts in India, of which the High Court of course merely dealt with the points of law which were raised on special appeal, and have not been very strongly pressed here. There are two questions in the cause. The first is whether the respondents, the plaintiffs in the Court below, have succeeded in establishing that when their puttee was confiscated and sold under one of the penal Acts passed during the time of the Mutiny, it was purchased by the appellant in the name of his son, upon the contract or understanding that upon payment of the whole purchase-money, of which the plaintiffs had already paid part, the rest being found by the appellant, they should be put in possession of the whole of their ancestral rights in the puttee? That is a question of fact; and if that agreement is made out to have been the understanding and contract between the parties, the second question is, what are the equities which should be applied to it?

Mr. Leith having to contend with the judgment of the two Courts which tried the question of fact, has very fairly brought to our notice certain grounds

upon which their conclusion should be impeached, and it is impossible to deny that several of those grounds have some foundation. He has urged, first, that a considerable amount of the evidence admitted was mere hearsay evidence; secondly, that among the evidence which was improperly admitted was the conviction by the Magistrate, which ought not in any point of view to have been used as evidence against the party in the civil suit, according to the strict rules of evidence, and which having been reversed by the Judge, no matter on what grounds, had ceased to be a standing conviction against the appellant. The third ground taken was the state of feeling against the appellant in the district; and in particular the strong animosity existing between him and the tehseeldar and Syud Ali Shah, who were two of the witnesses; and the last ground upon which the finding of the two Courts was impeached was the strong improbability that the appellant, who had been instrumental in bringing to justice certain persons of this village connected with the plaintiffs, should have been the person chosen to make the purchase on their behalf.

It seems to their Lordships that giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached, the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of law in this country before which, on a motion for new trial, it is shown that evidence improper to be admitted has been admitted before the Jury. The Court in that case are not judges of fact, and are unable to say what weight the Jury may have given to the evidence that ought not to have been admitted. But it is the duty of their Lordships, who are judges of the fact in such a case as this, to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees. Their Lordships, nevertheless, must express their regret that the Court of first instance in the case before them should have been as lax as it has been in the admission of evidence. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal.

Now, setting aside all the hearsay evidence, setting aside the conviction—the proceedings in reference to which seem to have been of a somewhat singular character, and even for the sake of argument admitting that the tehseeldar's evidence is not to be entirely relied upon, though their Lordships are by no means prepared to say that that person is unworthy of credit, and resting solely on the evidence which was given by the bankers, and the person described as the zemindar of Baroot,—it seems to their Lordships impossible to say that the finding of the Court below was wrong. The bankers' evidence is peculiarly valuable, because it is clear upon the proceeding that the whole of the village of Baroot was sold together. The bankers were the persons who were employed by persons interested in the other puttee forming part of that village to purchase it on their account. They admit such a contract. They speak from their own knowledge to the fact that the Singhs bought in the same way for the benefit of the persons interested in the other puttee, and they speak also to payment of the earnest-money. The other witness is apparently a witness of greater respectability than we usually find in such a case. It is impossible for their Lordships sitting here to estimate the force of the arguments which have been brought against the testimony of these witnesses by Mr. Leith; it is impossible for them to say what may be the feelings which have possibly prompted their evidence against the appellant. Certainly the general feeling of the district seems to be strongly against him, and the conviction that the transaction which the plaintiffs have put forward is really a true transaction appears to be general. But can we thence infer that the re-

spondents' case is a false story? It is just as likely to be true, and one can conceive no story which, if true, would be more likely to create a general feeling against the appellant. If he felt that he was not likely to have a fair trial before the local Judge with that feeling in the district against him, his proper course was to petition the European Judge to remove the case into his Court, and to try it in the first instance. But if he has not done that—if he has taken a trial in the ordinary Court, and that Court has found against him, and the evidence properly received appears to their Lordships to be trustworthy, or at least to be such that it is impossible for them to say that it is not trustworthy,—how can their Lordships be called upon now to set aside the finding of that Judge, confirmed as it was afterwards on appeal by the Zillah Judge?

In the Court of first instance, the Principal Sudder Ameen seems to their Lordships to have mistaken the effect of the contract, and to have held that the parties were entitled to recover only such a proportion of the lands as the sum which they had actually paid might be taken to represent. The Zillah Judge, Mr. Sapte, seems to have put a more correct interpretation upon the contract. He treated it as a contract upon which, on payment of the balance, they would be entitled to the whole. He did not fix a period at which this redemption, if one may so call it, was to take place; but that was set right by the decree of the High Court.

It, therefore, seems to their Lordships that on the whole substantial justice has been done in this case, and they will advise Her Majesty to dismiss the appeal.

The 7th December 1870.

Present:

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Succession—Co-parcenary—Custom—Ancestral property.

*On Appeal from the High Court at Calcutta.**

Umritnath Chowdry

versus

Goureenath Chowdry and others.

By the common law of Hindoostan, the descent is in co-parcenry where no other custom or right is proved.

The fact that a settlement was made by the Government in the name of an elder son, and that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the younger brother in property which was once the property of the father. The mere fact that one of two brothers was registered, so as to be the proprietor to the outer world, is not of great weight on that point, if there has been a continuous enjoyment of the property by both brothers upon equal terms.

This case, which has occupied the greater part of two days, appears to their Lordships, when reduced to its legitimate and reasonable dimensions, to be a very short case. The relevant and material facts are few and not substantially in dispute for any purpose which their Lordships have to decide.

The contention on the part of the plaintiffs below—the respondents here—is, that a certain estate, a zemindary with accretions which beyond all reasonable

* From the judgment of Kemp and Pundit, J.J., in Regular Appeal No. 474 of 1862, decided 5th October 1863: not reported.

question had been made by the investment of the profits of that estate, was an ancestral estate which descended to them and the appellant, who was a cousin, in co-parceny. It is admitted that by the common law of Hindoostan, the descent is in co-parceny where no other custom or right is proved. The case of the plaintiffs was that this property was ancestral property, which had belonged to their grandfather, one Hurjee, and descended from Hurjee upon the two sons, Bacharam and Sheeblool, the fathers of the respective parties.

The case mainly relied upon in the Court in India on the other side was, that there was no foundation whatever for this assertion; that the property was not ancestral property—that the grandfather never had any property at all, but that it was an acquisition by Bacharam himself under a grant made to him individually—or as we should say in English law, an acquisition by him by purchase; so that he became a new root of descent, and so that the common title alleged to be derived from the grandfather had no existence.

Now, it has been proved to the satisfaction of the Court below, and proved entirely to the satisfaction of their Lordships,—indeed was hardly disputed at last in the arguments at the Bar,—that this property was originally a zemindary, of which Hurjee, the grandfather, was possessed. Document after document, and all the evidence in the cause, go to show that Bacharam in the first settlement, then in the decennial settlement, and then in the perpetual settlement, claimed to have it made with him by reason of his hereditary right to the zemindary as hereditary zemindar. That being proved, that it was Hurjee's property, and that Bacharam was entitled by descent, of course the next proposition would equally follow, unless there is something to exclude it; that is, that he would not be entitled to it himself, but that he and his brother would succeed to it as co-parceners.

Well, has anything occurred to divest that right which in a case of ordinary property was certainly vested in the two jointly at the time when the history of this case begins? Their Lordships are unable to find anything to alter the right which existed at the time when the descent was cast. The fact that the settlement was made in the name of the elder son,—whether, originally, when he was a minor, or not,—the fact that he has continued to be solely registered from that time to this, affords no conclusive evidence against the title of the shareholder. There is documentary evidence, on the other side, of his being recognized as a shareholder, but not very strong or very conclusive evidence. The mere fact that one of the two brothers was registered, so as to be the proprietor to the outer world, does not seem to their Lordships to be of very great weight any more than it did to the Court below; and in respect to the actual enjoyment of the property, there has been beyond all question a continuous enjoyment by both upon equal terms. The two lived together; the families lived together, they messed together, and all the marriage and funeral ceremonies and other ceremonies of their religion were performed at the joint expense out of the income of the property, and apparently, as far as their Lordships can see, upon equal terms, and not as the bounty of an elder brother to a mere dependent who had no right whatever to the property.

It appears to their Lordships therefore that the case as principally alleged in the Court below has entirely failed, and it becomes necessary to consider the other topics which have been very much relied upon at the Bar here, as they were at a late part of the case in the Court below. It is alleged that, admitting it to have been Hurjee's property, admitting it to have been ancestral property in that sense, it was property which descended to Bacharam as the eldest male heir by reason of its being subject to a custom of primogeniture. The custom of primogeniture is stated in two ways, first as a custom of a district so as to bring it within the Regulation of 1800; that is to say, it is the custom of a district supposed to be a jungle mehal in Zillah Bhaugulpore. Now of the existence in any known district

whatever of anything which can be predicated as a jungle mehal in which this zemindary is situated, there is neither pleading nor evidence. There is nothing at all to show any custom, except a Collector's letter with respect to a custom extending to all the zemindaries throughout the whole Zillah of Bhaugulpore; and certainly it would be very strong indeed to hold, merely upon that evidence, that there was a custom proved extending to the whole of the Zillah of Bhaugulpore, or to the whole of any undefined district within that Zillah, of which the Court below says it has never heard anything, it being, they say, perfectly notorious that no such custom exists within that district. Well, then, the evidence of that custom appears to their Lordships to be absolutely nothing. Then, there is the other custom,—supposed to be a family custom, a custom of this particular family, under which custom it is alleged that Bacharam succeeded at such a time,—that is before the year 1794, in such a way as to exclude the title of his younger brother. Of that family custom there really is no sufficient allegation, if there be any allegation at all. Their Lordships find nothing on the pleadings to raise such a custom as that in the manner in which it ought to have been raised, if it was intended to have been pleaded and proved in this case. It is, in fact, inconsistent with the case almost entirely relied on by the defendant in the Court below; that is to say, of the new acquisition made by him under the grant or pottah from the Government. But if there be anything which is sufficient to raise it, which their Lordships do not see, there is an equal want of satisfactory evidence of any such custom. There is some trace in the Collector's letter of a sort of general custom extending through the whole of Bhaugulpore, all the zemindaries being held by that kind of title; but the genealogical tree, which is the only thing otherwise which is in evidence, is certainly, in their Lordships' judgment, insufficient to found a family custom, which the Court below have held must be proved by something like what we should call in this country immemorial usage. It is a thing which cannot be predicated of a simple and single estate, the title to which dates from comparatively a short period of time back. Both these cases of family and local custom, the burden of which was entirely on the defendant, have failed, and that brings it back to the case which the plaintiffs below had to prove; that is, the simple fact that this was ancestral property of their common grandfather.

That being so, and it being substantially admitted that there was no other source from which the acquisitions could be made, the decree of the Court below seems to their Lordships to be right, and they will therefore recommend Her Majesty that the decree be affirmed and the appeal dismissed.

The 8th December 1870.

Present:

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Title—Conveyance—Adoption—Deeds—Suspicion—Perjury and forgery.

*On Appeal from the High Court at Calcutta.**

Kali Chunder Chowdry

versus

Shib Chunder Bhadoory and others.

* From the judgment of E. Jackson and Glover, *J.J.*, in Special Appeal No. 3554 of 1864, dated 12th April 1865.—2 W. R. 281.

Where a Hindoo executes a kobala in favor of another at a time when he has no title to the property, his subsequently becoming entitled as heir would not make the kobala good.

The mere circumstances that a deed of adoption is not registered, is no ground why the adoption should not be believed.

Instruments which are proved by all the attesting witnesses and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery.

This is an action brought to recover a talook, called No. 396, Sakeer Mamood, and both the plaintiffs, who are respondents in this appeal, and the first defendant, who is the appellant, claim by deeds under the same owner, viz., Godadthur Toea. A kobala under which the plaintiffs claim was the first executed in point of time. It was not a kobala executed to the plaintiffs themselves, but was executed to Kedar Nath Lahoori, who is the third defendant, and who subsequently executed another kobala to the defendants. But it was objected on the part of the first defendant in the Courts below, and also before us, that, at the time when Godadthur Toea executed that kobala under which the plaintiffs claim, he had no right or title to the property in question at all. It appears to be admitted on all hands in the Court below that if he had no title to the property at the time he executed that kobala, his subsequently becoming entitled as heir would not make the kobala good.

Now, the question whether he had any title to the property at the time he executed that kobala appears entirely to depend upon this,—whether Hurree Coomar Toea, who was the original owner of the property, had adopted Beny Chunder as his adopted son during his lifetime; because, if he had so adopted him, then Beny Chunder was the heir of Hurree Coomar and became entitled to the property on Hurree Coomar's death; and as Beny Chunder did not die until after the execution of the first kobala by Godadthur Toea, under which the plaintiffs claim, if the adoption of Beny Chunder was good, then that kobala was bad and the plaintiffs have not made out their title.

The whole question, therefore, turns on whether there was a good adoption of Beny Chunder by Hurree Coomar. The two Courts, the first Court before which the case was heard and the Court of Appeal, have come to different conclusions on the question. The Judge of the first instance—although he mentions other grounds, which their Lordships do not think tenable for his decision—came to the conclusion that the adoption was good. He believed the evidence of it, and believed that the documents relating to it were genuine documents. On the other hand, the Principal Sudder Ameen came to the conclusion that the adoption never had taken place at all; he disbelieved the witnesses who spoke to it, and seems to have come to the conclusion that all the documents which were produced in support of it were forgeries.

Now, their Lordships have carefully examined the evidence on the one side and on the other; and they are of opinion that the evidence in favor of the adoption very greatly preponderates. The adoption is proved by a considerable number of apparently respectable persons, and the documents necessary to constitute an adoption are produced and proved by the attesting witnesses. It will be right, however, to examine the reasons given by the Principal Sudder Ameen for refusing to believe that the adoption had taken place. In the first place, it is said that there are not sufficient members of the family and persons of the same caste called as might have been expected. The answer to that appears to be very clear, viz., that it is admitted on all hands that Hurree Coomar had in fact no relations whatever except this Godadthur Toea, who was a very distant relation, and therefore it is impossible that others should have been called. Then, another objection that is made is that the priest of the family, who appears to have been the person who is alleged to have performed the ceremony, when called as a witness denies that there was any adoption at all. It appears, however, that this very priest is

himself a witness to the deed of gift, and he denies that that deed was a genuine deed, and says that he himself, in fact, was a party to the subsequent fabrication of it; his story being that the adoption was a thing which had not taken place at all in Hurree Coomar's lifetime, but was only thought of after his death. Their Lordships are of opinion that no weight whatever ought to be given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them. Then it is said that the barber also gives evidence against it. Whether the witness who is supposed to be the barber was the barber or not does not at all clearly appear. He does not himself say that he was a barber; he only says that he was a ryot who had the means of knowing, and who knew something about it, because, he says, he occasionally went to the house. But then it is a very strong confirmation of the truth of the adoption that, with one exception, all the witnesses who are called against the adoption and profess to say there was no adoption, admit that this boy, Beny Chunder, was, some say one year and some two years, before Hurree Coomar's death, brought to Hurree Coomar's house, and there lived with him and was brought up in fact as his son,—one of them says with a view to adoption. Now, no doubt, that does not of itself make an adopted son or make him the heir; but when you find a larger body of witnesses, who appear to have had quite as much, or better knowledge of the facts, come and say that the ceremonies of adoption were actually performed and that they were present at them, and that the deeds were genuine deeds, then the fact that these witnesses who deny the adoption are obliged to admit that the boy was being brought up in the house during Hurree Coomar's lifetime very strongly confirms their evidence.

It is said also that the deeds were not registered. If they had been registered, it would have been more clear, but it appears to be such a common thing not to register deeds that their Lordships cannot think the mere circumstance of their not being registered is any ground why the adoption should not be believed. Then, indeed, the Judge who disbelieves the adoption himself refers to the wuseat-namah, which was executed by the widow appointing the guardians, as a genuine instrument. If that is so, it is the strongest evidence of the adoption, for it in terms recognizes the adoption as having been made.

It is important also to consider on which side the possession went, because if the adoption was recognized soon or immediately after Hurree Coomar's death and between his death and the death of the adopted son, and the adopted son was the party in possession and not the alleged heir, that is very much in favor of the adoption. Now the great weight of evidence clearly is that the adopted son was in possession. There was an enquiry before the Magistrate, which resulted in the adoption being recognized; the guardians of the infant took possession; they gave a lease of the property to the third defendant, under which he took possession and under which possession has, in fact, been kept up to the present time. Therefore the possession has gone along with it, and though Godadhur Toee certainly seems to have executed this kobala to the party under whom the plaintiffs claim, he did not, as far as their Lordships can see, during the lifetime of the adopted son take any other step whatever. It is proved by two witnesses that the purchase-money which he was to receive was not paid at the time; whether it has been paid afterwards is left in a great deal of doubt, and that circumstance tends to show that he was not the real owner in possession but a person who was merely selling a possible title.

Under these circumstances, their Lordships are of opinion that although, no doubt, it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery.

There was an appeal to the High Court purely on points of law, but those

points have not been argued before their Lordships—in fact they have been abandoned.

Their Lordships will therefore recommend Her Majesty to affirm the decision of the High Court dismissing the special appeal; to allow the appeal so far as it relates to the decree of the Principal Sudder Ameen, to reverse that decree, and to declare that in lieu thereof a decree should be made dismissing the appeal from the Court of first instance with costs; to declare further that any costs which the appellant may have paid in India other than the costs of the special appeal be repaid to him: the appellant to have the costs of this appeal except so far as they have been increased by appealing against the decree of the High Court.

The 8th December 1870.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Mortgage—Consideration-money—Foreclosure—Estoppel.

*On Appeal from the High Court at Calcutta.**

Ram Surun Singh
versus

Mussamut Pran Pearee.

A defendant who has executed a mortgage and formally acknowledged under his hand and seal the receipt of the consideration-money may, in a suit for foreclosure by the mortgagee out of possession, deny that the money was advanced, the mortgage deed not creating any estoppel.

A pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them.

In this case their Lordships are of opinion that it is impossible to treat this deed of conditional sale and mortgage as creating any estoppel. It is sought to be enforced by a person out of possession. It is in truth the case of a common mortgage in which the defendant says there never was the money advanced. It is open to a mortgagor in this country to deny that the money, the receipt of which is formally acknowledged under his hand and seal, was advanced, and to cut it down to a nominal sum or nothing. That being so, and the instrument being relied upon by a person out of possession seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction. Then with regard to the supposed estoppel by pleading, it is equally clear that a pleading by two defendants against the suit of another plaintiff never can amount to an estoppel as between them. Their Lordships are satisfied that the decision of the High Court was quite right. Their Lordships will, therefore, advise Her Majesty that it be affirmed and the appeal dismissed with costs.

* From the judgment of Steer and Levinge, J.J., in Regular Appeal No. 147 of 1864, dated 21st September 1864—1 W. R. 156.

The 10th December 1870.

Present :

Sir James W. Colvile, Lord Justice James, and Lord Justice Mellish.

Issues—Practice—Appellate Courts.

On Appeal from the High Court at Agra.

Mussamut Mitna

versus

Syud Fuzl Rub and others.

Observations on the settling of issues by Courts of original jurisdiction under the Code of Civil Procedure, and on the duty of an Appellate Court when an objection is made before it that the first Court did not lay down issues in a case.

It has candidly been admitted by the learned Counsel for the appellants that in this case they would despair of inducing their Lordships to interfere with the finding of the Courts in India upon the questions of fact, and the conclusions which they have drawn from the evidence on the record. The question upon the appeal, therefore, is narrowed to this, has there been in this cause such a mis-trial as renders it incumbent upon their Lordships to reverse the decisions under appeal, and to remand the case for the settlement of proper issues and a re-trial upon those issues?

Their Lordships are desirous to say nothing which may have the effect of introducing any laxity in the Courts of India in regard to the observance of those provisions of the Code which direct the settlement of issues, provisions which their Lordships regard as most important. But they do not find in the Code anything which says positively that the omission to settle those issues is fatal to the trial. With respect to the former decisions of this Court, it is to be observed that the decisions upon the regulations which preceded the passing of this Code of Procedure were not altogether uniform. Most of them show their Lordships' desire to maintain the strictness of the obligation on the Judges of the country Courts to record the points to be tried, but there is one which has been cited by Sir Roundell Palmer which certainly shows that they did not in all cases consider the omission to be fatal. Those regulations, moreover, contained words to the effect that no evidence should be given except upon points which had been recorded. The case in 11 Moore,* which is a case upon the Code of Procedure, appears to have been complex, and the explanation given for what took place in that case certainly shows that their Lordships may have been exercising a discretion which cannot now be questioned. All these cases, however, differ from the present case in this respect. In this case the omission to raise the issues was brought before the notice of the Appellate Court. The Appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret, that the Judge below had omitted to settle the issues. The Court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the Appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under s. 354 of the Code. At all events it appears to their Lordships that there is nothing in the Code which made it imperative upon the Appellate Court, or now makes it imperative upon their Lord-

* 6 W. R. P. C. 57; 1 Suth. P. C. R. 649.

ships, to yield to that objection, and therefore, fully concurring in the observations made by the Appellate Court that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary.

Their Lordships, in coming to this conclusion, have had regard to the circumstance that no objection seems to have been taken in the Court below to dealing with the case without the settlement of the issues. If the objection had been taken, their Lordships think that the appellant would have stood on higher grounds, and it would then have been very difficult to say that a trial proceeding in the face of the objection could be held to be regular for any purpose. They do not, however, mean to affirm that mere waiver, or rather the omission to take the objection, is in all cases sufficient to purge the irregularity. They are of opinion, that if it had appeared that substantial justice had not been done, the objection might well have been taken when it was taken before the Appellate Court, and when taken ought to have prevailed. But being of opinion that there has not in this case been a failure of justice in consequence of the omission to settle the issues their Lordships are not prepared to send it back for further litigation, and they must therefore advise Her Majesty to dismiss the appeal with costs.

The 10th December 1870.

Present :

Sir James W. Colvile, Lord Justice James, and Lord Justice Mellish.

Appeal—Hindoo widow—Succession—Disclaimer—Estoppel.

On Appeal from the High Court at Agra.

Mussamut Oodey Koowur

versus

Mussamut Ladoo and others.

Where a case, heard in review before the four Judges of the late Sudder Court at Agra, was left undecided (because the four Judges were equally divided in opinion) when the High Court in the North-Western Provinces was established, it was held that one of the Judges of the High Court sitting as a single Judge had jurisdiction under s. 27 of the Letters Patent to hear and determine the case.

A Hindoo widow, by putting in petitions in the course of legal proceedings disclaiming her right to property which had descended to her son and in which she then had no interest at all, cannot be prevented from setting up her real right as heir of her son when that right actually accrued, *i.e.* upon the death of her son.

The first question in this case is, whether there was any jurisdiction in the Chief Justice for the North-Western Provinces to make the decree from which the appeal is brought, in the Court below? Now the matter has been enquired into, their Lordships are clearly of opinion that there was such jurisdiction. The appeal had been brought to the Sudder Adawlut of the North-Western Provinces, and the Judges of that Court had given a decision. Then an application had been made for a review, and an order was made that the case should be heard on review. It was so heard before four Judges, who were equally divided in opinion. By the law as it then stood, as appears by the order made at the end of their judgment, they being equally divided in opinion, the case was, under the provisions of s. 7 Reg. VI of 1831, referred for the opinion of one or more Judges

of the High Court of Calcutta. There was, however, a power by the 24th and 25th Vict. c. 104 for the Crown to erect a Court in the North-Western Provinces, and by Letters Patent of 17th March 1866 the Crown did erect a High Court in the North-Western Provinces which had the effect of abolishing the jurisdiction of the Sudder Adawlut. The consequence was that no final decision having been given on review, that proceeding was a proceeding pending which was therefore to be decided by the new High Court of the North-Western Provinces. The 27th Section of those Letters Patent is as follows:—"We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature for the North-Western Provinces, in the exercise of its original or appellate jurisdiction, may be performed by any Judge;" and, accordingly, Sir Walter Morgan (the Chief Justice) did sit, apparently as a single Judge. He appears to have heard the parties and given his final decision, and that was the decision of the High Court of Agra, which their Lordships are of opinion had, under these circumstances, jurisdiction, and the appeal therefore is brought from that decision.

Now, the action itself is an action brought by one Hindoo widow, Mussamut Ladoo, against another Hindoo widow, Mussamut Oodey, the widow of her eldest son, to recover three several properties. The only question before their Lordships relates to two of those properties, because, as to the third property, all the Judges below agree that the plaintiff was entitled to recover, and there is no appeal as to that. The plaintiff brought the suit on the ground that the defendant was in possession of the property, but that she, the plaintiff, was entitled to it as heir-at-law of her son Shib Lall, and there appears no question that she was such heir-at-law. The property had originally belonged to Buldeo Buksh. He had two sons, of whom one, the husband of the defendant in the suit, died in the lifetime of Buldeo Buksh. There appears to have been some attempted adoption; that is to say, Buldeo Buksh and Mussamut Ladoo appear to have attempted to give their second son, who was an infant, as an adopted son to the widow of their eldest son. But it is admitted that for various reasons that adoption, if it were ever attempted, was wholly invalid according to Hindoo law; if for no other reason, at any rate for this reason, that the husband of the widow who made the adoption had never given any permission to the widow to make such adoption, and it was admitted before us that the adoption was wholly invalid.

Well, then, that being so, it is plain that the son Shib Lall on the death of Buldeo Buksh became solely entitled to the property; and upon his death his mother became entitled as his heir, and therefore, if the matter remained there, it is admitted that she would be entitled. But it is alleged that she had done certain acts and become a party to certain documents, the effect of which was, at any rate as to these two latter portions of the property, to prevent her from recovering.

Buldeo Buksh had mortgaged these two properties in question, and a suit had been commenced, first in the name of Shib Lall by his assumed guardian, probably in the first instance on account of this invalid adoption, against the mortgagees to redeem the mortgage, which was resisted by them on the ground, which it is now quite immaterial to consider, that the mortgage had been a real sale. Some proceedings had also taken place for the mutation of names: and it would appear that in those proceedings for the mutation of names, the Collector and the parties had wrongfully assumed that the two widows and the son were jointly heirs of Buldeo Buksh. Then it was said that the plaintiff, being old and not wishing to interfere with the affairs, she had agreed that Shib Lall and Mussamut Oodey should alone be entered as the owners of the property and that her name should be omitted.

Then in the suit for the redemption of the mortgage, an objection was taken by the mortgagees that the suit was wrongly constituted, because Mussamut

Ladoo, and not Mussamut Oodey, was the proper guardian of the infant, and the proper person to bring the suit. On that occasion, Mussamut Ladoo presented a petition on which the matter before us principally turns, the main object of which unquestionably was to enable the suit to be carried on by Mussamut Oodey, either in her own name or as guardian of the infant, without joining the name of Mussamut Ladoo, and the entire contention on the part of the appellant before us is that by the proceedings which have been already described with respect to the mutation of names and by the language of this petition, Mussamut Ladoo in fact abandoned all her right to the property in question, so that when she became in point of law entitled to the property as heir of her son, she could no longer avail herself of that right as against the defendant. The petition is in these terms:—“Humbly sheweth the facts regarding the suit instituted in this Court by Mussamut Oodey Koowur, the widow of my deceased son Kullyan Singh, to recover possession by redemption of mortgage of mouzabs Omeepore and Umlera, pergunnah Chandouse, valued at Rs. 81,000 against Mussamuts Kurreemoolnissa, Muhtab Koowur, and Chand Koowur, defendants, are as follows:—Since the date of Kullyan Singh's demise, Buldeo Buksh, my husband, and myself gave our son Sheo Lall to Mussamut Oodey Koowur to be adopted as her son, and since then she has been his guardian and protectress. Moreover, owing to my old age, infirmity, and imbecility, I also caused only the names of Oodey Koowur and Sheo Lall to be entered in the proprietary column of the certificate of death of Buldeo Buksh, and I have no claim whatever to the proprietary rights in the two villages in question, Oodey Koowur, however, herself, and as guardian of Sheo Lall, being their sole owner. I have now become very old and imbecile, and have no strength to go about, look after, or understand my affairs, and Mussamut Oodey Koowur herself, and as guardian of Sheo Lall my son, is in every way proprietor and owner.”

If that is to prevent her recovering the property now in question, it must do so either because it operated as a conveyance or as a contract to convey the interest which she now claims, or because it operated by way of estoppel. There is no other way in which it can operate. Now, did it operate either as a conveyance or as a contract to convey the interest to which she has now become entitled as heir of her son? Their Lordships are of opinion that it is quite impossible that it could so operate, and that for two reasons: first, because at the time when she presented this petition she had not in fact any interest in the property at all, and certainly had not become entitled to any interest as the heir of her son, who was at that time alive; and in the next place there is not the least reason to suppose that in the petition she in any degree contemplated a conveyance of any such right. That was not the right which they were then considering at all. The main object of the petition was simply to enable the redemption suit to go on, and to enable the persons who had begun it as plaintiffs—Oodey Koowur and Sheo Lall—to carry it on. There was nothing in the language and nothing in the position of the parties which could lead any one to suppose that she had any interest that she might hereafter acquire as heir of her son, in her contemplation at all. On these grounds, it appears quite impossible that it can operate either as a conveyance or as a contract to convey her subsequently acquired interest.

Well, now, is she in any way estopped? It is very difficult to see how she can possibly be estopped. There has been a difference of opinion among the learned Judges in the Court below as to the construction of this instrument,—whether it ought to be construed solely as relating to her rights as guardian, and to convey them, and not to relate to the property at all? The language certainly, in some parts of it, does appear to refer very strongly to an interest as owner, and probably it may be that the meaning of the instrument rather refers to her supposed interest as owner; but it appears to their Lordships hardly necessary conclusively to decide upon the proper construction of this instrument, because even

assuming that it does refer to her interest as owner, that is to say, to her present interest as owner, and that she is assuming incorrectly that she has some interest as heir of her husband, their Lordships are of opinion that her stating that, and professing to resign that in favor of Oodey Koowur, could not possibly in point of law estop or prevent her from setting up her real right as heir of her son, when that right actually accrued. There is, in the first place, no consideration whatever for this conveyance of her particular interest; even if she had it, she receives nothing for it. Neither does Oodey Koowur act on any representation made by her, or alter her position in any way. There is no misrepresentation to Oodey Koowur of any sort or kind. Oodey Koowur was acquainted with the actual facts of the case, just as much as Mussamut Ladoo was. The real effect of the petition seems rather to be that they mutually agreed to represent what was not the fact, for the purpose of enabling a certain suit to be carried on. Their Lordships are of opinion that, assuming she did intend to convey a present interest in the properties, which she supposed or assumed she had, there is no principle of law or justice by which that can prevent her from setting up her real right when that right has accrued. It is true that this petition had the desired effect, and that Mussamut Oodey was allowed to carry on the suit, and afterwards when Shib Lall died, and Mussamut Ladoo immediately proceeded to present petitions to be allowed to carry on the suit instead of her, the Court, as their Lordships are disposed to think, improperly prevented her from carrying on the redemption suit, would not grant that petition, and allowed the redemption suit to go on in the name of Mussamut Oodey, who had begun it, but that mistake cannot, as their Lordships think, possibly deprive her now of the right to which she is in law entitled, though it accounts for the judgment of the Judge in the first instance, who properly considered that it was no business of his to overrule or to differ from the judgment of the superior Court.

On these grounds their Lordships are of opinion that this petition cannot possibly operate either as a conveyance, or as a contract to convey, nor by way of estoppel, so as to deprive the plaintiff of her right to recover all these properties, and their Lordships entirely agree in the judgment of Sir Walter Morgan, which was practically to the same effect. Their Lordships, therefore, will advise Her Majesty that this appeal ought to be dismissed, and the judgment of the Supreme Court of Agra ought to be confirmed, with costs.

The 12th December 1870.

Present:

Sir James W. Colville, Sir Robert Phillimore, and Sir Joseph Napier.

Appeal to the Privy Council—Guardian—Costs.

*On Appeal from the High Court at Calcutta.**

Ranee Bistoopria Putmadaye

versus

Nund Dhul and others.

The guardian of an infant who filed an appeal to the Privy Council has no right to insist that the appeal should go on when the infant, on coming of age, applies to withdraw from the appeal. If the guardian has incurred costs, he may have a claim to be recouped from the estate of the infant, if he has any.

* From the judgment of Steer and E. Jackson, *J.J.*, passed in Regular Appeal No. 287 of 1864, decided on 16th March 1865—2 W. R., 232.

In this case we understand that the lady represented by Mr. Bell, as guardian of an infant who was represented to have been duly adopted as the son of her late husband, instituted a suit to recover certain property from the respondent, who was in possession under a claim that the infant was the son and legal heir of the deceased. The suit was heard by two Courts. It is unnecessary for us, upon this application, to consider further whether the decision both passed against the title of the infant was right or wrong. We will assume that she may have had legitimate ground for applying in the Court below for leave to appeal to this Board.

That leave was granted in 1866 when the boy was still admittedly an infant. So far the proceedings seem to have been entirely regular. The transcript came home in 1867. The record was printed here, and the only thing which can be suggested as any irregularity may have been the lodging of the petition of appeal so late as 1870, after the infant had come of age and was for all purposes *dominus litis*.

It appears that the proceedings which are embodied in the supplementary record have taken place in India, and the effect of them is to show that upon being called into that Court the infant expressed his desire to abandon the appeal, and that the Court ultimately felt that it could not decide that question, and, the appeal having been transmitted here, sent the whole of the proceedings for the adjudication of their Lordships.

In that state of things the respondent applies that the appeal may be dismissed, and the application is resisted by the lady who was originally the guardian of the infant.

At one time it appeared to their Lordships that it might possibly be necessary to ascertain more clearly that the son is a consenting party to this application, which could only be done by directing the Court in India to take further proceedings, in order to have the fact ascertained. But looking to these proceedings and considering what the Court has done, it appears to their Lordships unnecessary to take that step and to put the parties to the further delay and expense which it would involve. When the suggestions were made to Mr. Leith their Lordships had not sufficiently adverted to the terms of the mookhtarnamah. We knew that the boy had made a clear admission to the Moonsiff, which had satisfied the Judge and the High Court, that he was of age and that he had executed that mookhtarnamah; but it did not, as it appeared to us at that time, follow that he had adopted all the statements in the petition which was presented under the mookhtarnamah. But when you come to look at the mookhtarnamah, of which he has admitted the execution, it seems very clear that he knew what he was about and what his mookhtar would do under that instrument.

He says:—"Now I have attained majority, and considering that no other profit will arise by carrying on the said case than a useless expenditure of money, and with the desire of withdrawing from the said case, I do appoint Jugmohun Doss Putto Naik, inhabitant of Saooda Khotee of Pergunnah Mayahagun in Zillah Midnapore, as mookhtar in my behalf, in order to engage a pleader of the High Court, and agree that the pleader of the High Court in Calcutta who will be appointed by the said mookhtar will file a petition of withdrawal from the said case, and the said withdrawal will be one as if filed by me, and completely valid."

Therefore, it seems to their Lordships that they have sufficient evidence before them in these proceedings that the young man is a consenting party to this application.

The question, then, is reduced to this—whether the lady who is represented by Mr. Bell has really such an interest in the appeal or such a *locus standi* in this Court as entitles her to resist this application and to insist that the appeal shall go on, although the party in whose name it is brought wishes to withdraw from it.

Their Lordships are of opinion that she has not. If she has incurred costs there can be no appeal for mere costs; having incurred costs on behalf of the infant in this suit, she may have a claim to be recouped from his estate, if he has any; but that does not entitle her to prosecute this appeal in his name against his will, with probably but faint chances of success.

It was thrown out that the decree had not dealt with the title of the defendant, and that she might have a preferable title to him; but the obvious answer to that argument is this—there has been a clear adjudication that the nominal plaintiff in this suit had no title. If the lady herself, as widow, has a better title, that title cannot be litigated in this suit, but must be litigated in an independent suit, in which, rejecting the adoption, she would come forward as the next heir of the deceased.

Therefore, we do not see that we should be justified in keeping this appeal upon our records. But considering the peculiar nature of the application and the position of the parties, it does not seem to us that we can do anything but dismiss the appeal *simpliciter*, saying nothing about costs. There is no proof that the infant has undertaken to pay the costs; and we also think that we ought not to give to either side the costs of this petition.

The 16th December 1870.

Present :

Sir James W. Colville, Sir Robert Phillimore, and Sir Joseph Napier.

Alluvial lands—Local investigation—Ameen—Appellate Court.

*On Appeal from the High Court at Calcutta.**

Ranee Surut Soonduree Dossee

versus

Baboo Prosunno Coomar Tagore.

Reverses, on a consideration of the facts, the judgment of the High Court which set aside a decision of the lower Court as to the position of certain chur lands in the Brahmapootra, when the decision of the lower Court was founded on a long and careful local investigation which was conducted by an Ameen who visited the spot and whose integrity was unimpeached.

An Appellate Court in India ought not to interfere with the result of a local enquiry except upon clearly defined and sufficient grounds, which must be expressed in its judgment.

The appellant and respondents in this case are the representatives of two zemindars, who, some six-and-thirty years ago, engaged in litigation concerning the title to certain chur land thrown up by the river Brahmapootra.

This litigation was begun by a suit, brought in 1834, by Prosunno Coomar Tagore, whom it will be convenient to describe as the respondent for the recovery of 5,000 beegahs of the land in question. In the course of that suit, and in the year 1835, a map of the land in dispute, with the land and water immediately surrounding it, was made by an Ameen, named Gouree Persaud Moitro under the authority of the Court; and in that map the different churs are delineated and marked with different numbers from 1 to 7 inclusive.

This first suit was successful, and Prosunno Coomar Tagore obtained a decree for about 5,000 beegahs of chur land. In 1845 he brought a second suit for 14,000 beegahs of like land, and obtained a decree from the Court of first instance. The defendants then appealed; and pending their appeal, and in July 1849, the

* From the judgment of Kemp and Seton-Karr, *J.J.*, in Miscellaneous Regular Appeal No. 505 of 1861, decided 9th April 1863: not reported.

parties came to a compromise, which was embodied in a decree of the Sudder Dewanny Adawlut, dated the 3rd July 1849, and was thereby directed to be carried into effect.

This compromise is set out at page 17 of the record. Its effect was that the churs marked in Gouree Persaud's map as Nos. 5 and 7 with 1,663 beegahs and 15 cottahs of chur No. 6, were to belong to those who are represented by the appellant; and that the churs Nos. 1, 2, 3, and 4, with the rest of chur No. 6, were to belong to the respondent. The boundaries, if the parties differed about them, were to be settled by arbitration; and if the parties could not agree to appoint arbitrators, were to be fixed through the Court Ameen in execution of the decree.

If then this map, which was the basis of the compromise, had correctly described the land as it then existed, nothing remained to be done but to measure off the 1,663 and odd beegahs from chur No. 6, and to put the parties into possession of their respective shares.

Unfortunately, the land which was the subject of the compromise was in some sort the creation of the river Brahmapootra, which is said after each annual flood to be apt to shift its course and to effect considerable changes in the alluvial deposits on either side of its channel. And thus it came to pass, that as soon as the parties proceeded to carry out the compromise, a contest arose whether, either between 1835 and 1849 or at some subsequent period, the river had not so changed its course as materially to alter the configuration of some of the seven churs and their bearings to its main stream. The only effect, therefore, of the compromise was to convert a dispute touching the title to lands into one touching the identification of parcel; the principal question being, not how chur No. 6 was to be divided, but where churs Nos. 5 and 7, which unquestionably belonged to the appellant's zemindary, were to be found; and this dispute has given rise to the intermittent litigation which, after lasting for more than fifteen years, was, in 1863, closed by the decree now under appeal.

The following is a short summary of that litigation:—Some time after 1849 and before April 1853, the respondent was put into possession of a considerable part, if not of the whole, of so much of the land contained in the seven churs as then lay on the western side of the Brahmapootra; and the possession so taken was confirmed by an order of the then Principal Sudder Ameen of Rungpore, dated the 19th April 1853. But that order was, on the appeal of the other party, set aside by Mr. Dunbar, one of the Judges of the Sudder Dewanny Adawlut, whose order of the 24th September 1853 directed the Principal Sudder Ameen to re-open the enquiry, but apparently did not disturb the possession already given to the respondent. Some delay in giving effect to this order took place in consequence of the respondent's having contrived to strike the execution case off the file; but it was restored under an order of the Sudder Dewanny Adawlut, dated the 14th February 1855.

The case was then investigated by the Principal Sudder Ameen; each party filed a map before him; he himself held a local investigation and made or caused to be made the map of 1855; and finally on the 27th June 1856 passed an order overruling the objections made to the record of his investigation by the respondent in the petition set forth at page 5 of the record, declaring the possession given to the respondent to be null and void, and directing that possession should be given to the parties in accordance, as their Lordships understood the order, with the present contention of the appellants. No change, however, seems ever actually to have been made in the possession of the land, of which possession was given by the Moonsiff. The respondent appealed against the last mentioned order, and the question was again re-opened by Mr. Torrens' order of the 30th January 1857, which remitted the case to the Principal Sudder Ameen with directions that in respect of those parcels which he had given to the then re-

spondent (the present appellant), he should again allow execution of the decree, and after that prepare a map (better than the present map), so that it might clearly appear for the perusal of the Appellate Court, and in other respects, what was the former and present course of the river Brahmapootra over the disputed lands, as stated in the map of Gouree Persaud Ameen.

The execution of this order was somewhat delayed by the rainy season, during which a local investigation was impossible; but on the 2nd December 1857 the Principal Sudder Ameen passed an order for the appointment of an Ameen acquainted with measurement by the compass. From one cause or another, however, nothing effectual was done under this last order until December 1860, when Kalidass Moitro, the Ameen, proceeded to the spot, made a careful local investigation, prepared the map which bears his name, and on the 13th April 1861 filed the elaborate report which is at page 35 of the record. That report, though it did not precisely adopt the representations of either party, in the main supported the contentions of the appellant. It was adopted by the Principal Sudder Ameen, who, on the 1st August 1861, passed a decree finding that churs Nos. 5 and 7 were where the appellant placed them, and not where the respondent placed them, directing that possession should be given accordingly, and also giving the necessary directions for ascertaining and making over that part of chur No. 6 (as to the position of which there seems to be no controversy) which under the compromise belonged to the appellant.

The respondent appealed against this decree. The High Court reversed it, finding that churs Nos. 5 and 7 were where the respondent placed them, and varying the Principal Sudder Ameen's decree accordingly. The present appeal is against that decree, and the first question for their Lordships' determination is whether it can be supported. It rests entirely upon the assumption that churs Nos. 5 and 7, which unquestionably were on the west of the main stream of the Brahmapootra when the map of Gouree Persaud was made in 1835, are now by reason of the altered course of that river on the eastern side of it. If that is not made out, the reasons assigned for the judgment wholly fail.

Upon what does this assumption purport to be founded? "On an examination of the maps filed in the cause, and on the explanations and arguments of the pleaders on both sides." What the latter may have been their Lordships are unable to say. But having given full consideration to the able argument of Mr. Doyne on behalf of the respondent, and having carefully examined the maps, they are unable to see any satisfactory grounds for coming to the conclusion contrary to the finding of those who have investigated the question on the spot; that the river has, since 1835, by making for itself a new channel to the west of its former channel, so changed its course as to put either of the churs described by Gouree Persaud as Nos. 5 and 7, or whatever may remain of either of them, on its eastern instead of its western bank.

It would be strange indeed if this conclusion necessarily resulted from a mere comparison of the maps, since it is opposed to the express convictions of the Ameen Kalidoss Moitro, who made the last and most scientific of the maps, and to that of the Principal Sudder Ameen, who conducted the local investigation and made the map of 1855. Mr. Doyne, indeed, has argued that the conclusion of the High Court may have been an inference, and would have been a legitimate inference, from the application of what he treats as the known law of the formation of churs to certain newly-formed chur land appearing in parts of Kalidoss Moitro's map. But the High Court has not assigned this as one of the grounds of its judgment. Nor are their Lordships, considering the disturbing forces which may exist in a river of so vast a volume and of such irregular action as the Brahmapootra, and also the positions of the several portions of chur land indicated in the map, by any means satisfied that the inference is legitimate or so certain that it ought to outweigh the positive findings of the Ameen.

Again the High Court observed that the Principal Sudder Ameen had not, in their opinion, duly considered the landmarks by which in both maps, when duly compared, the situation of churs 5 and 7 may be satisfactorily identified. The Court has omitted to state specifically to what landmarks it refers as instances of this omission. The instance most pressed in argument has been that of the tamarind trees appearing on the east side of the river in Gunga Persaud's map. But the real position of those trees, if they still exist, was also the subject of controversy; and after investigations on the spot, the Ameen rejected the respondent's theory concerning it. There is nothing to show that he was wrong in this. It is obviously impossible to draw that conclusion from Gunga Persaud's map, which, it is admitted, was not made by compass or according to scale.

Another point made in the argument, though not adverted to in the judgment, is the bearing of the village of Kompopoor to the land alleged by either party to be chur No. 5. It cannot be said that the Ameen has neglected to consider this landmark. And this explanation of the discrepancy in this respect between his map and that of Gunga Persaud, viz., that the village, of which the position is loosely indicated, is erroneously placed on the latter to the south instead of to the east of the river Jhelye, appears to their Lordships to be plausible.

Their Lordships then are unable to see any satisfactory grounds for the assumption which is the foundation of the judgment of the High Court. They would themselves be very slow to interfere with the judgment of an Indian Court upon a question of this nature. But they have to deal here with conflicting judgments, of which one is founded on a long and careful local investigation; and the other overruling the former, is supported by no reasons that their Lordships can pronounce to be satisfactory. And their Lordships may observe that the considerations which make them reluctant to set their judgment against that of an Indian Court upon such a question as this, ought to influence in some degree the Appellate Court in India and to prevent its interference with the result of a local enquiry, except upon clearly defined and sufficient grounds. Such grounds the Appellate Court may have thought it had in this case, but it has failed to express them. Against its judgment their Lordships have now to weigh the elaborate report of the Ameen and the judgment founded upon it. The integrity of the Ameen is unquestioned; his careful and laborious execution of his task is proved by his report; he has not blindly adopted the assertions of either party; and without going minutely into details, their Lordships think it sufficient to say that they see no grounds for impugning the accuracy of his conclusion upon what they conceive to be the broad and cardinal issue upon which the determination of this case depends, viz., whether the lands which represent churs Nos. 5 and 7 of Gunga Persaud's map are now on the east or still on the west of the main channel of the Brahmapootra. On the contrary, they believe the conclusion of the Ameen to be correct. And they are fortified in that conviction by the following considerations :—

It is to be observed that this controversy was by no means of recent date. The question was not whether the change alleged had been effected by the action of the river between 1835 and 1863. It appears by the respondent's petition at page 5 of the record and the maps that his contention was certainly as early as 1855, and possibly as early as the Moonsiff's proceeding, that the lands which represent the churs Nos. 5 and 7 of the compromise were then on the eastern side of the main course of the river. That this was in fact the case in 1849 is in the highest degree improbable. Though it is too clear that the parties by a compromise made upon loose data merely shifted the ground of contention instead of determining their disputes, it is almost inconceivable that they should have drawn and executed, as they did, the instruments of compromise upon the footing of Gunga Persaud's map, without advertent to so great a change in the position of

the churs relatively to the main channel of the river, if such a change had then taken place. The change then, if it ever really took place, must have taken place between 1849 and the Moonsiff's proceeding, or the year 1855; and in that case it might easily have been proved. It would then have been recent and notorious, yet in 1855 the Principal Sudder Ameen after local investigation decided against the respondent.

Again their Lordships upon the evidence see no reason to doubt that the land which the respondent treats as chur No. 5 is in fact the Pookamaree chur, and an accretion on an estate which never belonged to the appellant's family, and now belongs to Government,—an estate of which the Moonshee Chur, one of the landmarks of the map of 1835, formed part. There is nothing which induces their Lordships to believe that any of those whom the appellant represents were ever in possession of that chur. Yet the High Court without adverting to this point affirmed it to be the chur No. 5 of the compromise, and directed that the respondent should be maintained in the possession of it.

Upon the whole, then, their Lordships have come to the conclusion that it is their duty to advise Her Majesty to allow this appeal; to reverse the decree of the High Court; to direct that in lieu thereof the appeal to that Court from the decree of the Principal Sudder Ameen be dismissed, and the last mentioned decree affirmed with costs. The appellant must also have her costs of this appeal.

The 19th January 1871.

Present:

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

*Limitation—Joint Family—Mortgage—Redemption—Ss. 5 and 13
Act XIV of 1859.*

*On Appeal from the High Court at Calcutta.**

Radhanath Doss and others

versus

Gisborne and Company.

S. 13 Act XIV of 1859 deals with suits between one or some member or members of a joint family, and some other member of the joint family complaining of an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. That section does not apply to a suit in which one member representing the rest of the members sues to redeem a mortgage in which the title of the plaintiff to redeem is questioned, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

Before a person can obtain the benefit of s. 5 Act XIV of 1859, he must clearly and distinctly show that he fills the position of the person contemplated by that section as a person who ought to be protected, and he must show three things: first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bond fide*; and third, that he is a purchaser for valuable consideration. Meaning of the term "purchaser" in this section defined.

The claim in this case, which led to the decision which is under appeal, was a claim in substance for the recovery of property at present in the possession of the respondents, Messrs. Gisborne and Company. The recovery of that property was sought by the appellants on the footing that it had been made the subject

* From the judgment of Norman and Campbell, *J.J.*, in Regular Appeal No. 400 of 1865, decided 15th May 1866—5 W. R. 253.

of a conditional sale in the year 1828; and that they, the appellants, had now the right to redeem the property,—the amount for which the property had been conditionally sold or mortgaged having been paid off by the receipt of profits. This mortgage, made in the year 1828, was made by a person of the name of Kunhya Lall as mortgagor, to one Russick Lall as mortgagee. The appellants say that Kunhya Lall was the member of a joint family, of a family joint as regards this property, and that they, the appellants, were the other members of that joint family, and that the mortgage was made either with their previous approbation or their subsequent assent. Russick Lall, beyond doubt, was the native agent of the firm of Shawe and Hawes, and the mortgage, beyond doubt, was made to Russick Lall, because as the law stood at that time Englishmen could not have held immoveable property in this part of India in their own name. That law having subsequently been altered, Russick Lall assigned over to his principals, Shawe and Hawes, the property which he thus held for them in mortgage. Subsequently Shawe relinquished his share to Hawes, and finally by a deed executed in the year 1841, the details of which will afterwards have to be referred to, Hawes passed over or conveyed the property to the present respondents, Messrs. Gisborne and Company.

Now the first question which arises in this state of things is as to the right of the plaintiffs to redeem this property. Their possession as members of a joint family is denied by the respondents, who contend that there is no evidence that the family was joint, or that this property belonged originally to any person other than Kunhya Lall the mortgagor. Upon that question Mr. Maddocks, the District Judge, before whom the case first came, has delivered a very elaborate and careful judgment, in which he has come to the conclusion that the joint ownership of the property was made out in favor of the appellants, and, although it was not necessary for the High Court of Calcutta, in the view they took of another part of the case, absolutely to decide this question, they do not appear to have disapproved of the conclusion on this point at which Mr. Maddocks had arrived. The evidence having been so fully and satisfactorily commented upon by Mr. Maddocks, their Lordships do not think it necessary to say more than this, that looking to the form of the Government settlement of this property, looking to the history of the family which is in evidence, looking to the accounts going down to the year before the date of the mortgage showing the dealings of the family between themselves, looking to the ikrarnamah executed between Kunhya Lall and other members of the family almost contemporaneously with the mortgage of 1828, looking to the dealings with the mouzah Ugda which was excepted out of the mortgage of 1828, although forming part of the whole estate, their Lordships are satisfied that this property was the joint property of the family, and that Kunhya Lall was mortgaging it with the assent of, and as the manager for, the whole family.

Their Lordships would add to the general description of the evidence which has satisfied them of this, a reference also to the statements which were made very shortly after the conveyance of 1841 to Messrs. Gisborne and Company. In 1843 a suit was brought by the present appellants, or some of them, against Messrs. Gisborne and Company, making parties also Russick Lall and Kunhya Lall. The plaintiffs in that suit were nonsuited upon technical grounds, but in that suit the plaintiffs had stated their title substantially in the same way that it is now stated, and in the answers to that suit their Lordships find that Mr. Barnes, a member of the firm of Gisborne and Company, and the other members of the firm of Gisborne and Company, stated that the plaintiffs' suit was totally false, and that the reasons of the falsity of the plaintiffs' suit were stated in the answer of Russick Lall, another defendant, and that that answer was sufficient. They, therefore, referred their case to the answer of Russick Lall, and were content to adopt it as the statement of their case. Now Russick Lall, as has been said, was

the native agent of this indigo factory at the time of the mortgage in 1828. He must have known perfectly well everything connected with the title and the circumstance of the family, one member of which was making a mortgage to him ; and what Russick Lall, having these means of peculiar knowledge, said in the year 1843 was this,—“ Oh ! Administer of Justice, let your presence consider the fact that although the plaintiffs have no right and interest in the said mouzahs, yet even it is clearly evident from the contents of the former plaint that the plaintiffs themselves have admitted that the said Kunhya Lall Doss, by the advice and with the concurrence of the plaintiffs, sold the property in dispute to me ”—that of course means mortgage—“ for the sum of Rs. 17,011 with the object of liquidating the money due to the said gentleman from Kunhya Lall Doss, under the deed of mortgage dated the 25th May 1826.” Russick Lall was, therefore, content to affirm at this time, and Messrs. Gisborne and Company were content to adopt his statement, that Kunhya Lall had mortgaged the property by the advice and with the concurrence of the plaintiffs,—advice and concurrence which would have been utterly useless and unmeaning unless the plaintiffs had been joint owners of the property.

Their Lordships, therefore, on this part of the case, have no hesitation in accepting the conclusion of the Court of first instance, and they have the satisfaction of thinking that in that respect they are not differing from the opinion of the High Court of Calcutta, although it was not absolutely necessary for that Court to decide the question.

The next objection which was taken to the title of the plaintiffs to redeem is this. It is said that the conditional sale having been made in the year 1828, and the condition of that sale being for liquidation of the amount of mortgage-money in eleven years,—a year afterwards, in November 1829, the ikrarnamah which contained the condition making the transaction a mortgage was returned by Kunhya Lall and Russick Lall with an endorsement which is set out at page 235 of the record. The endorsement is partly defaced, but it runs thus—“ (Defaced) the said mehal, according to the conditions of the ikrar (defaced), the Government revenue, and interest, and the consideration being (defaced) : therefore I have returned this ikrarnamah to Russick Lall Doss, the purchaser. The mouzahs stated in the ikrarnamah I have absolutely sold. Dated the 27th Kartick 1237. Kunhya Lall Doss, Zemindar.” It is said that the meaning of this endorsement, which was partly defaced, is, that it amounted to an assertion that the profits of the zemindary were insufficient to pay the principal and interest and the Government revenue, and that, therefore, the ikrarnamah was returned by Kunhya Lall to Russick Lall.

Now, without going further, their Lordships are compelled to say that is a transaction which, upon the face of it, is almost incredible. The property was mortgaged by a usufructuary mortgage to run over eleven years. The mortgagee was bound, on the face of the deed, to pay the Government duty. The mortgage created no personal liability with regard to the payment of the debt. If the debt should be paid in the course of eleven years, the land would be free ; if not paid, at all events the mortgagor would be in no worse condition than he was at the end of the first year. There is no consideration moving to the mortgagor for the release of the equity of redemption. It is said that the district in which the property was situate was a district which, as regards its produce, was liable to the uncertainties of dry seasons ; but although that might lead to a diminution of the produce in one year, on the other hand, the absence of drought and the presence of moisture in another season might lead to a more plentiful crop, and the uncertainty is one which might have a double bearing as regards the ultimate result of the conditional sale.

But it is further to be observed that this allegation of the return of the ikrarnamah, and the production of it with the endorsement, was never heard of until

about two years subsequently, when one Bholanath having sued Kunhya Lall upon a debt of his own due to Bholanath, was taking proceedings to sell this property, or to sell the equity of redemption of it, as being the property of Kunhya Lall. Then it was that the return of the ikrarnamah was set up and that this endorsement was produced. The moment that defence was set up it was challenged—challenged not merely by Bholanath, but by the other members of the joint family—and steps were taken to dispute it. It is true that from circumstances connected with the attempted sale of Bholanath going off, the question was not ultimately decided at that time, which is very much to be regretted. The primary Judge decided against the transaction,—decided that it was not a real transaction, but a fraudulent one to defeat the creditor. There was an appeal to the appellate tribunal. The appellate tribunal thought that an investigation of the circumstance should take place, and sent it back for that purpose. The biddings at the sale not having been sufficient to lead to a sale taking place, the primary Judge thought that it was unnecessary to pursue that investigation. But both at that time and at every time since when the return of the ikrarnamah has been set up, the transaction has been challenged as an unreal and fictitious transaction.

Their Lordships are of opinion that it is an incredible transaction on the face of it, and they cannot arrive at any other conclusion than that it was a transaction between Russick Lall and Kunhya Lall, for the purpose of defeating the proceedings of the creditor Bholanath.

Their Lordships must add this further observation: the mortgage or conditional sale of 1828 is clear and undisputed. It lies upon those who desire to set up any title putting an end to the mortgage to establish their case by evidence which is clear and satisfactory. That onus certainly is not discharged in this case; and their Lordships therefore are of opinion that on this point also the title of the appellants is made out, and that unless on some other ground yet to be considered they are precluded from redeeming, they are not precluded by the pretended return of the ikrarnamah. Upon this point also their Lordships, in substance, agree with the view of all the Judges in the Court of India.

We come now to the remaining part of the case, which is this. Assuming the title of the plaintiffs to redeem to be made out, the respondents, Messrs. Gisborne and Company, claim the benefit of the statutes of limitation, and assert that the time during which the title of the plaintiffs to redeem could be in force has elapsed. In the first place, they say that the appellants are barred by s. 13 of the law of limitations, that is to say, the section which speaks of suits for enforcing the right to share in any property, moveable or immoveable, on the ground that it is joint family property. It is not necessary to repeat that section at length, for their Lordships are of opinion that it is a section which deals with suits between one or some member or members of the joint family and some other member of the joint family, complaining of what we should term in this country an ouster of some members by others, or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due. The present case is a case by no means of that description. In the present case the foundation of the title of the plaintiffs is a mortgage, which, as has been already said, was in its inception, in substance, the mortgage of the whole of the joint family. The circumstance that it is not the whole of the members of the joint family, but only some who now come to recover their share of the property, does not make this a dispute in any way between members of the joint family as to the question of whether the property is joint or not. It is merely a question of the title of the plaintiffs to redeem, and the question of joint or not joint property has only to be decided incidentally for the purpose of establishing that title as against strangers.

The respondents then allege that they are entitled to the benefit of s. 5 of the same law,—“In suits for the recovery from the purchaser, or any person

claiming under him, of any property purchased *bond fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase." Now, questions of very considerable importance have been raised and argued as to the meaning of this section. Their Lordships desire to say that the provision of the section is founded, no doubt, upon considerations of high policy,—of a policy which their Lordships do not at all doubt is one which is extremely beneficial to India, having regard to the circumstances of that country. But their Lordships cannot fail to observe that the provisions of the section are of an extremely stringent kind. They take away and cut down the title, which *ex hypothesi* is a good title of a *cestui que trust*, or of a person who has deposited, pawned, or mortgaged property; they cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section, as a person who ought to be protected. Their Lordships think that in order to claim the benefit of this section a defendant must show three things: first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bond fide*; and third, that he is a purchaser for valuable consideration.

Now, what is the meaning of the term "purchaser" in this section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage but an absolute title.

Now, it is important in this case to consider how it is that in pleading in the first instance the transaction which here has taken place, the respondents have put their title. In page 14 of the record, in the sixth head of their statement, they express themselves thus—"The defendants, as purchasers for a just consideration, have all along held adverse possession of the disputed property for more than 12 years without notice of any legal right as co-partners, i.e., if any right had existed pertaining to the plaintiffs, as well as to those persons from whom the defendants have acquired their right. Thus, in such a case, also the plaintiffs' claim is, by reason of limitation, inadmissible." There is no averment there of any fact; it is a statement that as purchasers they are entitled to the benefit of the statute, but when they come to their averment of facts, their statement is this: the second head is, "On the 16th May 1838, A.D., Russick Lall Doss sold the said mouzahs to Messrs. William Shawe and William Hawes for Rs. 17,011, and caused the names of the Messrs. William Shawe and William Hawes to be entered in the Government records on the excision of his own name, and Mr. William Shawe sold his share to Mr. William Hawes, who after that sold it to Messrs. Gisborne and Company and Mr. C. H. Barnes, and Mr. C. H. Barnes sold his 4 annas share to Messrs. Gisborne and Company and mutation of names took place." This is a statement which puts the title of Gisborne and Company exactly in the same position as the title of Shawe and Hawes. It alleges that Russick Lall sold to Shawe and Hawes, that Shawe and Hawes sold to Hawes, and then Hawes sold to Gisborne and Company. It draws no distinction between the various transfers of the property, but puts them all exactly on the same footing. Now, an allegation or a plea of a purchase for value is perfectly well known and understood, and the averments in that plea are not matters of technicality,—they are matters of substance. In pleading a purchase for valuable consideration in this country, the very first averment in the plea is that the

person selling either was seised, or alleged that he was seised, for an absolute title; and then the plea goes on to say that being so seised, or alleging that he was so seised, he contracted to sell, and did sell and convey that absolute title, asserting it to be such to the purchaser, who paid his money for that which was thus sold. There is not a fragment of an averment in the whole of this pleading of that kind. The pleading is perfectly consistent with the transaction having been nothing more than the purchase, that is to say, the transfer of that which was a conditional title, or a title by way of mortgage.

We turn then from the pleading to see what is the evidence of the transaction in the case. Now, there is no evidence at all of any negotiation for this purchase, of any specification, or schedule, or inventory of what the property was that was to be included in the general purchase of the factory which was taking place. There is no evidence of any allegation or statement on the part of the vendors, which would lead Messrs. Gisborne and Company to believe that this was an absolute title which they held to the property in question. The only evidence that there was a purchaser at all is the production of the purchase-deed to which reference is now made.

The purchase-deed is at page 296. It contains a recital of the manner in which the vendor, the first party to the deed, Hawes, had had conveyed to him the various factories which were to be handed over to Gisborne and Company. It then contains this recital of the contract between Hawes and Gisborne and Company, page 297:—"And whereas the said John Dougal, George Dougal, Charles Jones Richards, Matthew Gisborne, and John Richards have contracted and agreed with the said William Hawes for the absolute purchase of the said several indigo factories or works and premises hereinafter described, at and for the price or sum of Company's Rs. 210,000; and the same are intended to be conveyed and assured unto the said John Dougal, George Dougal, Charles Jones Richards, Matthew Gisborne, and John Richards, and their heirs, in the manner hereinafter expressed." It is a contract for the absolute purchase, but the absolute purchase of those premises which are afterwards described in this deed and intended to be conveyed by it. When we turn to what these premises are, we find first an enumeration of the Indigo Factory; then this addition—"All lands cultivated and uncultivated to the said several and respective Indigo Factories or sets of works respectively belonging or in any wise appertaining;" and further on, page 299—"And all the estate, right, title, interest, use, trust, property, possession, possibility, claim, and demand, whatsoever, both at law and in equity of them, the said William Hawes, Robert Molloy, and James Cullen and each of them in, to, out of, or upon the said several and respective Indigo Factories on sets of works, lands, hereditaments, chattels, and premises, and every or any part or parcel thereof." Now assume that there was in this commercial house, as a part of their property in trade, a mortgage securing to them the debt which has been mentioned; assume that that was perfectly well known to every person connected with them and to the purchasers. No more fit or apt deed could have been devised than this, for the purpose of conveying a title to that mortgage, as the rightful title upon which the property was to be held by the purchasers. The deed, in other words, is perfectly consistent with it, not having been the intention of any person to this transaction to do more than to hand over this along with all the other property which the commercial firm possessed, according to whatever might be the right and true title upon which each portion of the property was held. Their Lordships, therefore, can find in this deed no evidence of an averment on the part of the vendor, or of any belief on the part of the purchaser that the property Moheanwan was a property which the vendors claimed to hold by what we should call in this country a fee-simple title.

Under these circumstances, their Lordships think that the first requisite in

the law of limitation is not made out, and that the respondents here are unable to show, or at all events have not shown, that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract by the vendor to convey the property to them as an absolute property.

This would be sufficient to decide the case; for, of course, unless the whole of the three requisites exist, the benefit of the statute is not obtained. Their Lordships, however, think it right to go further, and to say that they are not satisfied that even if this objection did not exist, Messrs. Gisborne and Company are able to show that they are *bond fide* purchasers. It is unnecessary to impute, and their Lordships would not desire to impute, to Messrs. Gisborne and Company any dishonesty whatever in the transaction, or any moral obliquity in their dealings in this matter. But what their Lordships have to observe is this: Messrs. Gisborne and Company must be regarded as dealing in this case upon one of two footings. Either they were aware in the year 1841, when they took this conveyance, of all that had passed between this native family and the predecessors in title of Gisborne and Company, by way of allegation and averment and claim upon the one side and upon the other, that is to say, they must either have been aware of all the contents of the papers connected with the litigation which had taken place in previous years,—or, if not aware of the contents of those papers, they must at all events have been aware of the original conditional sale of 1828, and of the alleged return of the *ikrarnamah* with its endorsement. It has not been very clear to their Lordships upon which of these two footings the Counsel for the respondents would desire Messrs. Gisborne and Company to be dealt with. At one time it rather appeared that their Counsel would wish it to be considered that they knew nothing, or should be taken as knowing nothing, but the conditional sale and the alleged return of the *ikrarnamah*. At another time their Counsel appeared desirous to refer to certain portions at all events of the proceedings, which had taken place between the conditional sale and the year 1841. But assume that they were not aware of the details of that litigation; assume that Messrs. Gisborne and Company knew nothing but what has been called the bare title to the property, the conditional sale, the alleged endorsement upon and return of the *ikrarnamah*, and the transfer subsequently from Russick Lall to Hawes and Shawe. Their Lordships are of opinion that looking to the clear and undisputed mortgage in the first instance—looking to the transparent unreality of the transaction connected with the alleged return of the *ikrarnamah*, the mere production of the endorsement upon that *ikrarnamah* as the description of the cause for its return was amply sufficient to put any persons in the position of Messrs. Gisborne and Company upon an enquiry and consideration as to whether that transaction could be a real transaction, or whether it could be a transaction which could form part of the title of a purchaser. On the other hand, if, as seems to have been rather the opinion of the learned Judges below, and certainly seems much more consistent with all the facts of the case,—if it be taken that Messrs. Gisborne and Company were perfectly aware of all the accounts in the factory, and of all the details of the litigation and of all the claims that had been made before with regard to this property, then their Lordships consider that their attention was pointedly and distinctly called to the infirmity of title in this case, and that with their attention so called they could not be considered to be *bond fide* purchasers.

Therefore upon both grounds, both upon the ground that they are not purchasers within the meaning of the law, and upon the ground that if they were purchasers they are not, in the sense in which the words are used in the law, *bond fide* purchasers, their Lordships think that Messrs. Gisborne and Company are not entitled to the benefit of this statute.

It would perhaps be right that their Lordships should advert also to an

argument which was adduced, although not very warmly pressed, that under s. 10 Messrs. Gisborne and Company might find protection. The 10th Section says—“In suits in which the cause of action is founded on a fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.” This, in their Lordships’ opinion, is not an action founded upon fraud in that sense. It is an action upon title to recover the possession of property to which the plaintiffs are entitled, which clearly they must recover, unless there be some specific protection given to those now in possession of it by virtue of the other sections of the statute to which reference has been made.

This being the opinion at which their Lordships have arrived, they will humbly recommend to Her Majesty that the decree of the High Court of Calcutta should be reversed, and that in place of it an order should be made dismissing the appeal to the High Court and dismissing it with costs. That would set up again the decree of Mr. Maddocks, the Zillah Judge. Their Lordships are content to allow that decree to stand, and are unwilling to enter upon any criticism of the precise form of it, because no argument has been adduced before their Lordships upon the footing that, supposing the decree in substance to be right, any modification should be made of it in detail. Their Lordships, therefore, will leave that decree to be the decree in the case, and will only further add that the appellants should also have the costs of this appeal.

The 20th January 1871. —

Present :

Lord Cairns, Sir James W. Colville, Sir Joseph Napier, and Sir Lawrence Peel.

Res judicata—Judgment of the Revenue Court—Redemption.

On Appeal from the High Court at Agra.

Khugowlee Singh and others

versus

Hossein Bux Khan.

The rule laid down by the Judges in the Duchess of Kingston’s case on the law of estoppel is not technical or peculiar to the law of England, but is perfectly consistent with the second section of the Code of Civil Procedure.

The decision of a Revenue Court in a summary suit for arrears of rent brought by *A* against *B* and others, in which *B* set up an ikrarnamah under which he claimed on behalf of himself and others to hold certain land as rent-free, which suit was dismissed by the Revenue Court, who held the ikrarnamah to be valid, is no bar as *res judicata* to a suit for redemption by *B* against *A* on his title as mortgagee, in which *B* set up the same ikrarnamah.

This appeal having been heard *ex parte*, their Lordships were desirous, before they determined it, carefully to read and consider the evidence in support of the case of the absent respondents, the plaintiffs in the suit.

The suit was in the nature of a redemption suit, and was brought to recover from the appellants certain property on the allegation that their title was originally that of mortgagees by way of conditional sale; that the mortgage debt had been satisfied; and that, accordingly, the plaintiffs were entitled to recover possession of the land with mesne profits from the date of such satisfaction.

The case of the appellants was that they, or those whom they represent, had been in possession of the lands for upwards of twenty years under two deeds of absolute sale executed in consideration of Rs. 9,800 on the 12th March 1843, and

confirmed by two decrees of the Civil Court passed on the confession of their vendors, the plaintiffs in the present suit.

The plaintiffs, not denying that this was the ostensible title of the appellants, insist that the true transaction was a mortgage by conditional sale for securing the sum of Rs. 4,000 with interest, and that this was effected by the *ikrarnamah* of even date with the deeds of sale, which is at page 10 of the record.

It was therefore essential to the plaintiff's case to establish the validity of this *ikrarnamah*.

The Zillah Judge who tried the cause in the first instance decided that it was not a genuine instrument, and dismissed the suit. But the High Court of Agra on appeal reversed his decision, and decided in favor of the plaintiffs upon the ground which their Lordships will next consider.

This judgment of the High Court does not profess to proceed upon a review of the general and conflicting evidence given in the cause. It is founded solely upon the omission of the Judge below to give due weight to the fact that the *ikrarnamah* had been declared to be valid and genuine by the Deputy Collector of Futtehpoore in proceedings which will afterwards be considered ; and it treats that finding as *res judicata* between the parties.

Those proceedings are referred to on the face of the plaint; and their Lordships will therefore assume that the point, though not made the subject of a formal issue, was sufficiently raised on the pleadings.

Their Lordships, however, are of opinion that the judgment of the High Court reversing that of the Zillah Judge cannot be supported on this ground.

In the course of the argument, one of their Lordships quoted from the opinion delivered by the Judges in the *Duchess of Kingston's* case the following passage :—
 " From the cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true : first, that the judgment of a Court of concurrent jurisdiction directly upon the points is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another Court ; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."—
 1 Smith's "Leading Cases," p. 424.

There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the civil law, and it is perfectly consistent with the second section of the Code of Procedure under which this case was tried, which says :—

The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim.

Now, what were the proceedings which in this case were assumed to afford evidence in favor of the validity of the *ikrarnamah* which the appellants were not at liberty to dispute ? They are at pages 6 and 7 of the record. It appears from them that the appellants in March 1863 brought a summary suit for arrears of rent before the Deputy Collector against one of the plaintiffs in the present suit. They alleged that he was an occupier of a small portion of land not exceeding 37 beegahs, being part of the land in question, under a pottah and kubooleut. The defendant in that summary suit denied the case of the plaintiffs (the present appellants), alleged that the transaction of 1843 was a conditional sale, produced the *ikrarnamah*, and contended that under a particular stipulation in it he and

the other vendor or mortgagor were entitled to hold 75 beegahs rent-free. The appellants then, as now, denied the validity of this ikrarnamah. Evidence was taken on both sides; and the Collector holding that the appellants had failed to prove their case, and that the defendant in the summary suit had proved the ikrarnamah, dismissed the claim. On appeal to the Zillah Judge this dismissal was confirmed, but on the ground that the appellants had failed to prove that the defendant was a cultivator paying rent, and that their claim was barred by limitation. And the Judge remarked that the Deputy Collector had made a lengthy enquiry with reference to the papers filed by both parties, which had no connection with the present claim.

On special appeal to the Sudder Court the dismissal of the claim was again confirmed, the Court observing that the question whether the plaintiffs (the appellants) were out-and-out purchasers or only conditional purchasers under the deeds of the 12th March 1843 did not arise in the case.

From this statement it appears that the ultimate decision of this claim for rent did not turn upon the validity of the ikrarnamah. But if the judgment of the Collector had been final in the matter before him, his incidental finding that the ikrarnamah was a valid instrument would not be conclusive between the parties in the present litigation. For the question before him was not the issue now raised between the parties, and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent.

The *eadem causa petendi*, and the judgment of a Court of competent or concurrent jurisdiction, are both wanting here. Their Lordships, therefore, being of opinion that the decree under appeal cannot be supported on the only ground which the Judges of the High Court have assigned for it, will proceed to consider whether the evidence in the cause, taken as a whole, affords any sufficient reason for disturbing the decree of the Zillah Judge.

It is not denied that on the 12th March 1843, the deeds of absolute sale were executed; that on the 14th March they were produced in the Civil Court, where decrees were passed upon them; and that on the 1st May 1843, the proceeding for the mutation of names, which is set forth at page 27, took place. The last was not without opposition. One Fuzund Hossein Khan put in objections founded on the right of pre-emption under the Mahomedan Law, and on a claim to a small portion of the property sold. The former objection was overruled; but it could only have been made an absolute sale; and the fact that it was made is an additional proof that the transaction was then treated as, and understood to be, an absolute sale. In the plaint, indeed, it is alleged that the transaction was represented to be an absolute sale, and not what it really was,—a mortgage, in order to avoid any claim founded on the right of pre-emption. But this statement appears to their Lordships to be founded on a misconception of the law of pre-emption, and therefore to afford an argument against the truth of the plaintiffs' case. Three years later, in September 1846, part of the property was seized by a judgment-creditor of the vendors. The appellants came in as objectors, claiming as absolute owners; and their objection prevailed, though the ikrarnamah, according to the plaintiffs' case, had then been registered, and, if a valid document, would have left in them an interest capable of being taken in execution.

The plaintiffs have given no explanation whatever why they consented to the decrees. Although in 1846 there was this execution against them, there is no suggestion that in 1843 they had any interest for making that which was in fact a mortgage appear to be an absolute sale. The probabilities of the case, therefore, resulting from the history of the *res gestæ* are all against the validity of the ikrarnamah.

But what is the direct evidence of the execution of that instrument? The

evidence of the two first witnesses, Jhoo Khan and Khadir Bux, who are not subscribing witnesses, appears to their Lordships to be worthless. The evidence of the attesting witnesses who are called is not consistent. Sheadun Putwarry, who from his position might have been a more trustworthy witness, is not called. In addition to the discrepancies and other circumstances tending to cast suspicion on the testimony for the plaintiffs which have been stated by the Zillah Judge, their Lordships have to observe that the document impeached purports to have been executed on the same day as the undisputed deeds of sale; that by several witnesses it is sworn to have been executed at the house of Mahomed Sidiq, the writer of the bills of sale; yet all these witnesses say that they saw no instrument but the ikrarnamah executed. It is difficult to see why, if the ikrarnamah was really executed on the 12th March 1843, and in the house of the appellants' agent, it was not executed with the deeds of sale and attested by the same witnesses. Again, as the Judge has observed, the witnesses for the plaintiffs fail to prove the payment of the Rs. 4,000 which they allege to have been the consideration for the mortgage; whilst the witnesses for the appellants have proved to the satisfaction of the Judge, the payment of the Rs. 9,800 which they allege to have been the consideration for the sale. It lay on the plaintiffs to prove the validity of the instrument on which they rely. The oral evidence was conflicting, and the Zillah Judge came to a clear conclusion that the witnesses for the plaintiffs were not to be believed and that the witnesses for the appellants were trustworthy. Their Lordships would, for obvious reasons, be slow in any case to overrule the opinion expressed by the Judges in whose presence the testimony was given touching the credibility of native witnesses. In the present case their own conclusion, formed upon a perusal of all evidence in the cause, is substantially in accordance with that of the Zillah Judge. They are of opinion that he was right in holding that the plaintiffs had failed to establish the validity of the ikrarnamah, which was the foundation of their case, and in dismissing their suit. Their Lordships will accordingly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and to direct that in lieu thereof a decree be made dismissing the appeal against the decree of the Zillah Judge with costs. If the appellants have paid any costs under the order reversed, these costs must be refunded, and they must also have their costs of this appeal.

The 20th January 1871.

Present :

Lord Cairns, Sir James W. Colvile, Sir Joseph Napier, and
Sir Lawrence Peel.

Document—Stamp.

On Appeal from the High Court at Bombay.

Mantappa Nadgowda

versus

Baswantrao Nadgowda.

The plaintiff sued his elder brother for a share in certain family property. The defendant raised a question of family custom, and relied on a certain deed of release which he said the plaintiff had given him, but the existence of which the plaintiff denied. That document was not stamped, though on the face of it it was stated that it was to be stamped. No objection was taken on that score to the document before the first and the Lower Appellate Courts, who considered that the document was a

genuine document executed by the plaintiff. After its production it had an insufficient stamp of 2 annas put upon it. The High Court, on appeal, left the deed as part of the evidence in the case, but qualified its effect and the extent of its operation by making it a deed of release, releasing so much of that which the plaintiff might otherwise claim as would be covered by the insufficient stamp of 2 annas.

Held that the High Court might either have refused to admit the document for want of a stamp, or—which would be more correct—it might have required it to be properly stamped and the penalty paid into Court; but the course taken was entirely without precedent, without principle, and without authority.

The first question raised in this case is as to the existence of a custom in the Nad Gowdki family, by which on descent, where there was more than one brother, it is alleged that the younger brothers did not, according to the ordinary law, share with the elder in a division of the property, but received maintenance, or an allotment of property in lieu of maintenance, in place of sharing in the whole property. Their Lordships observe in the first place that this custom has not been pleaded by the defendants, and they would therefore feel a difficulty in knowing exactly what the precise terms of the custom are which the appellant desires to rely upon. But further than that, after considering the evidence, their Lordships find no sufficient evidence of any custom of the kind alleged at the Bar to have prevailed in the family. They therefore think it unnecessary to consider the question raised by the High Court in India, as to whether in this part of India a custom of the kind suggested might or might not be valid. That is a question which would properly arise for determination as soon as it was ascertained that in point of fact such a custom had prevailed. Their Lordships, however, find quite sufficient materials upon which to dispose of this case in the dealings that have taken place between the appellant and the respondent.

It appears that there were three brothers, the appellant being the eldest, the respondent the second, and another brother, not a party to this record, who was the third. It appears that upon the descent of the family property, the brother who is not a party received an allotment of land in lieu of maintenance, and did not claim to be and was not allowed to be a sharer in the property. It appears further that the respondent, on the 17th October 1852, entered into an engagement, evidenced by a deed of that date, between himself and the appellant, his elder brother, to this effect. The deed is addressed by the respondent to the appellant—"I, Baswantrao, son of Kiddiganappa, resident at Kasba Kelur, execute a deed of release to the following effect:—As differences arose in the family between me and you I live separate, my continuance in the house being impossible. As it was customary from the time of our ancestors for grants for maintenance to be allowed, I asked for land for the support and maintenance of my family, and accordingly you have given me for maintenance the land and houses described below." Then follows a description of the property, and the deed continues—"You have thus made me a grant of land and a house. I shall have no connection with the payment of the debts contracted both by ancestors and by yourself. Whatever debts there may be, you will pay or receive payment. You, as being born in the elder line, will in the same manner as the first-born descendant used to do from the time of our ancestors enjoy the Nad Gowdki Wutton, the Boodihall, and Kadapaty estate, the Halli Chaorat land, the Chaorat of this Kusba, the land of Gowdki Wutton, and whatever else may be, together with the Rasoom [cash allowance or fees] Bak-bab, and the rights and privileges [of the hereditary office]. I have no right to claim them. You will continue to pay as heretofore the Nad Gowdki, Mahal Joodee, and the Gowdki Joodee, and enjoy the whole of the Wutton for yourself. You will allow no dispute to be raised about the land and house now granted to me. I shall enjoy the said house and land and live in peace; with the exception of the two, namely, the fields and the house, I have no right over the rest of the Wutnee land and property; you will not be liable for the payment of any debts, &c., which I may contract. As there was no stamp available for the occasion, I have drawn this upon plain

paper. I promise to get the stamp within eight days from this date, and write the deed upon it and take this paper back. In case I should fail to procure the stamp and give the deed written upon it, I agree to pay all the expenses and the penalty which may be incurred for getting this paper stamped. To this effect I deliver and sign this deed of release of my own free will and in my sound mind."

Now if that is a valid deed, if it is not impeachable on the ground of fraud or any other ground, it appears to their Lordships that here is a clear and distinct contract between the appellant and the respondent, by which the respondent accepts an allotment of specific land, obtains certain benefits by being relieved from the family debts, and makes stipulations with his brother which are binding and enforceable,—which would be binding and enforceable probably in any case, but are still more so when the transaction is one in the nature of a family arrangement. It is true that the arrangement is made upon the expression of belief on the part of the respondent that he was acting in accordance with the custom of the family. It is very probable that that belief was founded upon fact, and the existence of that belief on his part does not in any way detract from, but rather adds to, the stringency and the effect of the family arrangement. It ought to be added that this deed having been executed on the 17th October 1852, the respondent appears to have entered into possession of the allotted property, to have remained in possession until the year 1861, when the plaint was instituted, without any complaint except that the portion allotted to him by way of maintenance was too small, which complaint again appears to have been met by an increased portion allotted for the purpose of increased maintenance.

Therefore, I repeat, if this be a valid document, and not open to challenge on the ground of fraud or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed, as it has been, by enjoyment and possession for a period of ten years.

Well, then, is there any ground for impeaching this document? Now, in the first place, it is to be observed that in the plaint filed by the respondent there is no challenge of this document whatever. It is not sought to set aside the document on the ground that he was misled, that he had not sufficient advice, or that he was ignorant of his rights at the time he executed the release. But when the document was presented as a defence on the part of the appellant, then the respondent challenged it, not upon the ground of fraud or ignorance of his rights, but upon the allegation that the document never had existed at all and that he never had signed such a document. Upon that issue evidence was entered into on both sides. The two Courts before whom the case was first heard—the Court of first instance and the Court of first appeal—weighing that evidence, considering it very fully and very carefully, disbelieved the evidence of the respondent and held that the document was beyond doubt a genuine document executed by him. The second Court of appeal did not differ from that conclusion arrived at by the first two Courts, but the second Court of appeal made this objection to the document. It appeared that in the first instance it had not been stamped at all: indeed, on the face of it, it professed to be a document written on plain paper, the stamp for which was afterwards to be supplied by the respondent. After it was first produced it appears to have had a stamp of two annas put upon it, and the High Court took notice that that was an insufficient sum to cover the amount of the property at stake. Now, admitting that the stamp was insufficient, which may be assumed, it appears to their Lordships that there were two courses which might have been taken by the High Court. They might have refused to admit the document for want of a stamp. Their Lordships do not say that that would have been a correct course. But it would have been a possible course. They might have refused to admit the document for want of a stamp, or they might under the Acts and Regulations for

that purpose have required the document to be properly stamped and the penalty paid into Court for the purposes of revenue. As to rejecting the document *in toto* for want of a stamp, there would have been this serious difficulty—that there does not appear to have been any objection raised to its admission in either of the first two Courts; and it is difficult to see how, that being the case, it would have been a just course to have rejected *in toto* the document in the Court of last appeal. However, the Court of last appeal did not take either of those courses. It did not reject the document. It did not do what obviously would have been the more correct course—require the deed to be stamped and the penalty to be paid, but it left the deed as part of the evidence in the case, just in the way in which it had been placed among the evidence by the Court of first instance, and it qualified its effect and the extent of its operation by making it a deed of release, releasing so much of that which the plaintiff might otherwise claim as would be covered by the insufficient stamp of two annas. Their Lordships cannot do otherwise than express their surprise at the course thus taken, which appears to their Lordships to be entirely without precedent, without principle, and without authority.

Their Lordships, therefore, find the deed as part of the evidence in the case. They are prepared to say that being evidence in the case, they think the full and natural weight should be given to it as part of the evidence in the case; and being of that opinion, they have already said that the deed not being challenged on the ground of fraud or on the ground of any ignorance of right, is the expression of a valid family contract between the brothers, acted upon by both and not now to be disturbed.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed, that the decision of the High Court should be reversed, and the first decision which dismissed the plaint of the respondent, be restored, and that the appellant should have his costs of this appeal as well as of the hearing in the Court of second appeal in India.

The 20th January 1871.

Present :

Lord Chelmsford, Sir James W. Colvile, Lord Justice Mellish, and
Sir Lawrence Peel.

Mortgage—Conditional sale—Redemption—Law of the Forum.

On Appeal from the late Sudder Court at Madras.

Pattabhiramier

versus

Vencata Row Naiken and another.

Under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale becomes absolute, according to the terms of the contract, by the mere failure of the mortgagor to redeem at or before the time specified in the deed.

As regards Bengal, a Full Bench Decision of the High Court, ruling to the same effect in cases to which Reg. XVII of 1806 does not apply, referred to with approval.

The ruling in the present case not intended to interfere with any rule of property established by judicial decisions, so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

In this case the appellant claims to be the absolute owner of the lands in question under several conveyances from the first and second of his co-defendants in the suit or from those whom they represent. That the title of his vendors or their ancestor was originally a mortgage title is undisputed; and the suit out of which the appeal has arisen was brought in October 1853 by the representatives of the mortgagor to redeem the property, alleging it to be still redeemable. The decision of the Court of first instance was in their favor, but that was reversed by the Principal Sudder Ameen of Combaconum, who decreed in favor of the appellant. His decree was reversed by the late Sudder Dewanny Adawlut of Madras on special appeal; and the present appeal is against the decree of that Court.

The Sudder Court having no jurisdiction to determine on special appeal any question of fact, and there being no cross-appeal to Her Majesty in Council against the decree of the Principal Sudder Ameen, their Lordships must accept his findings on the facts as conclusive.

Those findings were :—

1st.—That the original contract between the mortgagor and the mortgagee was contained in the deed of conditional sale, dated the 13th June 1808, which is at page 71 of the record, and is there called Exhibit No. 1; and that the plaintiffs had failed to establish that there was any other instrument of mortgage.

2nd.—That Exhibit No. 2, purporting to have been executed on the 16th June 1816, upon which the appellant had relied either as a confirmation of the then absolute title of his vendors or as a conveyance or release of the right of redemption to them, was not a genuine document.

3rd.—That certain letters put in by the plaintiffs in order to prove acknowledgments by the mortgagees that the mortgage was a subsisting and redeemable mortgage as late as 1851, were also forgeries.

The conclusion of law which the Principal Sudder Ameen drew from his first finding was that under Exhibit No. 1 the title of the mortgagees became absolute on the 10th June 1813, by reason of the failure of the mortgagor to redeem at that date; and the special appeal was admitted to try the correctness of that conclusion. Hence, the sole question for their Lordships' determination is whether, under the law of the Madras Presidency, the interest of a mortgagee under a deed of conditional sale does or does not become absolute, according to the terms of the contract, by the mere failure of the mortgagor to redeem at or before the time specified in the deed.

This form of security being common in India, the question is of very general importance, and on that ground the appellant obtained Her Majesty's special leave to present this appeal, which after considerable delay has, unfortunately, come on to be heard *ex-parte*.

The contract embodied in Exhibit No. 1 was that the mortgagee should hold possession of the land for five years paying the Government revenue; that the mortgagor should repay the principal, and redeem the land on the 10th June 1813; and that in default, the mortgagee and his posterity should enjoy the land as if the transaction were an absolute sale, with the right of alienating the same by gift, sale, &c.

The transaction then was one of mortgage by *bye-bil-wufa* or *kut-kobala* usufructuary; the usufruct of the property to be taken in lieu of interest. And the first question that suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract, according to the intent and meaning of the parties plainly expressed by its language?

That this form of security has long been common in India is notorious. The fact is stated in the preamble to the Bengal Reg. I of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindoo law appears from several passages in Colebrooke's Digest (vol. 1, pp. 183, 187, 188, and

193). That they were equally recognized and enforced between Mahomedans is shown by Mr. Baillie in his introduction to his learned work on the Mahomedan Law of Sale. If the ancient law of the country has been modified by any later rule having the force of law, that rule must be founded either on positive legislation or on established practice.

Nothing concerning such contracts is, so far as their Lordships are informed, to be found in the Statute Law relating to the Presidency of Madras except Reg. XXXIV of 1802. Ss. 8 and 9 of that Regulation extended to Madras the provisions of ss. 10 and 11 of the Bengal Reg. XV of 1793. Both these Regulations were passed with the object of fixing the legal rate of interest and of preventing the taking of interest in excess of it; and both have since been wholly or in great part repealed with other usury laws by Act XXVIII of 1855. The clauses in question affected only that part of the contract now under consideration which related to the usufruct of the property. As to that they may have made it necessary, contrary to the intention of the parties, to take upon a redemption an account of the rents and profits as between mortgagor and mortgagee in possession, compelling the latter to set what he might have received in excess of legal interest against the principal; but they neither extended the time of redemption nor imposed upon the mortgagee, when the mortgagor had failed to redeem within the stipulated period, the obligation of taking any judicial or other proceeding in order to make his title absolute.

In Bengal there was further legislation. In that Presidency a Regulation (XVII of 1806) was passed which allowed a mortgagor, who had executed such a security as that now in question, to redeem at any time before the mortgagee had finally foreclosed the mortgage by taking the proceedings which the Regulation made essential to foreclosure.

It is, however, unnecessary to observe that this Bengal Regulation had of itself no force in the Presidency of Madras. And their Lordships cannot find, either in the Madras Regulations or in the Acts of the Indian Legislature subsequent to the Charter Act of 1834, any statute by which similar provisions have been enacted for Madras.

That, in cases to which Reg. XVII of 1806 does not apply, the interest of a mortgagee under a deed of conditional sale becomes absolute according to the terms of contract by the mere failure of the mortgagor to redeem within the stipulated period, has recently been decided by a Full Bench of the High Court of Bengal in the case of *Surreefoonissa v. Shaikh Enayet Hossein*, 5 Weekly Reporter, p. 88. In that case the mortgage bore date the 30th November 1801; the mortgage was made payable on the 28th September 1806. The mortgagor sued for redemption, and the mortgagee admitted that there had been no foreclosure pursuant to the Regulation. The High Court, however, ruled that if the Regulation did not apply, the interest of the mortgagee became absolute on the 28th September 1806, and finding that the Regulation had not been promulgated, and therefore had not become operative in the district until the 7th January 1807, dismissed the plaintiff's suit. The point so decided is also assumed to be law in the judgment delivered at this Board in the case of *Forbes v. Ameerionissa Begum*, 10 Moore's Indian Appeals, 348*; and unless it be law, it is difficult to see why the Regulation of 1806 was passed.

Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the authority just cited. The utmost that can be gathered from this record is, that some uncertainty concerning the operation of these contracts may have crept into the Lower Courts of Madras. If the Principal Sudder Ameen was right in thinking that this afforded a reason why the appellant had sought to strengthen his title by the production of the false deed No. 2, it is to be observed that the plaintiffs, on the

* 5 W. R. P. C. 47; 1 Suth. P. C. R. 621.

other hand, showed their sense of the uncertainty of the law by setting up the false case that another form of mortgage had finally been substituted for the deed of conditional sale. Moreover the Sudder Court does not rest its judgment upon decided cases. The first reason advanced in support of that judgment is clearly untenable. That a party is precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or in law. Nor does the second reason assigned for the judgment appear to their Lordships to be better founded. It assumes that an obligation lay on the mortgagee to do some act by way of enforcing what is not very correctly termed the penalty, and that there could be no adverse possession against the mortgagor until there had been a tender and refusal of the mortgage-money. But this assumption implies that in some way or another the rights and obligations of the parties as defined by the contract had been qualified by a known rule of law. Their Lordships have already stated that, so far as they can discover, no such qualifications have been introduced as in Bengal, by any act of legislation into the Statute Law applicable to Madras. What is known in the law of England as "the equity of redemption" depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage-deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way. It must not then be supposed that in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the Law of the Forum, wherever such may prevail, or to affect any title founded thereon.

Their Lordships therefore being of opinion that the decree under appeal is erroneous and ought to be reversed, and that the special appeal to the Sudder Court ought to have been dismissed with costs, will advise Her Majesty accordingly. But considering the great and unexplained delay which has taken place in the prosecution of this appeal, they do not think that they ought to give the appellant the costs of it.

The 21st January 1871.

Present :

Lord Cairns, Sir James W. Colville, Sir Joseph Napier, and Sir Lawrence Peel.

Compromise—Excess land—Wasilat.

*On Appeal from the High Court at Calcutta.**

Nilcomul Lahoree and others

versus

Gonomonee Dabea and another.

Where the parties to a suit which went up on appeal to the Sudder Court entered into an agreement in 1826, by one of the terms of which it was stipulated that both parties should provisionally take possession of certain portions of the land in dispute, but that either party would be at liberty within twelve months from the date of the agreement to apply to the proper tribunal to effect a rectification in the

* From the judgment of Loch and E. Jackson, J.J., in Regular Appeal No. 477 of 1863, decided 8rd May 1864 : not reported.

quantity of land which each was to hold permanently, and one of the parties did make such application to the local Judge, who refused to entertain it on the ground that the appeal (which under the agreement was to be abandoned) was still before the Sudder Court, it was held by the Privy Council that the local Judge should either have entertained the application himself as an original suit, or have kept possession of it until a petition had been presented to the Sudder Court to make the agreement a proceeding of that Court, and to have an order giving effect to it by way of compromise.

Where the final rectification of the shares of land resulted in the respondent getting a larger portion than he had held provisionally under the agreement, and the respondent was put into possession of the additional share in 1854, his right to wasilat for such portion followed as a matter of course unless barred by some final impediment, and limitation in a suit by him for such wasilat it was held began to run from 1854 when the rightful partition was completed.

There is some obscurity and difficulty in this case, arising chiefly from the length of time during which the litigation has unfortunately continued, and from some of the proceedings in the course of that litigation not having been conducted with the perfect regularity which would have been desirable. But disembarassing the case, as far as possible from those difficulties, the facts appear on examination to be simple, and the law applicable to them to be without doubt.

Now what their Lordships find is this. So long ago as the year 1828, there was a controversy between the two persons whom I will term the appellant and respondent, although there has been a change of interest since that time, and there are now more appellants than one and more respondents than one. The appellant apparently had become possessed by purchase of the zemindary in question, and had sold a four annas share of it to the respondent. The respondent appears to have desired the fulfilment of that bargain, to be let into possession, and to have the wasilat or mesne profits for the four annas share during the time he had been kept out of possession, and he instituted a suit for that purpose and obtained a decree from the Court of first instance. He was ordered to be put into possession. The owner of the larger share appealed to the Sudder Court, and pending the appeal the possession of the respondent was suspended and the appellant was left in possession of the whole. In that state of things, the parties apprehending the delay and expense of the prosecution of the case in the Sudder Court, and the owner of the smaller share being anxious to get into possession of his property, came to an agreement which is upon record at pages 25 and 26. The substance of that agreement was this. The facts that I have stated were recited. The agreement provided that there should be an immediate possession given to the appellant and to the respondent of portions at all events of cultivated land—an immediate separate possession of portions of the cultivated land which were taken provisionally, and only provisionally, to be as near as then could be ascertained the proper proportion to which each was entitled, viz., a share of twelve annas and a share of four annas. Those proportions were mentioned by some general names and descriptions which need not now be specified. But then, as it was apparently obvious to both parties that that division and that possession would not be accurate with regard to the real rights of the parties, it was carefully stipulated that it should be only provisional, and that it should be subject to rectification. The parties, therefore, proposed that the rectification should take place in this way. If either desired it in the course of the ensuing twelve months, he was to have an arbitrator appointed, that is to say, he was to propose some person who would be acceptable to the other person concerned, and the rectification was to take place by the award of the arbitrator; but if the arbitrator was not appointed, then the person who was injured by his not being appointed, was to have liberty to appeal to what is termed the Hakim, which has been very properly considered to be the proper tribunal—whatever it might be—to appeal to the proper tribunal for the purpose of having effect given to this agreement as to the rectification of shares. There was a provision that the appeal in the Sudder Court was not to be proceeded with, and that an application was to be made to the Sudder Court to have that appeal dismissed and this instrument of compromise put upon record in place of the decree. Then the agreement contained this clause. It is a clause

relating to wasilat, but it is a clause which, as their Lordships think, is not a clause to be read as giving a right in certain cases to wasilat, but as defeating a right to wasilat which it is assumed would exist if it is not taken away. It was natural to suppose, and it would naturally follow, that if upon the rectification of the provisional arrangement made by this agreement, it should appear that one or other had been for a time in possession of a larger share of the zemindary than his proper proportion, the person so in possession of the larger share would have to pay wasilat or back rents—mesne profits—to him who had had the share which was not adequate to that to which he was entitled. It was provided, therefore, in these words,—“Should any one amongst us both, through negligence, fail to appoint an arbitrator, then he who should think this injurious to his right, shall, within the said period, apply to the Judges of Court—that is the Hakim—for determination of the matters above-mentioned; if by not doing this within the said limited period, any one should bring a suit for the excess after the expiration of the limited period, then he shall have no claim for wasilat of the same which had accrued during the period of dispossession; if the claim for wasilat be made, that will not be valid.”

I repeat, their Lordships think this is clearly a clause of defeasance of forfeiture of that which otherwise would plainly be the right of the person in possession, of the share less than he was entitled to. It is obvious that an arrangement of a different kind might have been made. The rents might have been impounded, they might have been kept *in medio*, or in the hands of some third party, until it was ascertained what was the true proportion which each should be put in possession of. That would have been clearly inconvenient to both parties; that was the very thing they wanted to avoid. Both parties, therefore, were put into possession of that which was the nearest estimate that could be made of their respective rights, in order that they might enjoy the advantages and the profits of the land, but that was all subject to rectification as to the quantity, and therefore subject also to making good to the party injured any excess of profit which the other might have derived.

That being the agreement made in 1826, we have next to consider what took place in the twelve months which followed the date of the agreement. The agreement was dated the 22nd September 1826. What followed was this:—On the 26th June 1827, both parties applied by petition to the Commissioner of the district in which they both lived, putting before him this deed of compromise and asking him to send it to the Sudder Court. The Judge to whom the application was made thought this was an irregular proceeding, that they ought themselves to forward it to the Sudder Court if they desired it. But two days afterwards, on the 28th June 1827, the respondent presented a petition in his own name to the same Commissioner, the local Judge, asking that effect might be given to this arrangement, and that proceedings might be taken in substance to rectify in his favor the division that had been made of the land by the agreement. The Commissioner gave in substance the same answer which he had given to the former petition, that the suit was before the Sudder Court and that the application should be made to the Sudder Court.

Now at this point of the case their Lordships must express their opinion that the application of the respondent being in the nature of an original claim founded, not on the former cause of action, but upon the agreement made in 1826, and the special terms of that agreement, the application to the original Judge might well have been entertained by him, and at all events they are not prepared to say that that application was made so improperly, so irregularly, to a person so entirely devoid of jurisdiction as to lead to a forfeiture under the clause to which reference has been made, on the score that the respondent had not applied within twelve months to the proper Hakim on the subject. Their Lordships are of opinion that the Commissioner to whom the application was made might well either have

entertained the application himself as an original suit, or at all events might have kept possession of it until a petition had been presented to the Sudder Court to make this agreement entered into in 1826 a proceeding of that Court, and to have an order giving effect to it by way of compromise. However, the Commissioner took a different view; but that in their Lordships' opinion cannot, if the proceeding was a proper proceeding on the part of the respondent, have the effect of subjecting the respondent to forfeiture under the clause of the agreement.

On the 13th September 1827, it appears that application was made to the Sudder Court by the appellant to make the compromise a proceeding or record of that Court and to give directions for carrying it into effect, which the Sudder Court on the 28th February 1828 ordered accordingly. That of course was after the expiration of the twelve months.

Their Lordships, therefore, are of opinion on this part of the case that the decision of the High Court from which the present appeal is brought was a correct decision, and that the High Court were warranted in holding that there had been no forfeiture of the right to wasilat under this clause in the agreement, by reason of the respondent not taking the proceedings within the twelve months.

It is necessary now to refer to the subsequent proceedings in order to dispose of the second part of the case as to the Statute of Limitations. On the 28th August 1828, the respondent applied to the local Collector for a rectification of partition of the zemindary. That was not in the form of a plaint or of an original action, but in the form of a petition. The Collector thought that the Sudder Court having had seisin of the appeal in the original cause, he had not jurisdiction to entertain this petition; and accordingly an application was made in the year 1832 to the Sudder Court by the respondent to rectify the division of the land. It is somewhat difficult to understand whether this is to be looked upon as an original proceeding, or as a proceeding carrying out and continuing the chain of the former proceedings in the case. Their Lordships are disposed to think that it is in the latter point of view that it ought to be looked at. There was the original suit in 1826 to which I have already referred; there was the compromise; there was the petition in the Sudder Court to have effect given to the compromise; and there was then this further proceeding in the Sudder Court to give that particular effect to the compromise which consisted in the rectification of the division of the zemindary. On the 28th July 1853, that is, after a lapse of twenty-one years, a scheme for the rectification of the partition was submitted to the Sudder Court by the officer who had been assigned for the purpose, and on the 25th April 1854 the Sudder Court confirmed that scheme. On the 25th July 1854, the respondent, who had been found by that scheme to be entitled to a very considerably larger share of the zemindary than he had been in possession of, was put into possession of the additional portion to which he thus was found to be entitled.

Now, I have stated already that their Lordships are of opinion that, consequential upon the agreement of 1826, there would be the right of claim for wasilat or mesne profits, if it should be ascertained that either party had not, according to the provisional partition then made, been put into possession of the share to which he was rightfully entitled. Whether either party was in possession of a larger share than his proper share could not be ascertained, and was not ascertained, until the rightful and proper partition was finally made. Until that period it was a matter of doubt and uncertainty whether there would be any claim for mesne profits or wasilat at all, and of still greater uncertainty, necessarily, what the amount of that claim might possibly be. On the other hand, when once it was ascertained that either party had been in possession of a share smaller than his own, his right to wasilat would follow as a matter of course, unless barred by some special impediment which at present does not appear in the case. Therefore, in the year 1854, when possession was given to the respondent of the additional share to

which he had thus become entitled, his right *prima facie* would be also to receive from the appellant that proportion of the mesne profits of the land which would represent the excess, in possession of which the appellant had been, and out of possession of which the respondent had been kept. Their Lordships are not prepared to say, that without any substantive or original proceeding, and merely by means of an application to carry into effect the compromise in the suit, this right to wasilat might not have been asserted and enforced. But the course which was taken by the respondent was this. He did not apply by petition or in the original chain of proceedings, but he commenced on the 28th January 1862 a separate and original suit to recover this wasilat, but to recover it as a claim which flowed out of the former proceedings. Now, putting aside for a moment the lapse of time between July 1854 and January 1862, their Lordships, although they do not affirm the regularity or the necessity for the plaint of 1862 as an original proceeding, are notwithstanding of opinion that if there is any irregularity, there is not such an irregularity in originating that separate proceeding as should disentitle the respondent to his claim for wasilat, if he otherwise was entitled to it; and that he was otherwise entitled to it, their Lordships have already expressed to be their opinion.

Is then the claim of the respondent limited in any, and what way, by any Statute of Limitation? Their Lordships are of opinion that it is impossible to show that the Statute of Limitations, the Act of 1859, which cuts down a right in cases of this kind to six years, was in force in Assam at a period which would make it applicable to this suit, and that therefore may be put aside. The other period of limitation is the limitation of twelve years. If the law of limitation on that score is applicable to all, it could only be by analogy, and not by any positive words of the law. But when their Lordships consider all the circumstances of this case, they are of opinion that it would be contrary to the spirit and object of the Statute of Limitations to apply that law, even by analogy, in the present case. Their Lordships do not desire to treat this case as a case of trust, as it appears to have been viewed by the High Court from whom the appeal comes. Their Lordships are unable to see that the appellant and respondent stood to each other in the position of trustee and *cestui que trust*. But their Lordships consider, as they have already said, that the right to wasilat was a right distinctly flowing out of, and consequential upon, the right to the rectification of the partition, that the right could not have been ascertained or enforced until the rightful partition was completed, that is to say, in the year 1854, and that it is to the year 1854 they must look as the period when the right to wasilat would accrue. If that is so, their Lordships do not think the lapse of time between 1854 and 1862 should disentitle the respondent to that which he otherwise would be entitled to. In saying this, their Lordships do not mean to affirm that it may not be in the power of the appellant to show any special circumstances, which he may be able to show, which should limit, as a matter of equity on the part of the Court, the claim of the respondent to mesne profits to some period short of the whole number of years between 1854 and 1862, during which the respondent was kept out of possession of the larger share to which he was entitled. They desire to leave that question open. It will be open to the appellant in taking the account for which the case has been remitted to the Court of first instance by the High Court to show any special case (if he is able to show it), by way of appeal to the equity of the Court to shorten the account which otherwise would have to be taken of the mesne profits. Their Lordships leave that view of the case, if it can be presented by the appellant, entirely untouched by what has now been said.

On the whole, therefore, their Lordships are of opinion that in substance the decision of the High Court is correct; they think that the present appeal ought not to succeed, and they will humbly advise Her Majesty that it should be dismissed with costs.

The 3rd February 1871.

Present :

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, and
Sir Lawrence Peel.

Succession—Family custom.

On Appeal from the High Court at Madras.

Serumah Umah and another

versus

Palathan Vitol Marya Coothy Umah and another.

If it is contended that 'the succession' to property is regulated by any special family custom, that custom ought to be alleged and proved with distinctness and certainty.

The suit out of which this appeal has arisen was instituted by two ladies, who were the daughters of one Patha Kutti. In the course of the litigation they died, and a daughter of each of them was substituted in the room of her mother as plaintiff on the record. It may be assumed that the persons so substituted, the appellants, were the representatives of the original plaintiffs, and, in determining the appeal, it will be more convenient to speak throughout of the original plaintiffs as if they had carried on the litigation to the end.

The suit was brought against those who may be taken, for the purposes of the appeal, to have been the representatives of one Moidin Kutti, the son of one of the plaintiffs, and it was brought to recover property which by the admission of both parties was once the property of Patha Kutti. The history of that property it may be convenient shortly to mention. It was purchased from one Amaneth by Kunju Hajji, who was one of the sons of Patha Kutti. He afterwards died. There appears to have been a partition of his estate among the persons entitled thereto, under, as their Lordships collect from the proceedings, the general Mahomedan law, and this particular property was assigned to and became vested in Patha Kutti as one of his heirs. Patha Kutti died in 1842, and before her death, viz., some time in 1839, her grandson Moidin, in some character or another, unquestionably entered into possession of the property. He retained that possession up to the time of his own death in 1858 or 1859—a period of about twenty years. Upon his death his widow and other representatives entered into possession, claiming as his heirs or under a title derived from him. The plaintiffs thereupon instituted this suit to recover possession of the property from them. The defendants relied both upon the long possession of Moidin and upon a title founded upon a deed of purchase from Patha Kutti. In that state of things it was necessary that the plaintiffs should recover by the strength of their own title; and they were met in the first instance by the plea of the Statute of Limitations founded upon the long possession of Moidin. The Zillah Judge, looking to the nature of the suit, has very properly overruled that plea as a bar to the trial of the suit; because the question whether the suit is barred by the Statute of Limitations or not necessarily depends upon the determination of the principal issue raised in the suit, namely, whether the long possession of Moidin Kutti was adverse or fiduciary; whether he was in possession of his own right as proprietor of the estate, or whether he merely managed the estate as the agent first of his grandmother and afterwards of the plaintiffs in the suit. It was therefore essential to the plaintiffs' case to establish the latter proposition.

What is the case which they make? It is that Moidin was first appointed manager by the grandmother; and that he was afterwards appointed to or con-

tinued in such management by them. But if he continued in possession in the character of agent or manager, it lies upon them to show that they at the death of their mother, Patha Kutti, were entitled to assume the character of principals. And, as their Lordships understand the pleadings and the evidence, in order to do this they say :—We do claim a right to inherit the property as the general heirs, under the Mahomedan law, of Patha Kutti; but we contend that either by some act done by her in her lifetime, or by some special custom of descent attaching to this property, we and we alone, although she had other persons who would under the general law have been co-heirs with her, became entitled to the whole of the property, either beneficially or with reference to some semi-religious trust; and therefore that Moidin Kutti, who continued in the possession of the estate as manager, was the agent of us and of us only; and that we only are entitled to recover the whole property. This, notwithstanding some confusion in the argument at the Bar, and a suggestion that the plaintiffs might be suing as some of the heirs on behalf of all the heirs, appears to be really the effect of the title alleged and sought to be proved.

Then, upon what does the proof of this title rest? It appears to their Lordships to rest solely upon the oral testimony of three witnesses, who are entitled, no doubt, to all the advantage derivable from the fact that the Judge who saw them, the Zillah Judge, has stated that their demeanor in the box impressed him favorably. But, when examined, that testimony appears to their Lordships to fall very far short of the evidence which is necessary to prove such a case as that which they were brought to support. They are none of them, it is to be observed, members of the family; almost all of them are described as Mopla merchants.

It is important to revert to the former history of the property. It is shown that it certainly passed to Patha Kutti under the general Mahomedan law. It cannot therefore be said that it is property of which the devolution is governed by any local law or custom. If it is contended that the succession to it is regulated by any special family custom, that custom ought to have been alleged and proved with a distinctness and certainty which are wholly wanting here. If the evidence of these witnesses is examined, it really is not clear upon what they rest the plaintiffs' title. They seem to allege that some of the property of this Mopla family was governed by one law and that other part of their property was governed by another law. It is admitted that this particular property came into the family, came to Patha Kutti under the general law; but then it is said that, by some act of hers done in her lifetime, she transferred it to what is called the *tarnard* or family property, and made it subject to a different law of devolution, the nature of which is neither stated nor proved with that degree of certainty which is required to establish so special a case in any Court of Justice.

Therefore their Lordships, notwithstanding the favorable manner in which the Judge may have spoken of the demeanor of these witnesses, feel bound to concur with the High Court in refusing to believe the story to which they depose.

Two other witnesses were called to prove that Moidin accounted to his mother and his aunt for the proceeds of this property. They do not appear to be persons very likely to have been present at such a transaction. They attempted to prove that on one occasion, viz., in 1850 or 1851, he accounted for the whole of the period during which he had then been in possession, but they did not agree in the account which they give of what passed on that occasion. One of them stated that the accounts were delivered to the plaintiffs; the other denied that any accounts were so delivered. This, therefore, seems to be evidence to which their Lordships cannot give any credit.

The Judge of first instance seems to have proceeded more upon the supposed defects in the defendants' proof of their title than upon the strength of the

plaintiffs' title, and he called in aid various documents which had been proved in the case and to which our attention has also been directed. But of those documents, the exhibits numbered from A to F, it is to be observed that, although they may here and there afford an inference which tends to throw suspicion upon the genuineness of the defendants' deed, their general tendency is to contradict the case of the plaintiffs and to support the case of the defendants; because they show that, during his twenty years' possession, Moidin was sometimes sued as the proprietor of the estate; and that as proprietor of the estate he petitioned the Collector for a remission of revenue. These proceedings took place publicly in the district; they can hardly have failed to come to the knowledge of the plaintiffs who, if their present case were true, would have called their manager to account for taking upon himself the character of absolute owner, when, in fact, he was a mere agent.

The plaintiffs, therefore, seem to their Lordships to have failed to prove that which was the substance of their case, namely, that the possession of Moidin was a fiduciary and not an adverse possession; and if that be so, they were unquestionably out of time in bringing their suit, which ought to be dismissed on that ground. This being their view of the case, their Lordships do not think it necessary to express any strong opinion as to the genuineness of the defendants' deed. It is the less necessary to do so since the judgment of the High Court does not, as their Lordships understand it, positively affirm that the deed was genuine. It assumes no doubt, as their Lordships must assume, that in some way or another, and by virtue of some act of his grandmother, Moidin came into possession of this property on his own account and for his own benefit. And their Lordships may observe that that view of the case is corroborated, not only by the acts which he did, but by the transfer to him, which is admitted, of the original sunnud, and the deed of partition forming the title to the estate. Mr. Leith indeed has endeavoured to explain that possession by attributing it to his character as his agent. But, in their Lordships' opinion, it is far more reasonable to suppose that if the plaintiffs had been the true proprietors of the estate, they would, in accordance with native habits, have kept their title-deeds in the recesses of the zenanah, and would not have entrusted them to a mere manager. And if this was likely to happen under ordinary circumstances, *a fortiori* it would have happened in a case in which, according to the evidence for the plaintiffs, the management of this property was by family custom vested in the females of the family.

On the whole, then, it appears to their Lordships that the judgment of the High Court was correct, and they must accordingly humbly advise Her Majesty to dismiss this appeal with costs.

The 4th February 1871.

Present:

Sir James W. Colville, Sir Joseph Napier, Lord Justice James, and
Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of Oude.

*Debtor and Creditor—Dower—Transfer by husband—Gift—Presumption—
Onus Probandi.*

Iftikaroonissa Begum
versus
Nawab Umjid Ally Khan and others.

Where there is a debt to a very large amount (in respect of dower, as in this case), and there is a delivery or transfer of something (Government paper) which is substantially in amount and character the equivalent of that which the debtor ought to have provided for the creditor, the presumption of law is that the thing given by the debtor to the creditor is given by way of payment and satisfaction, and not by way of additional gift, leaving the original debt unsettled; and the *onus* is on the person who alleges that there was a gift in addition to the debt, to give sufficient and satisfactory evidence.

This is an appeal from the decision of the Judicial Commissioner of Oude, affirming the decision of the Civil Judge of Oude disallowing the claim of the appellant, the widow of an Oude nobleman of considerable estates, to a sum of five lacs of the old rupees as dower. The lady, beyond all question, was entitled by her marriage contract to that sum as dower. The defence is that the dower has in fact been paid by the transfer—begun partly in the lifetime of the husband, and completed after his death—of Government paper to the extent of four lacs and 50,000 sicca rupees, being substantially the equivalent in point of value of the five lacs of old rupees payable under the contract of dower. The four and a half lacs are alleged by the lady to have been a gift to her, and that they are not to be taken by way of satisfaction of the obligation of debt in respect of dower. Her case is this, that by certain letters written by the husband in the year 1844, addressed by him to the Government Agent, who had possession of a very large amount of Government paper for him, he constituted himself a trustee of a portion of that Government paper to the extent of four and a half lacs in her favor; that a complete trust was created, and that the subsequent transfer to her of the instruments themselves, or of the instrument itself, after the death, was a mere execution of the trust so created by him by way of gift for her. Whether those letters would or would not amount to a sufficient execution of a trust under the circumstances of the case, their Lordships do not think it necessary to consider. They are of opinion that the case cannot be put higher, at all events, for her, than if the transaction had been completed at the moment by an actual transfer by the husband to the wife (or to a trustee for the wife, if that were requisite), by an actual transfer of the notes for four and a half lacs. Now if that transfer had actually been so completed at the time, it would have resolved itself simply into this. There is a debt to a very large amount. There is a delivery or transfer of something which is substantially in amount and character the equivalent of that which the debtor ought to have provided for the creditor. In that state of things the presumption of law, and the presumption which their Lordships think any Jury would draw from the circumstances is, that the thing given by the debtor to the creditor is given by way of payment and satisfaction, and not by way of additional gift leaving the original debt unsettled. That being the presumption of law, the onus is thrown on the person who alleges that there is a gift, in addition to the debt, to give sufficient and satisfactory evidence, and, in their Lordships' judgment, no such evidence whatever has been given in this case. Therefore, if it were a matter not affected by any previous decision, their Lordships would have come to the same conclusion, nearly upon the same grounds as the Judicial Commissioner of Oude. But they think it right to add, that the case comes within the rule which their Lordships have upon more than one occasion laid down, as to not disturbing decisions on mere questions of fact. The question was a question of fact, or of inference from facts, whether the thing done was done by way of gift or by way of payment, and the two Courts below having decided the question of fact substantially in the same way, though upon somewhat different grounds, their Lordships would not have disturbed the finding of the Judicial Commissioner, unless they were clearly satisfied that he was wrong.

Their Lordships will therefore recommend that this appeal be dismissed with costs.

The 8th February 1871.

Present :

Sir James W. Colville, Sir Joseph Napier, Lord Justice James,
and Sir Lawrence Peel.

Adoption—Will—Long possession.

*On Appeal from the High Court at Calcutta.**

Rajendro Nath Holdar

versus

Jogendro Nath Banerjee.

The case of a Hindoo claiming by adoption under a will which was put forward shortly after the testator's death and which was acted upon and recognized for a period of 27 years by the whole family, the validity of which will was questioned in a suit brought by the person adopted against members of the family, was considered to be analogous to a case in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired by a party who has a strict legal right to question his legitimacy. In such a case, the defendant in order to defend his *status* should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons.

Judgment of the Appellate Court, which differed from the Lower Court as to the evidence with respect to the validity of the will, reversed.

This case had been extremely well argued on both sides; but their Lordships having had time to examine the evidence, and having now weighed the arguments on both sides, have come to a clear conclusion that this appeal ought to be allowed, and the grounds of that conclusion I am now instructed to state.

The question is one touching the right of succession to the estate of one Kali Prosad Holdar, a Brahmin, who seems to have been possessed of a considerable estate, including certain spiritual rights and privileges connected with the worship of the goddess Kalee in the well-known temple in the vicinity of Calcutta. Kali Prosad died on the 16th Assin 1244, a day which corresponds with some day in September 1837. He left a widow, a mother, and four sisters. The mother predeceased the widow and died in 1855; the widow died in July 1864. Of the four sisters, two are dead—one of them without issue, the other leaving a daughter. And of the two surviving sisters, one is childless, and the fourth only has male issue, namely, the respondent Jogendro Nath and the infant respondent Kameeka Nath Banerjee, and these two persons, if Kali Prosad died intestate, are the persons who, according to Hindoo law, would be entitled to inherit the estate in succession to the widow.

Shortly after the widow's death in 1844 the respondent, Jogendro Nath, suing *in formâ pauperis*, commenced this suit in which he claims to recover an eight annas share of the estate from the appellant, who claims under an adoption by the widow alleged to have been made by virtue of a testamentary disposition of her husband, and from the other persons claiming interests in the estate under that testamentary disposition. The infant brother is made a defendant *pro formâ* on the record, and is represented by his father and guardian Kasseeputtee Banerjee.

The appeal, however, has been argued as if the litigation were confined to the adopted son of the widow, who is in possession, that is the appellant, and the respondent Jogendro Nath; and in that point of view it will be convenient to consider it.

The issues are stated at page 18: they are these—"Whether or not the suit is barred by the Statute of Limitation? Whether or not the will, the Dan Unnoomotte puttro of the 6th Assin 1244, B. S., alluded to in the written state-

* On appeal from the judgment of Trevor and Glover, *J.J.*, in Regular Appeal No. 260 of 1866, decided 8th April 1867.—7 W. R. 357.

ment filed by the defendant Rajendro, was a genuine document: if so, whether the defendant had been, according to the Shastras, adopted by Matunginee Dabea, widow of Kali Prosad Holdar, deceased?" The next issue is—"Whether in event of the aforesaid deed of gift being not proved, the plaintiff is entitled, under the Hindoo law, to succeed to the estate or property included in the suit? and if so, whether he is entitled to possess the whole estate or not?"

Of these issues the second alone, and perhaps only part of the second, is material. The first issue, that upon the Statute of Limitation, was originally determined by the Principal Sudder Ameen, the Judge of first instance, in favor of the defendant. His decision was reversed on appeal, and it has been candidly and fairly admitted at the Bar by Mr. Bell that it is impossible to impeach that decision; that, according to the authorities in India, time would only begin to run against the respondent from the date of the widow's death.

Again the third issue, it may be assumed, would, if it were necessary to try it, be necessarily found in favor of the respondent, the plaintiff in the suit, to the extent of the interest claimed by him in the estate, namely, a moiety or eight annas.

With respect to the second issue, it has been suggested by Mr. Doyne that it may admit of the contention on his part that the adoption of the respondent was invalid, because it was not made with the consent of the mother, which the will made a condition precedent to any adoption. But their Lordships, as they have already intimated, do not consider that that point is in terms open upon the issue, the latter part of the issue being "whether the defendant had been, according to the Shastras, adopted by Matunginee Dabea, widow of Kali Prosad Holdar, deceased." Those words really raise only the question whether all the ceremonies, and whatever other requisites the Hindoo law has made essential to an adoption, had been complied with. Their Lordships would not have held the parties strictly bound to the terms of the issue, if they had seen any trace that it had been understood in any other sense in the Court below. But they cannot find that that was the case, that it ever was raised below that the mother had not given her consent to that adoption; and they are confirmed in this by looking at the grounds of appeal which were filed by the respondents in the High Court in which he takes these two points with reference to the adoption—"The Lower Court has failed to consider that Matunginee had no right to adopt under the existing Hindoo law of adoption. There is no proof to show that the ceremonies and formalities prescribed by the Hindoo law were legally performed, and the defendant's adoption ought to have been cancelled on that score." There is not a word suggesting that the mother's consent had not been given. Under these circumstances, if the mother's consent were necessary under the will, as to which their Lordships give no opinion, it must be presumed that that consent was given.

That part of the issue which relates to the validity of the adoption according to the Shastras was found by the Court of first instance in favor of the appellant. The High Court has intimated no opinion, as it was not necessary for them to decide that point, whether the judgment in that respect was right or not; but their Lordships have heard no reason whatever, and no grounds have been shown before their Lordships at the Bar, for impugning that part of the decision of the Principal Sudder Ameen.

The sole question, therefore, on which the determination of this appeal depends, is the validity of that Dan Unnoomottee puttro, which it will be convenient, as it is in its nature testamentary, to call in the observations which I shall hereafter make "the will." This will purports on the face of it to have been executed on the day of the testator's death. The effect of it, so far as it is necessary to read the passage, is correctly stated in the judgment of the High Court. The Judges say—"This deed," as they call it, "it will be observed, gives his wife Matunginee permission, with the consent of his mother Jeomoney, to

adopt one son. It makes a present division of his property into seven annas and nine annas, but postpones the enjoyment of it by the parties for whom the several shares are intended until the death of his mother, who, during her lifetime, is to be the proprietor and manager of the whole sixteen annas of his property, and to pay his debts out of the nine annas share, and other expenses of maintenance, &c., out of the sixteen annas. On the death of his mother his four sisters are to take possession of their seven annas share; and in case of any one of them dying childless, her share is to descend to the children of the other sisters. The nine annas share is to be the property, without power of alienation, of Matunginee during her life, and after her death it is to descend to her adopted son." I stop there because I am not clear that the Judges have really given the true construction of the concluding clauses of the Will in what follows, and it is unnecessary to consider whether that construction is right or not.

The earliest production of the document was within ten months of the testator's death, in August 1838. In that month Jeomoney, the mother of the deceased, came forward as executrix, as we should say, under this will, claiming to be substituted as decree-holder in a suit in which her son had recovered a decree in his lifetime. The widow appeared on that occasion by her mookhtar to support her mother-in-law's application. The Judge seems to have required, or the parties to have tendered, proof of this instrument. The writer of the instrument was examined, and one, if not two, of the attesting witnesses were also examined. The evidence, such as it was, seems to have satisfied the Judge, at all events for the purposes of the application, that the document was to be treated as a true document; and accordingly the mother was substituted as the decree-holder.

So far, therefore, the widow, who was the heiress-at-law of the alleged testator, was supporting the alleged testacy. In 1844, however, there seems to have been some change in her disposition in that respect and some disagreement in the family, and she then made the application which is found at page 69 of the record, to sue *in formâ pauperis*, in order to assert her rights as heiress-at-law. She appears from that document at that time to have left her husband's house and to be residing in her father's house, where, of course, she would be under the influence of parties who would urge her to assert her extreme rights, and if they considered it necessary for her rights to do so to dispute the will. Whatever she may have actually done after that in the suit does not appear, but it is clear that in 1845 that litigation was compromised, and she reverted to her original position of a person supporting the will and taking under it. The compromise is at page 75. The effect of it was that the will was admitted as the foundation of the rights of the family, but the mother retired from that position in which the will placed her of being mookhtar of the whole estate,—the person managing the estate with whatever beneficial interest that management might give her, and supporting the whole family out of the proceeds of the whole estate; and that she thenceforward agreed to be entitled to receive maintenance only, and to put the widow in the possession of that which the will gave to her and the sisters—in immediate possession of that which the will gave to them. Now, that compromise has been very much relied upon by Mr. Doyne as affording an argument against the validity of the will. Their Lordships are unable to accede to the argument which he has laid before them. His contention is that it must be presumed that the mother would not have agreed to those terms unless she knew that the will was a false document and was afraid of its validity being contested in open Court. But, on the other hand, it may equally be said that the widow would not have agreed to relinquish her claim to the whole estate, if she had known that the document could not be proved in open Court, and that she had every chance of gaining her suit. Without imputing such a motive to the mother, it seems not wholly unnatural to suppose that she might be guided in that by the advice of members of the family,—that they might have put before her that the estate would very likely

be wasted in litigation,—that the proof of a Hindoo will when a true document is always an uncertain thing, and that being advanced in years and having her daughters put in possession of seven annas of the property, her position would not be materially worse, and that she might fairly agree for the sake of peace to make the sacrifice which she did make. On the whole, their Lordships think that it is impossible to draw any conclusion from that compromise which militates strongly against the evidence in favor of the will:

From that time forth, with perhaps one exception, the family appear to have acted consistently upon the will. This compromise was filed in 1845. The adoption was, I think, in 1848 ; but, intermediately, there are several proceedings both before and after the adoption in which all the family put forward this will claiming under the will ; and in fact there is nothing, except the document to which I am now about to refer, which shows that the will was questioned by any of the immediate family of Kali Prosad. That document is the one filed on the part of the respondents, and is at page 33 of the record: It is the petition of the widow when a party, a relation of the family, who had recovered a decree for costs against the mother, was seeking after the mother's death to get these costs from the widow ; and she, after stating that she had no connection with the widow as heir, that the heirs of the mother were her daughters, no doubt does in the second paragraph of her petition speak of having been induced to consent to a division of the whole sixteen annas by collusion. But this document is filed in the Court by her mookhtar ; it does not seem to have been signed by her, and their Lordships, considering that in this very document she describes herself as the mother and guardian of the son adopted under the will, cannot ascribe any importance to it, or suppose that this statement is anything but one of those statements which a native mookhtar is so apt to put in without much regard to the truth of what is alleged in it in order to gain some immediate object in the suit in which it is filed. The adoption took place with great publicity and formality, was known to all the members of the family, and must be presumed to have been made under the will.

We therefore find that for a period of 27 years this will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of Kali Prosad, and that the legal *status* of the appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the will, the presumptive heir, who was in existence before his title was defeated by the birth of the present respondent, might have come forward in one way or another and contested the will. Therefore there arises from all these circumstances a very strong presumption which their Lordships do not feel themselves at liberty to disregard in favor of the will. No doubt these circumstances, as the law stands, are not conclusive against the respondent. He has the right to call upon the appellant, the defendant in the suit, to prove his title ; but their Lordships cannot but feel that while he has that extreme right, every allowance that can be fairly made for the loss of evidence during this long period by death or otherwise—every allowance which can account for any imperfection in the evidence—ought to be made ; and on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the will, and to the acts done by them under the will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the defendant in order to defend his *status* should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindoo claiming by adoption is perhaps as strong as any case of the kind that can be put;

because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal Sudder Ameen, himself a Brahmin, who has embodied his conclusions in a judgment, the careful preparation and expression of which seems to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion that the witnesses who were called by the respondent to show that Kali Prosad was in such a state of body that it was impossible that he could have executed this will, were persons of no credit and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the will was genuine and ought to have been affirmed. Upon appeal to the High Court the learned Judges of that Court, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing witnesses for themselves, and also to examine the subscribing witness who had not been called in the Court below, the father of the respondent, re-examined the three witnesses who had been examined, and examined for the first time Kasseeputtee Banerjee. Of the evidence then taken, it may be said that the witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, Shiboram Chatterjee, elicited some fuller account of the preparation of the will, which is not altogether immaterial, if true, to the appellant's case. Of the evidence of Kasseeputtee Banerjee it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the testator at the instigation of the mother, who told him that the arrangement was for the benefit of his future son, and that her consent was necessary to any adoption. He does not venture to express a conviction one way or the other as to the truth or falsehood of the will, and it is obvious that his statement, taking it in the most favorable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and therefore his evidence is not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their judgment upon it. All they say as to the evidence of Kasseeputtee Banerjee is—"We think it better to form our opinion on the merits of this case irrespective of anything contained in it; although, notwithstanding the equivocal position in which he stands on his own showing, we are inclined to think that there is some truth in what is stated as to the origin of the deed now before the Court." That, therefore, may be left out of consideration.

Now, if the two judgments are looked at in opposition to each other, it would appear that the learned Judges of the High Court have in the first place differed somewhat from the Principal Sudder Ameen in his appreciation of the probability that such a document as this should have been executed. They say:—"As the Principal Sudder Ameen has remarked, it is contended by the plaintiff that that deed was a concoction of Kali Prosad's mother Jeomoney, who fabricated it to provide for her daughters, for whom a Hindoo mother has greater affection than for male children, and that it was only to quiet the wife that nine annas of the property was allotted to her: whereas by the defendant it is urged that Kali Prosad's

four sisters were, according to the custom of the family, married to Koolin Brahmins, who never take their wives to their home or otherwise maintain them; that, mindful of their helpless situation and of his own salvation, he made a provision for the former at the same time that he provided for the maintenance of the latter; and that, as a dutiful Hindoo son, he made the mother manager and proprietor; that, moreover, Kali Prosad's income was about Rs. 800 a-year, and that one quarter of seven annas of that sum, viz., Rs. 85 per annum, was not an out-of-the-way sum for each of his sisters. There is no doubt that this deed is for the benefit of the sisters of Kali Prosad Holdar, and that it is only in case his adopted son has issue that nine annas of the property can remain away from the sisters or their heirs eventually. Without going so far as saying that there is an antecedent improbability in this distribution of the testator's property, the Court has no hesitation in saying that that distribution is unusual. A permission is not given to the wife to adopt more than one son, and the adopted son's patrimony is cut down, and it does not become vested in him until after his mother's death, and if he dies issueless the property goes to the testator's sisters and their heirs. As to the necessity of Kali Prosad providing for his sisters married to Koolins by a deed of that sort, that is not so apparent. Whilst they live in the family house the obligation would remain on Kali Prosad and his heirs to maintain them and their children, but to divide his estate in this way is to go beyond the obligation which the Hindoo law imposed on Kali Prosad. Again, the Court does not see the justice of considering the adopted son of a stranger, and of contrasting him in the position of a stranger with that of the testator's sisters. After the adoption the adopted son is no longer a stranger; he is the person who procures the salvation of his adopting father, and therefore in the face of so great a benefit accruing to the testator from the son adopted, any permanent diminution of the property left to him, even to the amount of four times 85, Rs. 340 a-year, bears the semblance of injustice."

On this it is to be observed that the principal point upon which they differ from the Principal Sudder Ameen, is the probability of the provision made for the sisters by giving them specific shares in the property, instead of giving them mere allowance for maintenance; and it may be very true, as the learned Judges say, that these sisters being married to Koolin Brahmins, there would remain the obligation on Kali Prosad or his successors to maintain them. The whole question was, however, raised before the Principal Sudder Ameen, who, as a Brahmin, is at least as likely as the Judges of the High Court to know what a Brahmin would be likely to do in those circumstances, and he has expressed an opinion that the provision was not an unnatural one for the testator to make in those circumstances. Again, it is no doubt true that greater power is given the mother than she would have naturally under the law, and that the interest of the adopted son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted son.

It is possible, and it has occurred to their Lordships, considering that evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, that there may have been something like a compromise in the testator's mind, namely, that there may have been some pressure upon him on the part of his mother to make a larger provision for his sisters: on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of having an adopted son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe that they are not dealing here with a question whether a disposition has been obtained by any undue influence or under any pressure of that kind, but upon the issue whether this document is a forgery or is the will of the testator.

because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title.

With these observations, their Lordships proceed to consider the direct evidence as to the validity of this will. They do not propose to go into it at any great detail. It was fully considered in the first instance by the Principal Sudder Ameen, himself a Brahmin, who has embodied his conclusions in a judgment, the careful preparation and expression of which seems to their Lordships to be highly creditable to that native Judge. He came to a clear conclusion that the witnesses who were called by the respondent to show that Kali Prosad was in such a state of body that it was impossible that he could have executed this will, were persons of no credit and not to be believed. He, also weighing all the circumstances, giving weight to the probabilities of the case, and considering the positive testimony which had been adduced before him, came to a clear conclusion that the will was genuine and ought to have been affirmed. Upon appeal to the High Court the learned Judges of that Court, for reasons which they have not recorded, but which may easily be presumed to have been a desire to examine the subscribing witnesses for themselves, and also to examine the subscribing witness who had not been called in the Court below, the father of the respondent, re-examined the three witnesses who had been examined, and examined for the first time Kasseeputtee Banerjee. Of the evidence then taken, it may be said that the witnesses who were re-examined do not appear to have been in any degree shaken, and the cross-examination of one of them, Shiboram Chatterjee, elicited some fuller account of the preparation of the will, which is not altogether immaterial, if true, to the appellant's case. Of the evidence of Kasseeputtee Banerjee it is sufficient to say that it amounted only to this, that though his name did appear upon the document, it had been added some twenty days after the death of the testator at the instigation of the mother, who told him that the arrangement was for the benefit of his future son, and that her consent was necessary to any adoption. He does not venture to express a conviction one way or the other as to the truth or falsehood of the will, and it is obvious that his statement, taking it in the most favorable sense, that he merely put his signature at that time to a document of which he had not witnessed the execution, on that persuasion, does not entitle him to very much credit. If, on the other hand, he did it believing the document to be a forgery, he would, of course, be entitled to much less credit, and therefore his evidence is not that upon which any reliance can be placed, and the Judges of the High Court do not appear to have grounded their judgment upon it. All they say as to the evidence of Kasseeputtee Banerjee is—"We think it better to form our opinion on the merits of this case irrespective of anything contained in it; although, notwithstanding the equivocal position in which he stands on his own showing, we are inclined to think that there is some truth in what is stated as to the origin of the deed now before the Court." That, therefore, may be left out of consideration.

Now, if the two judgments are looked at in opposition to each other, it would appear that the learned Judges of the High Court have in the first place differed somewhat from the Principal Sudder Ameen in his appreciation of the probability that such a document as this should have been executed. They say:—"As the Principal Sudder Ameen has remarked, it is contended by the plaintiff that that deed was a concoction of Kali Prosad's mother Jeomoney, who fabricated it to provide for her daughters, for whom a Hindoo mother has greater affection than for male children, and that it was only to quiet the wife that nine annas of the property was allotted to her: whereas by the defendant it is urged that Kali Prosad's

four sisters were, according to the custom of the family, married to Koolin Brahmins, who never take their wives to their home or otherwise maintain them ; that, mindful of their helpless situation and of his own salvation, he made a provision for the former at the same time that he provided for the maintenance of the latter ; and that, as a dutiful Hindoo son, he made the mother manager and proprietor ; that, moreover, Kali Prosad's income was about Rs. 800 a-year, and that one quarter of seven annas of that sum, viz., Rs. 85 per annum, was not an out-of-the-way sum for each of his sisters. There is no doubt that this deed is for the benefit of the sisters of Kali Prosad Holdar, and that it is only in case his adopted son has issue that nine annas of the property can remain away from the sisters or their heirs eventually. Without going so far as saying that there is an antecedent improbability in this distribution of the testator's property, the Court has no hesitation in saying that that distribution is unusual. A permission is not given to the wife to adopt more than one son, and the adopted son's patrimony is cut down, and it does not become vested in him until after his mother's death, and if he dies issueless the property goes to the testator's sisters and their heirs. As to the necessity of Kali Prosad providing for his sisters married to Koolins by a deed of that sort, that is not so apparent. Whilst they live in the family house the obligation would remain on Kali Prosad and his heirs to maintain them and their children, but to divide his estate in this way is to go beyond the obligation which the Hindoo law imposed on Kali Prosad. Again, the Court does not see the justice of considering the adopted son of a stranger, and of contrasting him in the position of a stranger with that of the testator's sisters. After the adoption the adopted son is no longer a stranger ; he is the person who procures the salvation of his adopting father, and therefore in the face of so great a benefit accruing to the testator from the son adopted, any permanent diminution of the property left to him, even to the amount of four times 85, Rs. 340 a-year, bears the semblance of injustice."

On this it is to be observed that the principal point upon which they differ from the Principal Sudder Ameen, is the probability of the provision made for the sisters by giving them specific shares in the property, instead of giving them mere allowance for maintenance ; and it may be very true, as the learned Judges say, that these sisters being married to Koolin Brahmins, there would remain the obligation on Kali Prosad or his successors to maintain them. The whole question was, however, raised before the Principal Sudder Ameen, who, as a Brahmin, is at least as likely as the Judges of the High Court to know what a Brahmin would be likely to do in those circumstances, and he has expressed an opinion that the provision was not an unnatural one for the testator to make in those circumstances. Again, it is no doubt true that greater power is given the mother than she would have naturally under the law, and that the interest of the adopted son is postponed, and that the disposition is altogether different from that which might have been made by a man who had in his mind the single object of leaving an adopted son.

It is possible, and it has occurred to their Lordships, considering that evidence which points to the provisions of the Will having been discussed a day or two before its actual execution, and to the relations subsisting between the members of this family, that there may have been something like a compromise in the testator's mind, namely, that there may have been some pressure upon him on the part of his mother to make a larger provision for his sisters : on the other hand, that he was anxious to carry out the principle, dear to every Hindoo, of having an adopted son, and that the actual disposition may have been the result of some such a compromise. But their Lordships have to observe that they are not dealing here with a question whether a disposition has been obtained by any undue influence or under any pressure of that kind, but upon the issue whether this document is a forgery or is the will of the testator.

Another point upon which the learned Judges of the Sudder have intimated some dissent from the Principal Sudder Ameen was the credit to be given to two of the witnesses examined, namely, the two young men, Denonath Holdar and Koylas Chunder Banerjee. They say of that :—" We do not believe the statement of Denonath Holdar and Koylas Chunder Banerjee on this point. They were both boys ; no intelligible reason is given for their being at Kali Prosad's at such a time, and the evidence before us as to the duration of Kali Prosad's sickness, as to his state two days before his death, and as to his state on the day of his death, even if it be credited, does not admit of our believing at the same time that he entered into those explanatory conversations with the witnesses which in their depositions they detail." The observation that is founded upon the age of these two witnesses might have some force if this document were now produced for the first time, and their names were found upon it as subscribing witnesses. But the argument is all the other way, when it is considered that the document was beyond all question produced in 1838 ; because it is in the highest degree improbable that if persons were concocting a forgery, they would call into their councils two boys sixteen or seventeen years old, who would be manifestly from their youth not likely persons to be entrusted with the secret. They have given an explanation which seemed plausible to the Principal Sudder Ameen, and seems plausible to their Lordships, for their presence on that occasion. The explanation is that a message came to the father of one of them to go to the house, that he was prevented by business from going to the house, and he said to the son, " Will you go ? " The son met a companion, also apparently a relation of the family, and they went together. There may be some little exaggeration as to the amount of explanation given, but their Lordships see no reason, as the Principal Sudder Ameen saw no reason, why their statement that the testator did actually acknowledge before them that the document was his will should be discredited.

Therefore, going through the whole of these two judgments, it appears to their Lordships that really the *ratio decidendi*, or at least the turning point in the minds of the learned Judges, was the impression which they derived from the inspection of the letter M. Now that point was not taken for the first time before the High Court. The suggestion seems also to have been made in the Court of the Principal Sudder Ameen, and he, as we understand his judgment, thought that there was nothing in it. Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengalee language, their Lordships cannot but think that upon such a point as that, the native Judge examining a letter in his own alphabet, is more likely to be a competent Judge than the two European Judges. But independently of that, it appears to their Lordships to be a very unsafe ground of decision. The evidence as to the absolute prostration and insensibility of the testator at the time has been discredited. No doubt his own witnesses state that he put this letter, feeling too weak to write his name at full. But it is impossible from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that the man was too weak to make the impression with his pen which he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that ; and, therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it. They cannot think (considering that the evidence, supported as it is by the presumptions to which reference has been made, on the whole greatly preponderates in favor of the genuineness of this instrument), that the mere appearance to the eyes of those Judges of that letter is sufficient to outweigh it ; and therefore their Lordships, however great their respect for the judgment of the High Court, feel that it is their duty in the present case to advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and

to direct that in lieu thereof an order be made dismissing the appeal to the High Court. The party having sued *in formâ pauperis*, their Lordships will further recommend that an order be made dismissing the appeal to the High Court with such costs, if any, as according to the practice of that Court are given to an appellant suing *in formâ pauperis*, and the repayment of any costs that have been paid by the appellant; and their Lordships, considering that they are dealing with an heir-at-law questioning this will and supporting a judgment which has really been in his favor setting aside the will, are not disposed to make any order as to the costs of this appeal.

The 20th February 1871.

Present :

Sir James W. Colville, Sir Joseph Napier, Lord Justice James, and
Sir Lawrence Peel.

Contract—Consideration—Nullity.

*On Appeal from the High Court at Calcutta.**

Guthrie

versus

Abool Mozuffer Nooroodin Ahmed.

In a case in which the plaintiff alleges that he agreed to sign and that he executed a deed of sale for a consideration of a sum of money, in consequence of pressure put upon him and in order to get back certain papers, &c., of his which had been abstracted by the defendant and his servants, he cannot, whether under the English or Mahomedan law or under the general rule of equity and good conscience, be entitled to treat the deed as a mere nullity and be allowed both to avoid the contract and to retain the money.

This appeal is against two decrees which have been made in a suit instituted in December 1862 by one Cazeo Nusseeroollah to recover possession of certain lands with mesne profits, and to set aside a deed of sale purporting to have been executed by him on the 11th October 1855, in consideration of Rs. 4,000 to one Mr. Harry Inglis.

The suit was brought against the widow and representative of Mr. Inglis, who died about the beginning of 1861. The Judge of Zillah Sylhet made a decree in favor of the plaintiff on the 13th December 1862, and his decree was affirmed by the High Court of Calcutta on the 30th November 1863. Both plaintiff and defendant have since died, and they are represented—the former by the respondents, the latter by the appellants on the record.

The issues settled in the cause are thus stated at page 171 of the Appendix:—

1. Did plaintiff voluntarily and on receipt of the sum set forth in the koballah, referred to in the plaint, execute to Mr. Inglis the deed in question, or was the same forcibly taken from him by the latter?

2. In the event of the koballah being proved to be *bona fide* executed for value received, in that case is defendant in possession of only the talooks therein specified, or has she in addition taken possession of other seegga lands in addition to that appertaining to the talooks?

It appears, therefore, that besides the principal question as to the validity

* From the judgment of Phear and Kemp, J.J., in Regular Appeal No. 636 of 1862, decided 30th November 1863.

of the conveyance impeached, there was a subsidiary question as to the extent and description of the lands held by the defendant under color of it.

It will be convenient in the first instance shortly to consider what in September 1855 was the position of the parties to the transaction and their relation to each other.

The Caze was a native landholder, and also a Mahomedan holding an office in the Court of the Judge of Sylhet. He had acquired this property in 1844. Mr. Inglis was a European, resident at Cherra-Poonjee, and engaged in various mercantile speculations, some of which, it may be presumed, rendered the possession of this particular land desirable to him. He had been in possession of it under a peishgee lease granted to him by the Caze, which in terms expired in August 1855; but he contended that, by virtue of an instrument subsequently executed by the Caze for securing a further advance of Rs. 200, he was entitled to retain possession until the whole of what was due to him had been paid off. The Caze, on the other hand, treating the interest of Mr. Inglis as determined, had on the 16th August 1855 granted a lease of the lands for four years to one Mr. Sweetland as agent for Moran and Co., a European firm which seems to have been rivals in trade of Mr. Inglis. The result was probably a state of things not unfrequent in India, viz., that in which two European speculators are striving in competition with each other to obtain land from a native proprietor, and the native is playing fast and loose with both of them. On the 10th Assin 1262, B.S., corresponding with the 24th September 1855, Mr. Inglis's agent presented a petition in the Magistrate's Court, stating his master's title to the land and the lease to Sweetland, and praying for the intervention of the Magistrate on the ground of an apprehended affray. And, on the preceding day, the Caze had filed a petition in the Judge's Court, stating the loss of his boat containing his official and private seals, his register book, and other property; and insinuating that they had been abstracted and concealed by the contrivance and machinations of the amlah of Inglis, resident at a place called Chattuck. This petition did not conclude with any prayer for relief, but ends with this statement:—"I, by way of precaution, submit this petition reporting the matter as stated, and am engaged in search of the property. I will submit a detailed account of whatever may come to light hereafter." So stood things immediately before the execution of the deed of sale. In speaking of what next occurred, it will be convenient, when a date is mentioned, to use the Hindoo month Assin, which covers the whole of the transactions.

The deed of sale was executed on the 26th Assin at Chattuck in the house of one Brijomohun, the dewan or native manager of Mr. Inglis at that place.

On the following day, the 27th Assin, the Caze filed a petition in the Magistrate's Court, which contained the following statement of the circumstances under which, as he alleged, the deed had been extorted from him.

On the 3rd Assin he left Sylhet in a boat, taking with him his official and private seals, his registry book, two gold mohurs, &c. On the way he received information of the loss of an elephant from his zemindaree at Pharrar Poonjee, and in order to seek for and trace out the elephant, he went to that place, which he reached on the 6th Assin. He met there one Dhuneeram Doss, an agent of Mr. Inglis, who, after welcoming him with news of the recovery of the elephant, took him to his lodging and gave him betel and tobacco. On his return to the ghaut he found his boat and property gone. On this Dhuneeram took him back to his lodging and promised to find the boat, but returned in the evening with 40 or 50 armed khasheas, who ultimately were reinforced by 400 or 500 clubmen. His companions were arrested, imprisoned, beaten, and oppressed. He himself was told that Mr. Inglis was very angry with him for having granted the lease to Mr. Sweetland, and that there was no chance of his saving his life unless he would sell the property to Mr. Inglis. On the next day Dhuneeram Doss again visited

him, and told him that unless he agreed to sell the property, he would not get back his boat and property, nor would he be able to save his honor. Under this pressure he promised that after his return home he would "in some way or another get back the lease from Sweetland and sell to Mr. Harry." He then returned home in another boat, and presented his petition of the 9th Assin in the Judge's Court. Some days afterwards he again left Sylhet in the company of Biddyanund Rai the mookhtar of Inglis, went to Chattuck, where he fell into the hands of Dhuneeram Doss and Brojomohun Dewanjee and others, who told him that unless he would sell the mehal to Mr. Harry and receive back his property, he would not be able to recover the latter or return home without risking his life and honor. They kept him under restraint for four or five days, and finally on the 26th Assin compelled him to put his signature to the deed of sale, on which they had already put the impression of his private seal. They then returned his property with some slight exceptions, and released him from confinement. After detailing all these outrages, the petition prayed the Magistrate to cause a local investigation to be held; to have the houses of the parties implicated searched for the property said to be missing; to call for and consider the forged deed of sale which they had thus forcibly got signed, and to issue an order suspending its registration. The Magistrate, on the 19th October 1855, made an order for a local investigation by the Darogahs therein named.

In the other proceedings which followed on the execution of the deed there seems to have been some delay, which is probably to be accounted for by the fact that at that season all the offices were closed for the Doorga Poojah holidays.

On the 14th November 1855, the deed was registered on the appearance of Biddyanund Rai, describing himself as the mookhtar of the party executing, and on the usual evidence of execution. By a petition presented on the following day the Cazee protested against the registration.

On the 18th December 1855, the Magistrate, pronouncing it to be one of the grossest cases that had ever come before him, dismissed the Cazee's complaint, and by another and substantive proceeding fined him Rs. 200 for having brought a false charge. The first of these orders was affirmed; the latter was reversed on appeal by the Zillah Judge on the 23rd January 1856.

That the Cazee should after this have delayed to bring the present suit for nearly six years, is a circumstance which, if unaccounted for, would raise a strong inference against the truth of his case. But this delay is in some measure explained by the intermediate litigation which took place touching the lease to Mr. Sweetland, and which lasted until May 1861. In the course of that litigation to which the Cazee, seeking to get the benefit of an alleged ikrar, as well as Inglis and the persons claiming under Sweetland were parties, the validity of the deed of sale of the 11th October 1855 came incidentally in question, and was affirmed by the decree of the Principal Sudder Ameen of the 14th May 1861.

Their Lordships now proceed to consider the case made by the Cazee in the present suit, and the evidence by which it is supported. He has discarded the whole story of the evidence to which, as he alleged before the Magistrate, he was subjected on the 6th or 7th Assin. It was, indeed, incredible that one on whom such outrages had been perpetrated should return a few days afterwards to perform the promise which had been extorted from him, and place himself again in the power of those who had maltreated him. Moreover the fact that personal violence was offered to him on that occasion was inconsistent with the statements in his petition of the 9th Assin. He does not, however, recommend himself to credit by throwing over the more improbable portions of a story which had been judicially declared to be false, in order to make the rest more plausible. His case in this suit is that the adherents of Inglis led astray the elephant; that having thereby brought him to Pharrar Poonjee, they (about the 6th Assin) concealed his boat and the property therein; that afterwards, and in order to get his chattels

returned, he was induced to go to Chattuck, where, on the 26th Assin, the creatures of Inglis shut him up, and fraudulently having got a deed of sale drawn up in respect of the talooks desired him to sign it; that although he had refused to do so, yet being well aware that there was no chance of saving his life and reputation unless he attached his signature thereto, he signed and left it, and proceeding to the Criminal Court lodged a complaint which had been dismissed. The gist of his case, therefore, is still duress not only of goods but of person,—personal restraint and danger to his life and reputation. And, accordingly, the latter part of the first of the settled issues was as above stated—"Was the deed forcibly taken from him by Mr. Inglis?"

The decrees under appeal must be taken to find this issue in favor of the plaintiff; and either to rule that in consequence of the violence done to him he was entitled to treat the deed as a nullity and to recover the lands without returning the consideration-money, or to negative the fact that the alleged consideration of Rs. 4,000 was paid to him. They do not in terms find whether he did or did not receive that sum.

That the money was in fact paid by Inglis's people and received by the Caze, their Lordships on the evidence have no doubt. The payment is sworn to by the defendants' witnesses, and they are confirmed by at least three of the plaintiff's witnesses, viz., Gazeé Buksh, Gholam Hossein, and Kumuruddee, who all admit that the money reached the Caze's boat. In his earlier deposition before the Magistrate, Gholam Hossein admits this fact even more explicitly, and also his own participation in counting the money. Nor does the Caze anywhere expressly deny that he received the money. From the Magistrate's order it appears that on the investigation of his complaint he did not dispute, if indeed he did not expressly admit, the payment of the Rs. 4,000.

Again, their Lordships are of opinion not only that the evidence in the cause falls very far short of proof that the Caze was subjected to personal violence of the nature and degree stated in the plaint, but that it is insufficient to warrant the general conclusion that the deed was forcibly taken from him. It appears from the testimony of the more credible witnesses produced by him, viz., Gholam Hossein and Kumuruddee, that so far from being "shut up," he lived two days or more during which the negotiation was going on on board his boat which was lying off the ghaut at Chattuck; that he passed freely from his boat to and from the house of Brijomohun the dewah; and that he was in communication with a jemadar of police, who would doubtless have protected him had his liberty been threatened. These witnesses further admit that on the first day of the negotiation, and before there was any show of personal violence, he agreed to grant to Mr. Inglis a permanent lease of the land, though he refused to grant a putnee. The earlier deposition of Gholam Mahomed which, as made *recente facto*, is far more trustworthy than the testimony given by him in this suit, contains an admission that after two days' negotiations, and before going to the house of Brijomohun for the last time on the 26th Assin, the Caze had agreed "to dispose of the mehal for the sum of Rs. 4,000." It further admits that he signed the deed and handed it to Kumuruddee to be sealed. The only pressure to which this deposition, if taken to be true throughout, shows that the Caze yielded was the fear that unless he signed he would not get back his missing property. The statement that though he had told the witness that he would not have been able to save his reputation unless he affixed his signature is indeed thrown in at the end of the deposition. But no fact which renders that statement probable is proved. Against this testimony the evidence of the witnesses from the bazaar is worthless. But even their testimony does not amount to proof of the allegations in the plaint. Their Lordships are, therefore, of opinion that the plaintiff in the suit altogether failed to establish the case alleged, and that the evidence in the cause was insufficient to warrant the decrees under appeal.

Their Lordships need hardly remark that, in coming to this conclusion, they have not been insensible to the difficulty which they always feel in disturbing the concurrent judgments of two Indian Courts upon an issue of fact. They observe, however, that they have not here to deal with a consistent case deposed to by the witnesses for the plaintiff, and contradicted by the witnesses for the defendant—a case of which the determination depends on the credit to be given to the witnesses on one side or the other. In this case their Lordships' conclusion is very much founded on the inconsistencies and imperfections of the plaintiff's proofs. Moreover, the finding of the Courts below is inconsistent with the result of the investigation of the Magistrate held immediately after the transaction, and with the finding of the Principal Sudder Ameen already adverted to in favor of the validity of the deed. The judgment of the Zillah Judge contains several inferences which do not appear to their Lordships to have been warranted by the facts before him, and it treats the order of the Magistrate dismissing the complaint of the Cazee as reversed, whereas it was confirmed on appeal. The judgment of the High Court is a mere statement that the Judges of that Court saw no reason to differ from the finding of the Zillah Judge.

Their Lordships, however, regret to say that they are by no means prepared to affirm upon the evidence before them, that the conduct of Inglis and his agents throughout these transactions was fair, honest, and straightforward. The defendant allowed her defence to be conducted so as to leave her case open to grave suspicions. She has failed to explain what the negotiation really was which induced the Cazee, who a few days before was in a state of hostility, to make the sale. Brijomohun, Dhuneeram, and Biddyanund Mookhtar were all subject to the gravest imputations, yet not one of them was called as a witness to deny the charges against him. They are not shown to have been dead when the cause was tried; it is pretty clear Brijomohun at the least was then alive.

They had to meet not merely the charge of violence, but the imputation of having contrived, by means of the abstraction of the Cazee's goods, to trick him into coming to Chattuck where he would be under their influence, and of having made the detention of his goods the means of pressure upon him. From the latter imputation they have certainly not relieved themselves. Nor has Biddyanund shown by what authority he represented himself to be the mookhtar of the Cazee when he procured the registration of the deed. The non-delivery of the title-deeds, upon which stress was laid in the Zillah Court, seems to their Lordships to be a circumstance of no moment, since it is consistent with either view of the transaction; for those documents are not likely to have been with the Cazee at Chattuck, and his repudiation of the deed followed immediately on its execution. Nor are their Lordships disposed to think that the consideration for the purchase was at the date of the transaction inadequate. The lands, whatever be now their value, were then recently settled; and the peishgee leases afford some criterion of their then annual value.

Let it, however, be assumed that Inglis' amlah entered into the alleged plot to bring the Cazee to Chattuck; that they caused his goods to be abstracted and made the execution of the deed of sale the condition of their restoration; and that, on his side, he agreed to sell, and executed the conveyance in order to get back his goods, but with a mental reservation that he would take the earliest opportunity of impeaching the transaction. The testimony of his most trustworthy witness scarcely carries the case beyond this. What, on such a case, would be his rights? The contract was complete, and he could only be relieved from it in a suit properly framed for that purpose upon proof of facts entitling him to that relief, and upon the terms of accounting for the Rs. 4,000 with interest. Whatever be the law applied to such a transaction, whether it be the law of England which, in this case, was the law of the defendants, or the Mahomedan law, which was the law of the plaintiff, or the general rule of equity

and good conscience, which was the law of the Forum, these consequences would equally follow. The plaintiff could not insist that he was subjected to such duress as destroyed his free agency and entitled him to treat his deed as a mere nullity. He could not both avoid the contract and retain the money. For the law of England it is sufficient to cite *Skeate v. Beale*, 11 Ad. and Ellis, p. 983, or Sheppard's "Touchstone" p. 61. The Mahomedan law on the point may be found in the 3rd volume of the *Hedaya*, pp. 454 to 458. The *Cazee*, however, did not take this course. He thought to gain an advantage over his opponents, by making the transaction the groundwork of false charges which would bring them within the scope of the criminal law. Whether he might have succeeded in establishing a case for such equitable relief, as is above suggested, their Lordships are not in a position to say, since no such case has been alleged or proved before them. On this appeal they can only say that he has failed to prove the case made, and that his suit ought to have been dismissed. To such a case the rule laid down in *Hickson v. Lombard*, L. R., 1 House of Lords, p. 324,* clearly applies.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal should be allowed; that the decrees under appeal be reversed; and that in lieu thereof a decree be made dismissing the suit with costs in both the Courts below. Their Lordships would, however, further recommend that this dismissal be without prejudice to any question as to the lands alleged not to have been comprised in the purchase-deed, or to the title of any person other than the *Cazee* or those claiming as his representatives. They deem this reservation to be necessary, inasmuch as the evidence as to any lands being held by Mrs. Inglis in excess of those conveyed by the deed is altogether unsatisfactory; and a claim appears to have been advanced by certain members of the *Cazee's* family under a title alleged to be prior to that conveyed by the deed, which was not tried—and could not have been tried—between them and the defendant.

The 20th February 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James,
and Sir Lawrence Peel.

On Appeal from the Court of the Judicial Commissioner of Oude.

Act VIII of 1859 s. 205—Attachment and sale in execution—Future award of arbitrators—Invalid order (duty of Judge to recall and cancel).

Syud Tufuzzool Hossein Khan

versus

Rughoonath Pershad and another.

* In delivering opinion in this case, Lord Cranworth said:—I subscribe most readily to the doctrine that where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the Bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or failing that ground then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives. There is nothing of this sort in the pleadings of this case.

Construction of the words "all other property whatsoever, moveable or immoveable" in s. 203 Act VIII of 1859.

A claim under a future award of arbitrators, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled, is not liable to attachment and sale in execution under the above section.

To proceed, so far as the practice of his Court will allow him, to recall and cancel an invalid order, is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor.

This is an appeal from a decision of Sir George Couper, the Judicial Commissioner of Oude, reversing a decree of Mr. Fraser, the Judge of the Civil Court at Lucknow, given in favor of the appellant, the plaintiff in a suit which he had brought to set aside an alleged illegal order of Mr. Smith, the officiating Civil Judge of that city. The order in question cancelled a judicial sale in execution of a decree for a money demand made in a suit in which one Sah Banarsee Doss was plaintiff, and Ramnath, the father of the first respondent, was the defendant; in which suit the plaintiff recovered the sum of Rs. 683 3 annas. The decreeholder, Banarsee Doss, unable to obtain payment of this demand, attached as the property of his debtor a certain claim in a pending arbitration between Ramnath, the judgment debtor, and Sheonath, his former partner. He proceeded, as if in the regular course of such executions, to its sale in satisfaction of his decree. It was sold accordingly by auction by the Nazir of the Court, and the appellant became the purchaser of it for the sum of Rs. 1,350.

The claim was thus described in the notice of sale:—

"The claim of Ramnath *v.* Sheonath, which was remanded by the Lords of the Privy Council for the settlement of accounts, and has been referred to arbitrators."

The sale took place on the 25th October 1866, and on the following day the arbitrators made their award, and awarded to the first respondent, as the son and representative of Ramnath then deceased, the partner of Sheonath, the sum of Rs. 34,000, and the outstanding debts they awarded to Sheonath. These outstandings were partnership debts due to the late firm, in respect of which neither partner, however, had incurred any special liability to the other. The submission, which was in the most general terms, and conferred the most ample discretionary powers on the arbitrators, contained the following expressions: "The case has been made over to you for your decision. We, the parties concerned, agree to have our cause decided among ourselves, and are willing to abide by an amicable adjustment. We, therefore, of our own free will and accord declare and do state in writing that in any way whatsoever our case may be decided by you, the same will be accepted and recognized by us."

The appellant claims to be entitled to the sum of Rs. 34,000, as purchaser of the same at the auction sale for the sum of Rs. 1,350. The sum so claimed, however, had no existence at the time of the attachment; it was not a debt nor liability at that time from Sheonath to Ramnath's son; it was a debt created by the award, and not the liquidation of a preceding unliquidated demand *ex contractu*. It was (in respect amongst other matters) awarded of a then extinguished share of debts which were till then debts due to the partners jointly, and became, under the award, the sole property of Sheonath. It was quite competent for the arbitrator to award money to be paid by, instead of to, the judgment debtors and to give him the outstanding debts. The attachment was not of a several share of the outstandings; had that claim been made, it should have been asserted by a different notice, directed also to the original debtors. On its effect, if so made, it is not necessary to decide.

Mr. Smith set aside the order directing the sale. He made his annulling order *ex parte*, without any notice to the appellant, who was in ignorance of, and had no opportunity of opposing it. The appellant, on becoming aware of the order, petitioned Mr. Smith against it. His petition was received; it stated in

detail all his objections to the order which were fully considered; Mr. Smith, however, adhered to his opinion, and sustained his order.

In consequence of this decision by Mr. Smith, the appellant brought a regular suit to set aside the order annulling the purchase, and to enforce his right as purchaser. Mr. Fraser decreed the suit in his favor; but, on appeal to the Judicial Commissioner, that decree was reversed. From this last decree the present appeal has been brought.

The decision of this appeal depends on the true construction of s. 205 Act VIII of 1859; but before their Lordships enter upon the consideration of the effect of that section they will dispose of some other objections which were urged against Mr. Smith's order.

The Judge proceeded, it is said, in reversing the sale on the ground of irregularity alone. The real objection, however, to this sale, if sustainable in law, is not one of irregularity, it is one which, from its nature, as founded on a want of power in the Court, affects equally, if it be valid in law, the title of a purchaser under a strictly regular sale.

Assuming the decision under appeal to be correct, the sale would be simply inoperative, though uncanceled.

This answer substantially disposes of another objection which was directed against the propriety of Mr. Smith's act in cancelling the sale. The act itself may have been right, though he erred in his mode of doing it.

Mr. Fraser appears to have supposed a Judge of that Court unable to correct his own error, in sending forth, *per incuriam*, an invalid order which he would not have made if duly informed.

To proceed, so far as the practice of his Court will allow him, to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor. It would be a serious injury to the suitor himself to suffer him to attempt to execute an inoperative order.

If, then, the decision appealed from be correct, no other objection can reasonably be urged against the course adopted by Mr. Smith than this, that he did irregularly without notice that which it was his duty by a more regular course to do.

Their Lordships are satisfied, however, that no harm or wrong was done by Mr. Smith's suspending *ex mero motu* an order which appeared to him *ex facie* improper—and this was in effect and substance what he did.

The section on the true construction of which the decision of this appeal depends is s. 205 Act VIII of 1859. After an enumeration of many specific subjects of execution of various natures, the section, at its close, employs very general words, as if to include all property not enumerated. These words, "all other property whatsoever, moveable or immoveable," are in substance the same with the words in the old writ of sequestration pending a suit under the old procedure of the Company's Courts in India. (See the form in Macpherson's Civil Procedure, 3rd ed., p. 196.) This writ issued pending a suit to restrain an alienation commenced, or supposed to be about to be made, on the part of a defendant in fraud of his creditor.

Of this writ and the ordinary writ in execution the author says that scarcely any kind of *property* is exempt from its operation. The old writ of seizure in the same Courts has words less extensive in their import than those in the former writ; and it is obvious that the former, which more resembles an assignment than an ordinary writ of execution, may have had, by reason of the apprehended danger of waste of inchoate demands which might result in debts, a wider effect than the writ of actual execution.

The process now under consideration is one differing from both, it is similar to the seizure of effects in the hands of a garnishee. The question is on what

property that proceeding operates, and not what is the widest reach of any execution, including the appointment of a receiver, which these Courts may issue.

The judgment under appeal refers to a late authority in support of it, which appears fully to bear out the position for which it was cited, viz., that the sums attached must be not inchoate, but existing and definite. No case was quoted in opposition to it.

The section uses the word property, not claim nor right. A mere right of suit is not property, but a title to recover future property.

A debt or property, which is seizable, or may be attached, does not lose those qualities merely by being the subject of a pending suit. The Judge refers to a passage relating to unproved assets which proceeded from a Directory Order of the late Sudder Dewanny Adawlut.

It is certainly said in Mr. Macpherson's work before referred to, that unproved assets may be seized by attachment; but it is also said, in a passage where he is plainly referring to the said order in the same work, that mere rights of suit cannot be attached. These two apparently but not really conflicting positions, may be reconciled by reading the direction as applying to liquidated demands in their nature definite and certain, though *sub lite* and unproved. Various passages from Mr. Macpherson's work on Civil Procedure noted below show that future property cannot be attached. It appears plainly from these passages that a mere expectancy, or a mere right of suit, cannot be attached, that the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. Thus, if the land of A be held by A subject to an option in B to take it at a definite price or sum, the attachment must be of the land and not of the price. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due, may not; and it is added that if a creditor desires to have a security on the receipts of a salary as they accrue, that can be effected only by contract with the debtor and arrangement with him, and not by an attachment by the act of a Court (see pp. 432-434, 3rd edition). Mr. Leith referred in his argument to the family property of Hindoos, and urged such a share in such property may be attached and sold in execution. No doubt can be entertained that such a share is property; that a decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the owner of it, whether by seizure or sequestration, or appointment of a receiver.

In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled. The uncertainty at the time of the attachment and sale was not limited to a mere question of *quantum*; it was wholly uncertain, as Sir George Couper has correctly explained in his judgment, in what the arbitration might terminate.

Their Lordships think that this very case affords a clear proof of the wisdom of that construction which the judgment under appeal has put upon the words of this Act. The Courts have power to secure at once the rights of creditors and those of debtors by a judicious application of the powers of the Act; but their Lordships feel that it would be a cruel wrong and injustice if, under color of an execution, a thing described as a "claim remanded by the Lords of the Privy Council for the settlement of accounts and referred to arbitrators," could be put up to judicial sale: a thing utterly incapable of being estimated or valued, as vague and uncertain and unmeriting a description as if it had been "all the claims of Ramnath against all his debtors." It is obvious, moreover, what a door of fraud would be opened if, pending a reference, the award of the arbitrators could be put up for sale.

Their Lordships throw no kind of doubt on the power of the Court, by sequestration or direct seizure, notice to debtors, or otherwise, to sell or administer, in execution of a decree-creditor's claim, all that the former law allowed him. They do not find in the Act which apparently regulates rather than extinguishes any prior right of a creditor, any evidence of intention to exempt property from executions, but they agree in the observation of the Judge that the Code of Procedure is a new starting point, and must be construed on its own terms, and worked in the mode which it prescribes. Ss. 236, 241, and 243 of the Code provide sufficiently which debts due to the judgment-debtor may be received and applied in satisfaction of the judgment debt without the sacrifice consequent on a judicial sale. And their Lordships are satisfied that there is nothing in that Code to authorise such a sale as has been professed to be made in this case, and which would require for its justification words too plain to be mistaken and too inflexible to be controlled.

Their Lordships will therefore humbly advise Her Majesty that this appeal be dismissed.

The 17th June 1871.

Present :

Sir James W. Colville, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Limitation—Tenants in common—Separate collections.

*On Appeal from the High Court at Calcutta.**

Ranee Khujooroonissa

versus

Syud Ahmed Rezah ;

and

Syud Ahmed Rezah

versus

Ranee Khujooroonissa.

Two owners of an estate in which they had equal shares, having agreed to collect the rents through a collector appointed by the Court, appeared both of them to have collected and received sums in the mofussil from the local agent of the collector and sometimes from the tenants. The circumstances all went to show that their receipts were not receipts which could be alleged to be receipts by a tenant in common antagonistic to his other tenant in common, but that they were all part and parcel of a common arrangement by which the whole of the rents were to be received by the agent, or by the party acting under the authority or with the tacit assent of the agent, the separate collections of each party having to be dealt with as if received from the agent or collector.

HELD that the Statute of Limitation could not apply to a claim by one of the owners against the other as for the collections made during 12 years previous to the institution of the suit, one party having received more one year and less the previous year; and that it would be absolutely necessary in taking the accounts from any date to see what the state of things was between them at that date.

It does not follow that because a man who was tenant in common has received something and has then sold it to another tenant in common, that a third tenant in common can make the purchaser answerable personally for that which was received by the person who has relinquished in his favor.

These are appeals from two judgments of the High Court of Judicature of Calcutta, in two suits which were instituted in the Zillah Court of Purneah. They may be described as a suit and a cross-suit respectively, by the owner

* On appeal from the judgment of Trevor and Macpherson, J.J., passed on the 25th May 1864, in Regular Appeals Nos. 1 to 3 of 1863. See Special Number of the Weekly Reporter 235.

of a joint estate against the other owner or owners of the estate. The High Court dismissed both suits as having been misconceived, their reasons being shortly stated in the judgment before us. One suit was instituted covering a period of twelve years, and treating anything anterior to that as barred by the Statute of Limitation. The other was a suit that sought, by way of cross account, to take the account from a period long anterior to the commencement of the twelve years. The Court in its judgment says—"The first Court was of opinion that the Statute of Limitations did apply to a portion of the claim of Ahmed Rezah, and that the Court could not enter into transactions or revive accounts relating to a period of more than twelve years before the institution of the present suit, and that as the suit was instituted in April 1857, the accounts to be settled by the Court would be those subsequent to 1845, and those only. After examining the accounts, the Judge dismissed the claim of Mahomed Rezah and passed a decree in favor of Enaet Hossein, whose whole claim was subsequent to 1845, for Rs. 34,630-2-10½ pies, with interest of 12 per cent., and costs in proportion. From these decisions two appeals have been preferred to this Court, and the first point to which our attention was called was the applicability or otherwise of the Statute of Limitations to any portion of the claim of Rajah Ahmed Rezah. There can be no doubt that mutual accounts, if they contain some item, or even any one claim within twelve years, would not be barred by the Statute of Limitations, though the rest of the claim were beyond that term. But this rule is strictly confined to accounts between two parties which show a reciprocity of dealings, or, in other words, to transactions in which there is a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. Is, then, the present claim of Syud Ahmed Rezah, as against Enaet Hossein, a claim of this nature? The parties are 8-annas proprietors of the same estate. They have held their shares separate. They have by tacit, if not by express, agreement collected their yearly shares of the rents by their separate endeavours; and, in short, by their acts have taken up a position altogether unconnected with and antagonistic to each other. This mode of action, no doubt, gives the party who has received less than half the yearly net rents of the estate, an action against the party who has collected more than his rightful share of those rents; but his right to these surplus rents arises in consequence of a wrongful act of the other party, and at the end of each year a wrongful act of this nature is a cause of action from the commencement of the year following that in which the surplus collection was made. It follows that these yearly claims are in the nature of separate and distinct demands, against which the Statute of Limitations runs, and that they can by no process of reasoning be brought within those special and particular accounts as against which limitation will not run. Turning, then, to the remarks which have been addressed to us by the learned Counsel on the part of both the plaintiffs, and to the accounts filed, and the case made by each of them against the other, they appear to us that they are founded on a mistaken view of the case as between the parties before us. The contention before us has been that each party as against the other is entitled to one-half of the actual collections made; but in our view this is not the case. Considering the independent and antagonistic position which each party has taken up against the other, and the tacit, if not express, agreement entered into between them as to the mode of collection, it seems clear that neither party has a claim against the other on account of superior diligence exercised by him in the collection of the yearly rents, but that the only ground on which a right of action accrues to either party is the realization by the other side of a sum larger in extent than one-half of the yearly rents, that is, of a sum beyond that to which he is of right entitled. That such has been the case—that Mahomed Rezah and Enaet Hossein have, during any of the years covered by these suits, collected a sum beyond their legal right, that is, one-half of the net rental of the estate, has not been attempted to be shown

to us; but the learned Counsel have only entered into elaborate calculations founded upon very infirm data, of collections actually made, and have thereupon asserted the right of their respective clients to one-half of the net actual collections. Such a view of the case, as we have above observed, is altogether inadmissible."

Proceeding upon that footing they find that neither has received more than his half, and they proceed to dismiss both suits. Now in this view of the case, as stated by the Court, their Lordships are unable to concur. Their Lordships are not satisfied either upon the case as stated by the pleadings, or upon the facts as proved in evidence, that the position of the parties was that of parties unconnected with, and antagonistic to, each other—each collecting only that which he could by his diligence collect of the rents of the estate.

The material circumstances are these:—The parties having had quarrels with one another had first of all a collector appointed by superior authority. They then, having got rid of the official collector or manager, appointed an agent of their own; they then again were obliged to be placed under the control of the Court, who appointed an official manager. The duty of the agent and the manager was to receive all the rents and to divide them between the parties. Both parties, however, appear to have collected and received sums in the mofussil from the local agent of the collector, and sometimes from the tenants. The whole of the circumstances, however, show to their Lordships that their receipts were not receipts which can be alleged to be receipts by a tenant in common antagonistic to his other tenant in common, but that they were all part and parcel of a common arrangement by which the whole of the rents were to be received by the agent, or by the party acting under the authority or with the tacit assent of the agent, so that the whole was to be treated as a sum received by the agent, or in his behalf, the separate collections of each party having to be dealt with as if received from the agent or collector. That being so, it seems also to their Lordships that it would be impossible to apply the Statute of Limitations to the claim, because if the account was a continuing account—one party having received more one year, and having received less the previous year—it appears to their Lordships impossible to say, "We will cut the account short at the twelve years, and not allow your receipts during the twelfth year, *ante litem*, to go to pay that which was due to you in the thirteenth year, *ante litem*." It would be absolutely necessary in taking the accounts from any date to see what the state of things was between them at that date.

That being so, their Lordships have to consider what really was the decree which the High Court ought to have made upon the appeal in Enaet Hossein's suit, which is the one now substantially before us, because it is stated by the other appellant that if that appeal is decided in his favor, so that nothing is decreed against him, he is not minded to prosecute any claim on his part further.

It resolved itself therefore into this, whether the decree awarding Rs. 34,000 and interest to Enaet Hossein was well founded, and whether the appeal ought to have been allowed. The accounts were, in the first instance, referred to Mr. De Courcy. Mr. De Courcy took those accounts. The result was complained of by both parties. Their Lordships have before them the objections which were taken by the respective parties to the accounts of Mr. De Courcy, which objections were really the matters for decision before the Court of first instance. Of course it would be impossible to ask any Court to go and retake an account, which, by reason of its complicated character had been referred to an expert to take between the parties, and therefore it was quite right for the Court not to go through all the items of the account, but to require and obtain from either party the objections which he took to the account as so taken. Both parties thereupon do present their objections to the account. Mr. Simson, the Judge of the Court below, proceeds to deal with these objections; and it is in respect to the mode in which

he has dealt with these objections that it appears to their Lordships that they are able to come to a conclusion which will dispose of the appeals to-day. The balance found due is Rs. 34,000. There is one item alone of Rs. 56,000 to which an objection was taken, which would more than cover that balance, if the objection were well founded and ought to have been allowed by Mr. Simson. That objection arises with respect to Rs. 56,000, which, by the admission of both parties, was not received by Ahmed Rezah, the defendant; but was actually received by his half-brother. But that receipt by the half-brother of the Rs. 56,000 was treated by Mr. Simson as a receipt by Ahmed; and it has been contended before us that that was rightly so treated, at least that we have not got the materials for saying that it was not rightly so treated, and that we ought, therefore, if we differ from, or doubted the truth of, the conclusion arrived at by Mr. Simson, to send it back again for further investigation. But it appears to their Lordships that the case with regard to the receipt by Ahmed's brother does appear sufficiently before them to enable them now to arrive at a conclusion without referring it back to take any further evidence, or to enter again into the account.

Now, Mr. Simson has treated Meeran—and it has been suggested before us that he has rightly treated him—as being a mere name and a mere sham; as a person who really was receiving for Ahmed, and that his receipts were to be treated as Ahmed's receipts. But it appears that Meeran had really obtained a decree entitling him to a certain portion of this estate, as an ancestral estate. He was a half-brother of Ahmed, and was therefore *prima facie* entitled to share in the estate. He had obtained that decree, and after obtaining that decree he did receive the amount of collections which have been brought into this account. There is nothing to satisfy their Lordships, and nothing apparently to justify the assumption of Mr. Simson, that he could treat the whole of that as a mere sham and collusion between Ahmed and his half-brother, for the purpose of preventing Ahmed being responsible for these receipts.

But it does not rest merely upon that. It is important to see in what way the plaint itself in the original suit treats Meeran's position. The plaint in the original suit does not treat Meeran as being a mere sham, as being a person who was not entitled to receive the rents, but says that Meeran was a shareholder and was made a defendant in the first instance as one of the parties to account. The plaint says this: The share of Meeran in the zemindary, was in the possession of Syud Ahmed Rezah, and Syud Ahmed Rezah knowingly, notwithstanding this extent of appropriation by Meeran, has granted Meeran certain mehals under putnee pottah, in the name of Moosah Rezah, his son, in proportion to his share in the malikanah profits, and got a deed relinquishing claim on the zemindary executed by Meeran. Hence the responsibility for this money collected by Meeran which appertained to the zemindary devolves upon Ahmed Rezah personally. Whatever Meeran received under the denomination of his own malikanah from the Mostajirs and Malgoozars of the pergunnah, Ahmed Rezah, after he had the deed of relinquishment executed, not having given to Mostajir and Malgoozars credit for such money collected and appointed by Meeran, has realized it over again, proofs as to which are forthcoming. Meeran and Ahmed Rezah are both step-brothers, and the estate of Meeran is included in the said 8 annas in the possession of Ahmed Rezah. Thus, whoever of the partners of that 8 annas appropriates, responsibility thereof devolves upon Ahmed Rezah, the occupant of the entire 8 annas of the zemindary. Still, it is considered expedient to make Meeran *pro forma* defendant. That is the case which is made there: that is to say, a charge is made as to the receipt, the only ground for it being that there was an actual receipt by Ahmed. "We charge you with the receipt of money for our use because Meeran received it." The ground upon which they put it is—"Meeran is your brother. You are the joint owners of the one-half which is divided between you. There has been some deed by which, subsequent to the

receipt, Meeran has relinquished his share in favor of Ahmed for a valuable consideration. Therefore, we will treat the receipts in respect of the whole of that half which was divided between Meeran and Ahmed as being receipts for which they are jointly and severally liable." That seems to their Lordships to be the foundation of the claim in respect of the receipts of Meeran. In point of law, it is to their Lordships quite clear that no such claim can be sustained; that it is not because a man who was tenant in common has received something, and has then sold it to another tenant in common, that a third tenant in common can make the purchaser answerable personally for that which was received by the person who has relinquished in his favor. That is the case made; and there is no case whatever made, and no evidence before their Lordships to show, as has been suggested, that Meeran was merely a name and a sham, receiving everything he did receive on behalf of Ahmed.

It appears to their Lordships clear that Ahmed ought not to be made, and could not legally be made, personally responsible for the Rs. 56,000 in a suit which, in their Lordships' view, was sustainable only as a suit for adjusting the account between the parties in respect of their respective receipts from the common agent, or which they had intercepted on the way to the agent. That being so, it entirely turns the balance against the plaintiff. The plaintiff did not, therefore, in the Court below, make out the proper proof to his right to any balance at all as due to him, and the suit in the Court below ought to have been dismissed,—their Lordships agreeing in the result with the High Court, although compelled to dissent from their grounds of decision.

The one suit is thus disposed of, and the plaintiff in the other suit is satisfied with things remaining as they are, and does not seek to have any further accounts or to proceed with his appeal. Under the circumstances of the case, and both appeals having come on together, their Lordships do not think it right to give any costs of either appeal.

Their Lordships therefore agree humbly to report to Her Majesty, as their opinion, that both the decrees of the High Court should be affirmed, and that both appeals should be dismissed, each party bearing his own costs therein.

The 22nd June 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James,
Lord Justice Mellish, and Sir Lawrence Peel.

Practice—Decree for possession—Boundary.

*On Appeal from the High Court at Calcutta.**

Baboo Puhlwan Singh and others

versus

Maharajah Moheshur Buksh Singh;

and

Maharajah Moheshur Buksh Singh

versus

Megburn Singh and others.

* The appeal in the first case (that by Puhlwan Singh) was from the judgment of Steer and Kemp, J.J., in Regular Appeal No. 494 of 1863, decided on the 29th April 1864; see Special Number of the Weekly Reporter, p. 191. The appeal in the second case was from the judgment of Kemp and Seton-Karr, J.J., in Regular Appeal No. 361 of 1865, decided on the 17th April 1866;—See 5 W. R., p. 211.

HELD that although it is open to parties before the Privy Council to allege that a mistake has been made in point of law which they did not raise in the Court below, they must clearly make it appear before the Privy Council that the mistake was really made by the Judge below, and that the decision is in fact attributable to such mistake.

Where a decree directed that plaintiff should obtain possession of land according to the boundaries given in the plaint and also specified the quantities of land of which he was to obtain possession, and it turned out that those quantities were not strictly accurate, it was held that the decree should be interpreted as if it were a conveyance of land stating the boundaries and then saying that it contains so many acres; and that the plaintiff was entitled to all the land contained within the boundaries stated in the plaint, the mistake in the quantities stated in the decree being merely a false description.

This was a suit in the nature of an action of ejectment, brought to recover a considerable quantity of land which was alleged to belong to the plaintiff, on account of its having been gained by accretion to four mouzahs which had been previously his property. Besides certain defences in point of law which have all been abandoned before us, there were two substantial defences in point of fact on the merits which were raised by the defendant. First, he said in substance that the land was not gained gradually by accretion, as alleged by the plaintiff, but was what is called a chuckee, and after stating the facts, as he alleged them to be, he summed up by saying—"In consequence of the route thus described by the river, the chuckee in suit stood firm, retaining all the traces of numbers and boundaries, and continued without opposition on part of any one in the occupancy of your petitioners." Then he raised a second defence on the merits, by which he said—"The land in the south and north of the disputed land is in the possession of your petitioner, hence, were it even admitted according to the plaintiff's false plea that the diluvian was by Dhooee, still considering the land in suit to be a part and parcel of the land Nos. 447 and 912 in the occupancy of your petitioners, none but your petitioners, under the provisions of the very law quoted by the plaintiff, could be entitled to its possession." Issues were framed on those pleadings. Both parties were allowed to present their issues, and then the Judge, out of the issues presented, framed those which were to be tried. The material issue was this—"Whether the disputed lands have been gradually washed away and have accreted on the estate of the plaintiff by obliteration of its former marks, or whether by the sudden change of the Ganges they have accreted with a continuance of the former marks." This issue a little confuses the matter by bringing in the marks as if they were necessarily conclusive of the question—"Whether the disputed lands have been gradually washed away, and have accreted on the estate of the plaintiff;" as if it followed that because the marks were obliterated, therefore the land had gradually accreted. The other alternative is put in the same way—"Whether, by the sudden change of the Ganges, they have accreted with a continuance of the former marks." Then there are further issues—"Even if gradually washed away, whether, on the ground of the same being intermixed up with other lands in the possession of the defendants on the south and north of the disputed lands, the defendants are entitled to the same or not?"—"Whether the plaintiff, after being in possession of the disputed lands, has been ousted by the defendants or not, and whether any land adjacent to the disputed land amongst the accreted lands, is still in the possession of the plaintiff, or whether the plaintiff was never in possession of the contested lands?" A great mass of evidence was given. The Judge in the Court below, the Sudder Ameen himself, inspected the ground on several occasions, and most careful enquiries were made on the spot as to whether the land had gradually accreted or whether it had been a chuckee suddenly formed. It was then ordered that an Ameen should draw a plan, and survey the land and present a report to the Court. That accordingly was done. He framed the plan in the suit which is before their Lordships, which shows by distinctive colors—yellow, pink, and green—the land sought to be recovered in the action, the chuckee which is admitted still to belong to the defendants, and land which is in the possession of the plaintiffs but is claimed by the defendants.

Now, the questions which really arise are two,—first, whether the land has gradually accreted, and how that issue ought properly to be determined ; and secondly, whether the defendants, by reason of their chuckee, are entitled to any portion of the land, even assuming that it has been accreted ?

As respects the first question it is necessary to consider, have the Courts below been wrong in point of law, or have they committed any error in fact ? Now, no doubt their Lordships at one period of the argument had considerable doubt whether there might not have been a mistake in point of law, because looking at the nature of the report of the Ameen and of the judgment of the first Judge, and even at the form of the issues, there appeared reason to doubt whether it had not been supposed that if the surface of the land had all been changed, and the marks had all been obliterated, so that no houses or trees or mounds or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river,—that was conclusive of the question. Now, if the Court below had meant to say that was conclusive in point of law, so that the land was to be considered as land gradually accreted, even although the channel of the river had changed and had gone from one bed and course to another ; if the Court below had meant to say that, if the marks of the old channel were obliterated, and if the marks of the land between the old channel and the new channel had also been obliterated, by reason of the water having flowed over the surface and washed off the old land, and brought new sand and mud down upon it ; notwithstanding there was land left between the two channels which had not, in fact, fallen into the river and been entirely sunk into the channel itself,—if they meant to say that was conclusive, their Lordships would have thought they would clearly have been wrong in point of law. But upon the whole of the case it does not, in fact, appear that the defendants ever substantially raised that question before the Court below at all. In their arguments they appear to have assented to the framing of the issues in the way in which they were framed, and they appear to have assented to resting their case on the question whether the land which is sought to be recovered did or did not on its surface appear to be entirely new and fresh-formed, with no marks of the old cultivation and habitation upon it, or whether it had, as they seem to have alleged it had, houses and trees, and boundaries and marks of the old cultivation upon it. Certainly, when parties before their Lordships allege that a mistake has been made in point of law, if they have not raised that question in the Court below, although it is certainly open to them to raise it here, yet their Lordships ought to be very certain indeed that the Judge really has made the mistake imputed to him, and that the decision in fact is attributable to such mistake. It may well be that the Judges made no such mistake at all, that they perfectly understood what gradual accretion is, and what the true rule of law on that subject is, and that they meant merely to say that, as a matter of fact, which no doubt was a material fact to ascertain, there were none of the marks of the old cultivation upon it which the defendants had alleged. If any marks of the old channels, or of the old houses, and of the trees, and of the old mounds, could have been found, that would have been conclusive against the plaintiff, and therefore it was a matter very material to be enquired into. It did not necessarily follow, nevertheless, that because no marks were found, therefore the plaintiff had proved his case, but it does not appear that that objection was ever taken. The parties were content to rest upon the issues as framed, and it may be that they all thought, and possibly thought rightly, that under the circumstances, the condition of the land would be the best evidence which could be given as to whether the land really had gradually accreted, or whether there had been a sudden change in the course of the river. Therefore their Lordships think that it is impossible to say that either of the Courts below came to any wrong conclusion in point of law on the question of accretion.

Did they then make any mistake in point of fact? And certainly, looking at the great extent of the changes, and particularly at the maps, and some portion of the evidence, there might be some reason to doubt whether the whole of it had really accrued by gradual accretion as alleged. But their Lordships are of opinion that the case clearly comes within the rule which they have so often laid down, where the dispute turns upon matters of fact and where the Courts below have agreed on the conclusion which they have come to respecting that fact. This was a case where a careful examination on the spot was most material towards coming to a proper conclusion on the fact. That examination was held, and apparently very carefully held, and it was after that examination that the first Court came to a conclusion in favor of the plaintiff on that part of the case. The High Court came to the same conclusion, and their Lordships are of opinion that there is certainly no such error shown in that conclusion as would enable them, or make it right and proper, to reverse or alter that decision. It may be added that the map of 1851 appears to their Lordships to show that as respects one great change that took place in the course of the river, the effect of it was that the plaintiff got a large acquisition to his mouzahs, and that what he so got, which contains a large part of that colored green, and probably a small part of that colored yellow, was gained by gradual accretion. Therefore, on the whole, their Lordships think that they ought to come to the conclusion that the first material issue was properly proved and decided in favor of the plaintiff.

Lopez's case* was very strongly urged upon their Lordships; but their Lordships do not think that this case is at all governed by the decision in Lopez's case. That was a case where the river first went forward, and then, after a certain number of years, came back again, and brought to the surface the ground which had been sunk. It was held that that went back to the old owner. Here the sole question is,—has the land, by gradual accretion, been accreted to the estate of the plaintiff, the defendants not having at all raised the issue that it was their old ascertainable land, swallowed up and then restored? As their Lordships are not convinced that the Courts below have erred in point of law, and as they have taken very careful means to go right, and there is nothing to satisfy their Lordships that they went wrong in point of fact, their Lordships are of opinion that their judgment on that part of the case ought to be confirmed.

But there is a second very material portion of the case, namely, whether the whole of the lands have really accreted on to the plaintiffs' land; and certainly the map itself, to the eyes of everybody who looks at it, appears to show that it is a very extraordinary conclusion that these lands have wholly accreted to the plaintiffs. Here we have on the south the chuckee, admitted to belong still to the defendants; the land on the other side of the river belongs to the defendants: and yet it is supposed that many hundred acres of land in fact directly situated between the defendants' land and the river, and their land on the other side of the river, somehow or other have accreted to somebody else's estate, and not to theirs!

The Judge in the Court below, dealing with this question, deals with it very shortly, and says they cannot claim any portion of disputed land as having accreted or belonging to their land, because the river Ganges flows between them. That is in itself unquestionably an inaccurate statement. The river Ganges does not flow, at least did not flow, at the commencement of the suit, or for some time previously, between them. What had happened was this. The river Ganges had originally flowed, as is admitted on all hands, at the bottom of the undisputed chuckee. Then, by what is admitted to have been a sudden change, a portion of the Ganges began to run above the chuckee, and between what is now the chuckee and the disputed land which is colored yellow. Now it seems quite clear from the description of the premises that the whole of that portion of the stream which so

* 14 W. R. P. C. 11; and p. 336 *ante*.

flowed between the chuckee and the land colored yellow, and in fact much of the land colored yellow itself, was then the property of the defendants. Therefore, the whole that was there before the Ganges came was the property of the defendants. Well, then the Ganges comes there. It is not necessary, perhaps, to say what exactly the effect of that might have been on the soil covered with water. Their Lordships must not be supposed to say that that was taken away from the defendants. But, at any rate, the moment that the Ganges left that stream which it had so formed—and it certainly does not appear to have remained there above a year or two, as far as their Lordships can discover—the moment that course became a nullah, dry in the dry season, it appears to their Lordships quite clear (and indeed Lopez's case would be for that a direct authority) that that land which had been covered with water, when it ceased to be covered with water, became the property of the defendants. The consequence is, that the defendants were themselves the owners of the land to which the greater part of the new land accreted. It appears to their Lordships quite clear that that portion of the yellow which is *ex adverso* the chuckee must be taken as accreted to the chuckee.

As to the other portion, their Lordships think that the plaintiffs have shown that the land colored green was in their possession, and that that portion which is *ex adverso* the land colored green, has accreted to that land. The High Court on this part of the case took a view which certainly appears rather surprising, that because the defendants had mainly no doubt, and principally denied that the land had accreted at all, and had said that it had been caused by a sudden change in the river, and had not been caused by gradual accretion; that because they said that and failed, they were not entitled to rely on their second defence, which is most clearly stated in their pleadings, is most clearly stated in the issue, and is also stated in the judgment of the first Judge in the Court below. It is to their Lordships perfectly clear that the mere fact of their having relied on their first defence could not possibly prevent them also relying on their second defence if the first defence failed. The final result is that there must be a division of the disputed land, each estate taking that which is *ex adverso* its own frontage. The carefully prepared map of the Ameen shows with sufficient accuracy how this division is to be made. Their Lordships think that taking the point where the extreme left of the yellow at the bottom of the nullah intersects with the land colored white in the map directly below the green, a line must be drawn from that point, as nearly as may be perpendicular to the course of the Ganges, until it meets the river, and that the land which lies to the right of that, that is to say, to the south-east of it, will belong to the defendants, and that the land which lies to the north-west of it will be the only land which the plaintiff is entitled to recover in this suit.

With reference to the second suit, their Lordships think that the point on which the High Court decided that suit does not arise, because they say that the plaintiff has not recovered the whole of the lands which he might have recovered in the first suit. Now they arrived at that conclusion from this consideration: the plaintiff, in his plaint in the first suit, specified the boundaries of the lands which he sought to recover, and he most clearly specified the boundaries towards the Ganges as being the river Ganges itself; and there can be no doubt that he sought to recover the whole of the land which he said he was entitled to up to the Ganges, but he stated also the number of beegahs that there were in his plaint, according to his measurement, as 2,967. When the Ameen of the Court came to measure it, he found that there were more beegahs than the plaintiff had estimated, and therefore the High Court came to the conclusion that he had only recovered the 2,967 beegahs. They did not alter the judgment of the lower Court at all, but simply affirmed the judgment with costs. The High Court then comes to the conclusion that, having recovered only that quantity, he had

failed to recover the excess, which is therefore not his, and that the subsequent accretion is to that excess. It is not easy to see, if he was not to recover the whole of the land between the boundaries which he had stated in his plaint, what portion of the land stated within those boundaries he was not to recover; and it is not very easy to see why that portion has been taken from the land next the river rather than from any other portion. But their Lordships are of opinion that that is really a misconception of the true legal effect of the decree of the Court below. That decree is this:—"That a decree be given to the plaintiff, that the plaintiff obtain possession of 2,967 beegahs 10 cottahs of disputed land mentioned in the plaint, and in the map of the Court Ameen, according to the boundaries given in the plaint." Well, now, the judgment is that he is to recover it according to the boundaries given in the plaint. It is true, it goes on to specify the quantities, but it turns out that those quantities are not strictly accurate. Then the question is, which is he to recover, the quantities or according to the boundaries given in the plaint? Their Lordships think that it must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities. Their Lordships think that that principle ought to be applied to this case, because they find among the rules which prevail in the Courts in India, it is stated:—"Where the boundaries of the property in suit are required by the Code to be specified, they ought to be stated with as much precision as possible, a map being, if necessary, annexed to the plaint, or some map which has the character of a public document being referred to; but if the boundaries be set forth, the land may be decreed to the plaintiff, even though the quantity be somewhat more than they stated in the plaint." Now, that is the very thing that happened here. The quantity was somewhat more than they stated in the plaint; but their Lordships think that the true construction of the decree in the first suit was, that it was a judgment for all the land contained within the boundaries stated in the plaint. That being so, the ground on which the Supreme Court relied in the second suit, namely, that there was a splitting of the suit, did not arise at all, because he has recovered in the first suit all the land which he could recover. In the result as arrived at by their Lordships, he has not in fact recovered anything like what he has claimed. At any rate that point does not arise, because it was not correct to say that it was not necessary to bring a second suit. There was a continual fresh accretion going on during the two years which elapsed between the time when the first suit was commenced and when the second was brought. It appears to their Lordships that the second suit is substantially brought for that newly accreted land, and the decision in the second suit ought simply to follow the decision of the first. To avoid any possible misconception, their Lordships have had the line drawn on one of the copies of the Ameen's map which is to be annexed to their report, and so much of the land claimed in the second suit as lies to the north-west of the line which has been already specified, their Lordships think the plaintiff is entitled to recover in the second suit.

There will, of course, be some further question about the mesne profits; and it appears that the cases must go back to the Court below for the purpose, first of all, of fixing the boundaries as described in the line which has been specified; and next, of finding out what are the real mesne profits according to these boundaries. There is no information before their Lordships by which it is possible that they could specify what those mesne profits should be.

As to the costs, their Lordships are of opinion that, as respects the costs in the first Court, they should be given according to what is the ordinary practice of the Courts in India as to giving costs in cases where a plaintiff recovers a portion only of the land which he claims, and there is a successful defence as respects the

other portion. Their Lordships are further of opinion that, under all the circumstances, there should be no costs at all to either party, either of the appeals to the High Court or of the appeals that have been brought to the Queen.

Their Lordships will, therefore, recommend to Her Majesty that an order be drawn up in accordance with these terms.

Their Lordships' recommendation to Her Majesty on these appeals will be that she would allow both appeals, and declare that the plaintiff in the suits (the Maharajah) is entitled to so much of the accreted land as lies on the north-west of the line drawn on the map annexed to this report, and that the defendants are entitled to so much of the accreted land as lies on the south-east of that line; and that she should remit the causes to the High Court, with a direction to put the parties in possession, and to settle the amount of wasilat payable and receivable by either, in conformity with the above declaration. And declare further, that the costs of both the suits in the Zillah Court should be paid and received by the parties according to the practice of the High Court, in the proportion which the amount recovered by the plaintiff bears to the amount claimed by him, and that each party should bear his own costs in the High Court; credit to be given for any costs which have been already paid; and that there should be no costs of either appeal.

The 27th June 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Novation of Bond—Pl. and Surety—Government bonds—Evidence.

On Appeal from the late Sudder Court at Agra.

Lalla Bunseedhur

versus

The Government of Bengal.

In a case in which a surety was sued by Government for the amount of defalcations committed by the person for whom he was security during the period of six years out of a total period of eight years for which he held office, it appeared that the surety bond was renewed only three times,—the old bond being retained by Government,—and that in the other years the Government did not renew the bonds but made an enquiry into the sufficiency of the security. It was contended by the surety that by the renewal of the bond, each bond as it was renewed was in fact a novation, so that no action could any longer be maintained upon the old bond, and the surety was only responsible for the deficiencies which might have taken place subsequently to the giving of the last bond.

HELD that in the absence of any thing to show that the Government knew of the frauds or that the surety had any idea that he was discharged or had a right to the old bonds, it could not, in this case, be inferred that it was intended to discharge the old bonds, if after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence.

The *ex-parte* deposition of a witness who might have been called and cross-examined at the trial ought not to have any weight given to it.

This was an action brought on the part of the Government of Bengal against Lalla Bunseedhur, who was a surety for the Treasurer of the Mirzapore Collectorate; and it was brought to recover a sum with interest of upwards of Rs. 60,000. The case on the part of the Government was that between 1843 and 1848 the Treasurer had been a party to the embezzlement of the sums of money in question. Now, the first defence that was relied upon was a defence in point of law. It appears that the surety bonds were three times renewed. The Treasurer occupied

that position for a period of eight years. The bonds were not renewed every year,—they were three times renewed, and in the other years the Government did not renew the bonds, but they made an enquiry into the sufficiency of the security. The first point that was argued on the part of the appellant was, that by the renewal of the bonds each bond, as it was renewed, was in fact a novation, so that no action could any longer be maintained upon the old bond, but it must be taken that by an examination of the accounts, the Government had satisfied themselves that no fraud or embezzlement had been committed up to that time ; and that though they did not give up the old bond, yet, practically, the new bond was to be taken in lieu and satisfaction of the old bond ; so that the surety only became responsible for the deficiencies which might take place subsequently to the giving of the new bond. If that defence was correct, the consequence would be that there would be a defence to all except any deficiencies which might be proved subsequently to the giving of the last bond. Their Lordships are of opinion that that defence cannot be maintained. It rests entirely upon this, that we are to infer that each new bond was given in substitution for the old one. The Sudder Court says that in their judgment the new bond was given probably under a misapprehension of what was the proper construction of the orders of Government, which require that from time to time—in fact, annually—there should be an examination into the sufficiency of the securities. They seem to have thought that made it necessary, or, at any rate, desirable, that new bonds should be given ; but, however that may be, the question simply is—are we to infer that it was intended to discharge the old bond, if, after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence ? If, indeed, the Government had known of the frauds, that would raise a totally different question, for then, of course, they ought to have warned the surety, and not allowed him to go on by giving a new bond. But that is not contended. It is not suggested that until the year 1848, when the discovery was made by one of the parties in the office making a statement to the Government, the Government had any suspicion whatever that any frauds were going on. The old bonds were never given up. The surety did not ask for the old bonds. There is nothing to show that he had any idea that he was discharged, or that he had a right to the old bonds, and their Lordships think that the explanation given by the High Court is the correct one ; but whether it is correct or not, there is nothing to show that the Government intended to give up or abandon any claim that they had upon any of the bonds. Then it was argued that at any rate the Government having satisfied themselves, by their Collector, and by the examination which they made of the accounts, that no fraud had been committed, and that the accounts were correct, the new bonds were given upon the faith of the accounts being correct, and that they are to be estopped from saying that the accounts were incorrect. There does not appear to their Lordships to be any ground for that argument. There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts and not discovering the frauds sooner could operate as a discharge. The object of having securities is that if secret embezzlements take place the Government may have a security upon which they can rely.

Then with respect to the case itself. The mode in which the alleged frauds were committed is stated very clearly in the judgment of the Zillah Judge. He puts it in this way :—“ The Government asserts that the embezzlement occurred in this way, viz.,—the Treasurer received sums of money on account, revenue of villages, &c., which he did not pay into the Government Treasury, or enter in his Hindie Siaha ; but, in connivance with the Siaha Navees and others, entered in the Persian Siaha as received by transfer, although there were no deposits on account of the said villages, &c., from which payments by transfer could be made, at the

same time referring in the said Sialia, and also in the receipts he gave for the said sums, to orders issued for payment by tranfer from *bond fide* deposits relating to other villages, &c., which payments were again made up from moneys paid into the Government Treasury in advance on account of other villages, &c., which will be adverted to below. Bunseedhur, in his answer, does not positively deny that the sum sued for has not been embezzled, but he insists that Sreekishen never received the items forming that sum, or they would be in his Hindie Sialia; and, moreover, Irasals have not been adduced to show that the sums were sent to him to take charge of; and that, in short, the Persian Amlah and Tehseeldars are the embezzlers, and not Sreekishen. I consider that the statement of the Government proved as to the amount embezzled."

Now, that being the sort of charge that was made, it was strongly argued on the part of the appellant that it was proved only by inadmissible evidence; and, indeed, it is on account of this allegation that the charge was only supported by inadmissible evidence, that their Lordships have been induced to hear this case at such considerable length as they have done, because, if it had been simply an ordinary case in which it was a pure question of fact, which both the Courts below had agreed on, it would have been governed by the ordinary rule, that unless it could be clearly shown that the Court below had made some plain mistake the judgment ought to be affirmed. Now, it is alleged that they made a plain mistake in this way. That there was a great deal of inadmissible evidence, to which both the Courts below gave weight—not only evidence which was inadmissible by the law of England, but evidence which ought not, in fairness and justice, to be allowed to have any weight.

That alleged improper evidence consisted principally of this: when the alleged frauds were in the first instance discovered, the first thing which was done was that the Collector went down to examine into the matter; and to examine everybody who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither Sreekishen nor Bunseedhur were present. Now, certainly, if any substantial reliance had been placed upon those depositions—if this case could not be proved independently of them, their Lordships would have been disposed to think it would certainly have been wrong to place any weight upon their evidence. If they were alive (and there is nothing to show that any of them except Sreekishen himself were dead), they ought to have been called at the trial; and to rely upon an *ex-parte* deposition of a witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to. But as respects Sreekishen himself, he was frequently examined; first he was examined by the Collector, and subsequently he was examined by the Magistrate, and then afterwards he was tried and found guilty; and subsequently an action being brought (into the details of which it is unnecessary to go at present,) he was examined again, and then alleged that he was innocent. Now, their Lordships do not consider that his evidence ought necessarily to be entirely rejected,—it probably would not be satisfactory to support a case upon an admission made by him alone, if the other evidence was not sufficient to amount to strong evidence against him; but if there is strong evidence against him, then probably the examinations (at any rate the examinations before the Collector) might be referred to for this purpose at least, namely, to see if he could give any satisfactory explanation of the charges which were made against him.

Then, as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the Zillah Court and of the Sudder Court (certainly of the Sudder Court), and their Lordships are disposed to think of the Zillah Court also, that any reliance was placed upon

them, and therefore they may be rejected. The real question is, therefore, first of all taking the evidence which must be and everybody says is admissible, how does the matter stand? There are three things to be made out, that there was an embezzlement, that the sum embezzled amounted to the sum claimed, and that Sreekishen, the treasurer, had a guilty knowledge of, and was a party to, those embezzlements. Now, was there an embezzlement of the amount claimed? Upon that question there really was no serious dispute in the Court below. It is charged plainly in the plaint,—the answer does not in plain terms state that there was no embezzlement at all. On the contrary, in the very first answer, the substantial defence is that if there was an embezzlement, Sreekishen was not a party to it. But it did not rest there. All the voluminous documents with which the Government supported their case, the bill of discovery having been filed previously, were open to examination on the part of the defendant.

Then the accountants were called, and they stated what the result of all the documents was ; they stated that they did show a deficiency in the accounts to the amount claimed,—that is the only possible way in which a fraud of that kind can be proved, because it is quite impossible for the Court itself to go into every single item of the voluminous accounts. In this country it is the practice to call an accountant, who goes through the books ; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way. Now, the appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive banker, and they appear to have been clerks of his own who themselves went through these accounts, and after they went through them, they were asked did they want any more documents,—was there anything that the Government could produce which they required? They said there was nothing more. They were examined. Their evidence has been read to their Lordships ; and the result of that evidence is that an examination of all these documents tends to show that there was an embezzlement in these accounts to the amount stated. But they rest their defence upon this : they say these accounts do not make out that Sreekishen, the treasurer, was a party to the embezzlement. The result come to from an examination of the accounts, as they allege, is that they only show that the persons who kept the Persian accounts had been parties to the embezzlement, but that they do not show that the treasurer had been a party to it.

The question, therefore, in their Lordships' opinion is reduced to this—is there satisfactory evidence that Sreekishen, the treasurer, was a party to these embezzlements? and that also in a great measure resolves itself into this—is there satisfactory evidence that these sums in question were received in cash at the treasury at all? for if they were received in cash, then, according to the ordinary course of business, they were handed over to the treasurer himself; and inasmuch as the Persian clerks never handled the money, it is impossible to see, if the money really was brought into the treasury, how, by any manipulation of the accounts, the Persian clerks, who had not got the money, could possibly carry out these frauds or embezzle the Government money without the knowledge and assistance of the treasurer.

How then does the question stand as to the way in which the payments were made? The actual practice was this : the payments were either made in money or were made by transfer of deposits. When they were made in money from the village authorities, an authority to receive the money was procured to show that it was the intention of the person who had the money to pay in cash. He brought the money to the treasurer. The practice was that it was carried into the room where the treasurer was, and it is stated by some witness that somebody else was always there with him, and there the money was paid over. There was a receipt, and there is produced a form of the receipt for such cash payment, and that formed his receipt. Then it is the duty of the treasurer to see that that amount

of money is entered in the Hindee account. Then it is also taken to the Persian clerks, and they have to enter the receipt of the money in the Persian books, and then the receipt has also to be taken to some other clerk, who enters it in the dakhilla account-book, and then the receipt (whether before or afterwards does not clearly appear) is signed by the treasurer, and it is given to the person who brought the money. Then it would appear that he takes it back to the village authorities, and in some cases the village authority also puts his name upon the receipt.

Now, when the money is paid by a transfer of deposits, then it appears that these deposits either may be in the treasury itself, having been previously paid in cash, or they may be in some other treasury, as at Benares, where it may be more convenient to the land-owner to make his payment. If that is the case, an order always has to be got from the Collector to authorise that transfer by way of deposit, and then that order appears to be brought to the office, and upon the authority of that order the transfer is made. Now there are many of these cases. The Court below divided them into three lists, and for the present reference will only be made to the first class; that is, where the receipts were actually given. Now, in these cases, the forms of the receipts are set out at page 696; and the first and the strongest evidence against the treasurer is this: that the receipts are given in a form which, on the face of it, appears to be exclusively applicable to a payment in money; and looking at the form of the receipt, it is impossible to say that it does not, upon the face of it, purport to be a receipt for money. There is a number, and in the first column there is the name of the mehal, and in the second column there is the name of the malgoozar on whose behalf the payment is made. Then there is the amount received, and the items in respect of which it is paid. Then there is the date upon which the money was deposited, which perfectly plainly means the date of the payment, which is the 30th March 1844 upon this receipt which is now before us. Then there is the name of the person through whom the money was deposited, which also perfectly plainly means the name of the person who brought the money to the treasury and paid it in; and then there is the date upon which the receipt was given, which is the 30th March 1844, being the same date as that upon which the amount was paid.

Now this is written out in Persian, and purports to be an acknowledgment of the receipt of cash. It is signed at the bottom by the treasurer himself, with a memorandum "Rs. 743. Received by transfer by a Perwannah, No. 2669," in the particular one to which we are referring.

Now, there is perhaps some little difficulty, or, at least, their Lordships had some difficulty in the course of the argument, in discovering exactly what was the mode of giving a receipt when the payment really was made by a transfer. Although there is perhaps no direct evidence of what the form of it was when the payment was made into the treasury by deposit, whether it was the treasury at Mirzapore or the treasury at Benares, no doubt some receipt, acknowledging that payment, must have been given. Several of the witnesses who were examined upon the part of the Government stated that no receipt at all was given when a deposit was transferred, at the time when the transfer was made. In the judgment of the Sudder Court, which appears to have been taken principally from the allegations in the plaint, which are not certainly specifically, if at all, denied by the answers, it is stated that at some time or other, whether the practice was first introduced by this particular treasurer or whether it was introduced before, is not perfectly clear; but, at any rate, upon many occasions a receipt was given, but that alterations were made in the form of it, as one would suppose would be the case, as otherwise it would represent what was positively untrue; and that it would contain a reference in the body of it, not merely after the signature at the end, to show that it was merely a receipt for a transfer, and that no money was paid at

all at the time when it was given. Therefore the receipt forms the first evidence and very strong evidence against the treasurer.

Then that is confirmed in a great variety of instances by evidence upon the part of the village authorities, the Canongoes, who say that, as respects those villages, they have no deposit accounts,—that it was the ordinary practice to pay in cash. That, secondly, confirms the statement that the payment was in cash. Then there is no entry of a receipt in cash in the Hindee Siaha, which would make it clear, and which in fact is not seriously denied, that if it was paid in cash, beyond all question the treasurer was a party to the embezzlement. Then in the Persian Siaha they are entered upon the day upon which the payment was made, and it is very important to observe that they are entered as paid in cash. In examining the items it is quite plain that in the body of the Siaha they are entered as paid in cash; but, of course, if they had been summed up in the abstract of the day's proceedings as having been paid in cash, then the amount of cash in the Persian Siaha would have differed from that in the Hindee Siaha, and then when the Collector came to examine the books the fraud would have been discovered directly. Therefore, though they are stated in the body of the Persian Siaha as received in cash, yet in the summing up they are not summed up in the cash column, but they are summed up as a part of those sums which were received by transfer of deposit. We also find in these Persian Siahas that day by day not only is the ultimate balance signed by the treasurer, but the pages are also signed. It is said that he does not understand the Persian language, but there is no satisfactory evidence of this, and it is very improbable that the Persian clerks should have dared to go on day by day making those false entries which the treasurer could have discovered at any time.

Then, besides that, there was another clerk, who kept a book of receipts called the dakhilla account, in which nothing was entered except payments in cash, and in which we find these entries as being received in cash. Now, taking all that evidence of the payments being received in cash, are we to believe that the landowner or his agent who brought the money, the village authorities, the Persian clerks, the persons who kept the dakhilla books (of whose guilt there is no evidence whatever), were all combined to cheat the treasurer, and that they should succeed during this long period of years in cheating the treasurer, though at the very time they cheated him they brought these documents day by day to him for his signature, thus giving him an opportunity of detecting them?

Moreover, if one looks at the accounts kept at the time, it will be seen that there is no reference in them to the deposit accounts from which the sums embezzled were fraudulently pretended to be taken. There is no reference to them in the Hindee Siaha, or the Persian Siaha, or in the dakhilla book. The only place in which you find any reference to them is in the receipts themselves in the handwriting of the treasurer himself. There you find a reference to the alleged transfer, and that is not denied. It is admitted by the accountants of the defendant, that in reality these transfers were all false and fictitious, because in reality they were not transfers from the accounts of the landowner who made the payments, but were in reality transfers from totally different accounts which had nothing to do with these particular receipts; but being afterwards, as it appears, made up in some other way, which it is not necessary to enquire into, the Courts below agreed in the belief that the money was really received in those cases, and their Lordships certainly do not see any ground at all for differing from that opinion.

This morning Mr. Forsyth has taken us through two selected instances, and we have examined and traced these two cases all through, so as to enable us to see what was the effect of the entries; and that which has been stated has been proved in these cases. We have not thought it necessary to go beyond that, nor is it necessary to consider in detail whether there is sufficient evidence in those

cases in which the entries are not produced, but only the copies of the receipts. Their Lordships must consider them as copies of the receipts, nor is it necessary to go into the detail of those cases where no receipts at all are produced, because it is quite clear that the whole of the frauds are upon one system from beginning to end; and when it is once shown and proved that there were frauds to this amount and how they were concocted and carried out, and when it is further shown clearly from certain instances that there is evidence, beyond all question, that the treasurer was a party to them, the inference is very strong indeed that he was a party to all the frauds. It never could be believed that some of the frauds were committed with the knowledge of the treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way.

Upon these grounds, therefore, their Lordships have come to the conclusion that the judgment of the Court below was right, and that it was fully supported by the evidence, and hence they will recommend to Her Majesty that this appeal should be dismissed with costs.

The 28th June 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Evidence—Forgery.

*On Appeal from the High Court at Calcutta.**

Kurallee Persaud Misr

versus

Anuntoram Hajra and others.

Judgment of the High Court, reversing a decision of the Lower Court which held a deed to be a forgery, upheld on a consideration of the evidence in the case.

The appellant in this case brought his suit for the cancellation of a deed of sale alleged to have been fabricated, and for certain leases granted under the title acquired by means of that deed of sale, and for setting aside an order made in an Act IV case.

The short outline of the case is this:—The respondent's family were the owners of a putnee talook; that talook was sold for arrears of rent in 1850; it was then purchased in moieties, one moiety being purchased by the father of the appellant, the other by a person of the name of Lukhikant. Whether Lukhikant purchased benamee for the dispossessed putneedars, it is immaterial here to consider, because it is clear that in December 1858 the title of Lukhikant, whether a mere nominal title or a beneficial ownership, was transferred to and became vested in the respondents. Between December 1858 and the date of this alleged transaction in March 1859, Muddosoodun and the respondents were the joint owners of the putnee talook; that is now an admitted fact. It is then alleged, on the part of the respondents, that on the 15th March 1859 they purchased Muddosoodun's share from him. The deed produced and impeached bears that date. That deed was registered on the 6th April 1859. On the 15th April 1859, the respondents

* From the judgment of Bayley and E. Jackson, *J.J.*, in Regular Appeal No. 420 of 1861, decided on 17th August 1864: not reported.

granted the earliest of the leases impeached to certain native coal-masters, and on the 23rd April 1859, Muddosoodun, professing to be still owner of a moiety of the talook, granted a lease to a rival coal company, known as the Bengal Coal Company. From that time the parties seem to have been *in flagrante bello*, backed on either side by their respective lessees, the rival coal workers. The active dispute is said, and appears on the face of the Magistrate's proceedings, to have begun as early as the 25th April 1859. It led to proceedings under Act IV of 1840, the final proceeding in which was had before the Magistrate in July 1859. He then made an award declaring that the respondents were in possession, under a deed of sale, of the moiety of Muddosoodun, and that award was upon appeal affirmed by the Judge on the 20th December 1859. Intermediately there took place those high-handed and lawless proceedings on the part of the Bengal Coal Company in the interest of Muddosoodun, and in their own interest as the lessees from Muddosoodun, to which our attention has been directed by Mr. Bell. Muddosoodun died in May 1860, and the suit was brought by the present appellant, his son and representative, in 1861.

The Principal Sudder Ameen decided in favor of the plaintiff on the 9th September 1861, and upon appeal that decree was reversed by the High Court, which, on an application to review its decision, pronounced a second decree adhering to the first. Against those two decrees the appeal has been brought.

Now it is obvious that the one single issue, upon which the whole case depends is, was this deed forged, or not forged? If the parties claiming under the deed were trying to defeat an existing possession on the other side, and to recover by virtue of the title derived under the deed, their Lordships are not prepared to say that there are not circumstances of suspicion attaching to the transaction which might make it doubtful whether plaintiffs so suing had discharged the burden of proof which lay upon them. But that is not the nature of the suit. The parties claiming under the deed are in possession. They have been found to be in lawful possession by the Magistrate's award confirmed by the Judge. These are decisions of competent Courts that the respondents were in fact in possession, and that their possession was acquired lawfully and under color of the deed; and it is impossible wholly to disregard that finding, though, no doubt, the propriety of it is one of the matters in issue in this suit.

That being the case, we proceed to consider, in the first place, what is the evidence on which the appellant calls upon their Lordships to reverse the decisions under appeal and to declare this deed a forgery.

The greater part of the evidence adduced by the appellant is really of the most worthless character. It is the mere rumour existing in the locality as deposed to by ryots and others, persons who do not profess for the most part to speak from their own knowledge. On the other hand, there is an absence of that kind of evidence which in such a case one would have expected to see. What the case of the respondents as to the execution of this deed was must have been made known to the appellant by the proceedings in the Act IV case. That case is that the deed was executed in the house of Muddosoodun; that the consideration money was brought there; that it was paid there, and the date of the transactions is fixed by the date of the deed. Yet not a single witness is brought from the family of Muddosoodun either to impeach his handwriting, or to prove that this story was a mere figment, and that the parties were not there at that time, and that no such transaction as deposed to took place. It may be true that this kind of evidence is very often given by witnesses who do not receive much credit; but in every case it must depend on the character of the particular witnesses whether such evidence is credible or not, and the absence of any attempt to prove such a case is a circumstance which is certainly open to much observation.

Such strength as there is in the case of the appellant is to be found in the

judgment of the Principal Sudder Ameen. The following are the principal grounds on which he decided in the appellant's favor. He relied upon the fact that the deed, therefore, instead of being executed on a paper bearing one stamp purchased immediately before the date of the deed and purchased by the persons who propounded the deed, or purchased (according to what is said to be the ordinary course) by Muddosoodun, the vendor, has been engrossed upon two stamp papers purchased by different persons, and at different dates within a month of the execution of the deed. He also relied upon the circumstances attending the registration of the deed, as to which we shall presently say a few words. Again, although there was no evidence as to the handwriting before him, he upon his own comparison of the handwriting came to the conclusion that the name of Muddosoodun, when compared with an admitted signature of that person, did not appear to be in his handwriting, and that it resembled the handwriting of the person who wrote the body of the deed. He further in some degree relied upon the witnesses upon whose testimony their Lordships have already remarked, who stated from hearsay that no sale was ever made by Muddosoodun, and upon some evidence given to show that the respondents were persons who were not rich enough to purchase the talook ; and, on the whole, he came to the conclusion that the forgery had been made out.

Their Lordships entirely concur with the judgment of the High Court that the stamped papers under all the circumstances of the case do not raise any strong argument against the validity of the deed.

Upon the question of handwriting they have to deal with this circumstance. There was no evidence given in the cause that the signature of Muddosoodun was not in his own handwriting ; and against the opinion of the Zillah Judge, founded on a comparison of handwriting, they have to set the opinion of the two Judges of the High Court, who, in the first instance, decided the appeal, supported as it was by the opinion of three of their brethren to whom they submitted that point, one of whom was a native presumably as competent as the Principal Sudder Ameen, to determine a question of Bengali handwriting. The circumstances attending the registration are no doubt those which most strongly tend to cast suspicion upon the transaction, but their Lordships are not prepared to say that in a case in which it lay upon the other party to prove the forgery, they amount to proof of a forgery. It seems to their Lordships that the mookhtar who is missing and is not called by either party, might as well have been called by the one party as by the other, if he had been forthcoming. The mookhtarnamah itself is not before them, and upon that part of the case all that can be said is that it is left extremely bare ; and that as it lay upon the plaintiff, the appellant, to make out his case, any mere deficiency in the proof must fall upon him, and not upon the other side. Whatever be the value of the testimony as to the inability of the respondents, and it does not appear to their Lordships to be very great, it is obvious that any deficiency in their means of making the purchase, if it existed, would probably be supplied by the opulent persons who wished to obtain a lease from them for the purpose of working the coal.

With respect to the question of possession, which the Principal Sudder Ameen seems also to have considered was wrongly found by the Magistrate in favor of the respondents, their Lordships are of opinion that there is nothing before them which would warrant their saying that that finding, supported as it is by the judgment of three Judges of the High Court, was erroneous ; and if it were not erroneous, it tends very much to support the deed, because it is only to that deed that the possession can in any way be attributed. It was clearly a legal possession, and there was no pretence that they legally acquired the possession of Muddosoodun's share in any other manner. If that possession had been undisputed for any length of time, that would of course be an extremely strong circumstance in favor of the validity of the deed. That cannot be said to be the case here, because the dispute

between the parties supervened so shortly after the execution of the deed, but still, as far as it goes, the possession of the respondents, however short, is a circumstance which cannot be disregarded.

Therefore, notwithstanding the suspicions which may rest in their Lordships' minds in respect of this transaction, whether by reason of the evidence of Wilson, which, however, is capable of being explained by supposing that he was mistaken as to the dates or as to what passed in conversation before him; or by reason of the non-delivery of the earlier title deeds, or by reason of the mysterious and unexplained circumstances attendant on the registration, their Lordships feel that there is not before them any grounds upon which they would be warranted in reversing the decision of three Judges of the High Court upon the merits, and that of two other Judges upon the question of possession, and in pronouncing this document to be a forgery.

They must, therefore, humbly recommend Her Majesty to dismiss this appeal with costs.

The 29th June 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Mortgage—Foreclosure—Purchaser under decree—Judgment-creditor—Limitation.

*On Appeal from the High Court at Calcutta.**

Anundo Moyee Dossee and others

versus

Dhonendro Chunder Mookerjee and others.

The plaintiff whose claim was based on the title of a person who purchased under a decree for sale in a suit for foreclosure of a mortgage, which suit was brought in the Supreme Court and was instituted prior to a sale under which the defendant claimed, contended that the defendant was bound by that decree for sale in exactly the same manner as if he had been a party to the foreclosure suit.

HELD that there was no foundation for such a claim and that the decree for sale had no operation whatever upon the title of a person in the country who was no party to the foreclosure suit.

The title of a judgment-creditor, or a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor. The possession of such purchaser is *bona fide* and without notice of the mortgage is the possession of an owner; and a suit by a mortgagee against the purchaser founded on a title to enter into possession by reason of a default having occurred ought to be brought within 12 years after the commencement of the purchaser's possession.

Bishop of Winchester *v.* Payne explained.

In this case their Lordships are of opinion that the judgment and decree of the Court in India must be affirmed.

The case has been argued at some length, and several important questions of law and of practice have been discussed before their Lordships. The suit itself, when one looks at the plaint, scarcely seems to raise any of those questions. The suit is based entirely upon the title of a person who says he purchased under a decree for sale, which decree was made on the 15th November 1852. The contention before their Lordships at first was that that sale was made in a suit for foreclosure of a mortgage, and that that suit for foreclosure having been instituted prior to a sale under which the defendants claimed, the defendants are bound by

* From the judgment of Norman, C.J., and E. Jackson, J., in Regular Appeal No. 634 of 1862, decided 12th September 1864,—1 W. R. 103.

that decree for sale in exactly the same manner as if they were parties to the foreclosure suit.

Their Lordships are of opinion that there is no foundation whatever for the claim so put ; that the case to which they have been referred, of the Bishop of Winchester *v.* Payne (11 Ves. Jr. 194), has really no relation to any case of this kind. That case merely determines this,—that where there is a suit for foreclosure and a defendant to that suit makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, the purchaser will not be allowed himself afterwards to institute a new suit for a new foreclosure ; the ground being, that if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that is simply a foreclosure, that is to say, that the person would be barred and foreclosed from instituting any new suit in the Court for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively, against a party who was not before the Court. It simply says, you shall not institute a fresh suit for redemption. This was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Court of Calcutta had no effect whatever *in rem* ; it had no effect whatever over the property in the mofussil. The decree for sale was merely a decree in substance that the parties to the suit should concur in conveying and selling the property to a purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the country who were no parties to the suit. Therefore, it appears to their Lordships that the view of the case presented to them based upon that case of the Bishop of Winchester *v.* Payne, has really no application to the subject-matter of this suit.

But the Courts below did go into the title anterior to the sale, and upon an investigation of that title the Supreme Court came to a conclusion in favor of the respondents. Their Lordships think it right, therefore, to some extent to go into the matters which were so discussed in the Court below.

Now one of the questions, and the most important question in their Lordships' judgment, conclusive with regard to the matter which was raised, was this : whether the title of the defendants was anterior to the title of the mortgagee and was anterior to his mortgage. Their Lordships are satisfied upon the evidence that before the mortgage was made which is the foundation of the plaintiff's title, whether it was made in October 1841 or whether it came into existence some time between that and the date of the registration, which is the only thing before them, that is to say, the registration in May 1842, (whichever date be taken), at that time when that deed was executed, the property in question was actually attached under a decree of the Court, and that it was under a sale in pursuance of that original decree and of that execution that the title of the defendants accrued ; and their Lordships are of opinion that the title of the defendants, independently of the Statute of Limitations, is paramount and superior to the title of the mortgagee.

As a great deal of argument has been addressed to their Lordships upon that question of the Statute of Limitations, their Lordships think it right to add that, in their judgment, if the attachment under which the title of the defendants was derived had been posterior to the mortgage, still the Statute of Limitations would have been a conclusive bar. Their Lordships think that the title of a judgment-creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a person holding in priority with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee. The possession, which the man

supposed he acquired, was a possession as owner. He thought he was acquiring the absolute title to the property and that he was in possession as absolute owner. Their Lordships are assuming that no notice was proved of the existence of the mortgage title given to, or acquired by, the purchaser; and there being no such notice, they are of opinion that the possession of the purchaser was the possession of a person claiming to be owner. Under these circumstances they are of opinion that if the title of the mortgagee to enter by reason of a default having occurred before had accrued, and if the purchaser under such a title had been in possession for twelve years, believing himself to be owner *bond fide*, under a claim to the ownership of the property, and not being in possession in any way as mortgagor or under the mortgagor, then in accordance with the cases, several of which have been cited to their Lordships, and probably were cited in India, according to the principles of those cases which their Lordships adopt, they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the twelve years after the commencement of his possession.

Their Lordships, on the whole, are of opinion that the judgment of the Court below is correct, and they will humbly recommend Her Majesty that the appeal be dismissed, and dismissed with costs.

The 30th June 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Share-holders—Limitation—Cause of action.

*On Appeal from the High Court at Calcutta.**

Syud Lootf Ali Khan

versus

Mussamut Afzuloonissa Begum and others.

A sum of 2 lacs of rupees which had been paid by a debtor in part satisfaction of a larger sum due to the share-holders (among whom were the plaintiff and the defendants) the heirs of a deceased banker, according to their shares in the estate, was appropriated by the defendants. The several share-holders brought separate suits against the debtor for their separate shares, the result of which suits was that the 2 lacs was appropriated to the whole debt and the plaintiff's claim was thereby reduced by Rs. 25,000, while the defendants received Rs. 16,000 more than that they were entitled to from the common debtor.

The present suit was brought by the plaintiff against the defendants for his full share of the 2 lacs. The defendants pleaded that the suit was barred by limitation, more than 12 years having elapsed from the date of the original payment of the 2 lacs.

HELD that plaintiff's cause of action arose out of the result of the former suits against the debtor, and not out of the original payment of the 2 lacs, and limitation ran, not from the date of the original payment, but from the time that the defendants received more than their proper share.

HELD also that the plaintiff was entitled to recover from the defendants, not the full sum of Rs. 25,000 which he had lost as the result of the proceedings against the debtor, but the Rs. 16,000 which the defendants had received over and above their proper share, and which must be considered as money had and received by the defendants to the plaintiff's use.

In this case their Lordships are of opinion that the decree of the High Court ought to be reversed, and the decree of the Zillah Judge maintained, with a variation which their Lordships will state.

* From the judgment of Seton-Karr and Campbell, *J.J.*, in Regular Appeal No. 464 of 1864, decided 30th June 1865,—3 W. R. 113.

Where a payment was made on account of a bond-debt (the amount paid being less than the interest due). HELD that the payment ought to be deducted from the interest; s. 6 Reg. XV of 1793 being construed to apply to cases where the interest at the time of suit had accumulated so as to exceed the principal.

This was an appeal from a judgment of the High Court of Calcutta (Bayley and E. Jackson *J.J.*), dated 14th Dec. 1863,* in which the Court decided in favor of the contention of the present respondent, that the amount paid on account of a bond-debt ought to have been deducted from and credited first to the interest due at the time of such payment, and not regarded as a payment towards the principal, s. 6 Reg. XV of 1793 being construed to provide against the award of accumulated interest in excess of the principal.

In appeal before the Privy Council it was contended, on behalf of the appellant, that, with reference to the terms of the receipt for the amount so paid, the intention clearly was to deduct such amount from the principal, and that, in the mode of calculation adopted by the High Court, the object of the Regulation had been disregarded.

Their Lordships were of opinion that the High Court had proceeded upon a sound basis of calculation, and that there had been no appropriation of payment, and that the wording of the Regulation applied to cases where the interest at the time of suit had accumulated so as to exceed the principal. There was here no calculation so as to give compound interest, and therefore their Lordships would humbly advise Her Majesty to affirm the appeal.

The 3rd July 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Minors—Collusive Sale—Compromise—Practice.

On Appeal from the High Court at Calcutta.†

Moulvie Abdool Ali

versus

Mozuffer Hossein Chowdry and others.

A suit by the plaintiffs' guardians for the plaintiffs' mother's share in certain dower resulted in a decree for Rs. 62,913, calculated on the allegation in the plaint that such share was one-third of the entire amount of dower. That suit having been sold by the plaintiff's guardians for the alleged sum of Rs. 51,000, the plaintiffs brought the present suit to set aside that sale as collusive.

HELD that it was incumbent on the defendants in this suit to prove that they paid the Rs. 51,000 to the plaintiffs when they came of age, or at least that the money reached the plaintiffs' hands when they came of age.

A compromise set up by the defendants in the present suit having been rejected, a decree was given to the plaintiffs for the sum of Rs. 62,913 awarded in the original suit. That decree was upheld in appeal; but as it was alleged that on the facts stated in the plaint in the original suit the plaintiffs' mother's share of the dower was one-eighth, and not one-third, the Privy Council held that plaintiffs ought not to benefit by that mistake, if it was a mistake, and they accordingly left it to the lower Court to enquire into that point and to let execution go for the one-eighth or the one-third share, according as the fact might turn out.

Where a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court.

* Sevestre's Reports (from August to December 1863) p. 834a.

† From the judgment of Seton-Karr and Macpherson, *J.J.*, in Regular Appeal No. 225 of 1865, decided 22nd March 1866.—*See* 5 W. R. 173.

particularly where infants are concerned, so as to have the assent of the Court at the time instead of its being totally concealed from them.

The Privy Council will not interfere in a case in which objections are taken to matters of practice, unless they see very clearly that justice has not been done.

This is an appeal from a decision of the High Court of Judicature in Bengal, affirming and modifying a decree of the Principal Sudder Ameen of Backergunge, dated the 9th May 1865. The object of the suit was to set aside a sale of the interest of the plaintiffs in a former suit. The original suit, the sale of which was sought to be set aside, was a suit which had been brought by the guardian of the present plaintiffs on their account against their grandfather to recover the plaintiffs' share of their grandmother's dower. That suit had been sold to a lady, who appeared on the face of the sale to be the purchaser, for the price of Rs. 51,000. The plaintiff alleges that it was a collusive and a fictitious sale. In the answer the defendants allege that the suit is not maintainable, upon the ground that it was a valid sale; and they say secondly, which is practically the same thing, that "the guardian of the plaintiffs having, for their benefit and in lieu of an adequate consideration, with the approval of their father and the permission of the principal head of their family, and their eldest paternal uncle, the said Meer Fujummul Ali, *bonâ fide* sold the suit, No. 42,—any claim in respect thereof cannot lie against me, or against any one, save their guardian, father, and paternal uncle,—and the said valid deed of sale is on no account liable to be set aside." It is remarkable that in this answer the defendants do not allege either that the original decree was obtained for too much money, nor yet do they allege, except most indirectly, and their Lordships are disposed to think they do not practically allege at all, that the defendant had ever paid the purchase money of Rs. 51,000 either to the guardian on account of the infants, or to the infants after they came of age.

The next step in the present suit that appears is, that on the 9th January 1865, there were applications by both the parties for the postponement of the hearing of the suit, on the ground that negotiations for a compromise were going on, and it was ordered by the Judge that "time be given to the 6th February, which day is fixed for the hearing of the suit; if no settlement takes place within that time both parties must be present with their evidence, otherwise no objection will be admitted." It is important, with reference to the point which was subsequently raised, to observe that when the first application for postponement was made, the Judge most distinctly warned the parties that if the compromise did not take effect when the proper time came for hearing the suit, he should insist that it should be heard, and they must be ready with their evidence.

The next important matter that takes place is that in February (the native date is 20th Falgoon 1271), a deed of compromise, called a *solehnamah*, was actually executed. It is unnecessary to recite the terms of it, except that it is perfectly clear on the face of it that it gives the plaintiffs not only very much less than what the amount of the original decree was, but also very much less than the original compromise of Rs. 51,000. That *solehnamah* was registered on the 15th March. There is also produced an alleged receipt, which the plaintiffs deny, of Rs. 2,000 for the costs of the suit. Then on the 29th April there is a further application by both parties for the postponement of the suit. It does not appear how it was not heard at the time originally appointed; probably, although there is no formal order, some applications must have been made in the interval for the postponement, but on the 29th April there is the application of both parties for a further postponement. There is this difference between them, that although it is clear that the deeds of compromise had been actually executed, and also actually registered at that time, yet the plaintiffs do not state that the matter had been compromised, but they state that negotiations for an amicable settlement are going on between the parties, but the compromise cannot be concluded unless an extension of time be granted, and therefore, the plaintiffs, notwithstanding that

they had executed the deed of compromise, and notwithstanding the deed of compromise had been registered, clearly treat the suit as not being actually compromised; and the arrangement as not being actually made at that time. The petition of the defendant, no doubt, is in other terms, because he says, "whereas a compromise has been come to between both parties." On that the Judge orders that a week's time be granted, and the case be brought on for hearing on the 8th May. Looking at the terms of his previous order, that also seems a clear warning that when the 8th May came, if what he considered a valid compromise was not at that time effected, he should go on and hear the case. Then it also appears that on the same 29th April a variety of witnesses were heard in Court both for the plaintiffs and the defendant; and that also goes to show that the parties could not possibly have conceived that the suit was finally compromised at that time, for it appears that several witnesses, as many as five, were examined for the plaintiffs, and three were examined for the defendant. The witnesses for the plaintiffs depose that they were present at the time when the original compromise was made, that no portion of the Rs. 51,000 was paid, and three of them state that the defendant said that he would pay it to the plaintiffs when they came of age. The witnesses for the defendant do not deny that. They speak to matters which for the most part seem immaterial as to whether the uncles of the plaintiffs and the plaintiffs were on amicable terms or not. That took place on the 29th April. There appears to have been one day further postponement, and on the 9th May the suit came on for hearing, and then for the first time an application was made by the mookhtar of the defendant to file this solehnamah on account of the plaintiffs, and the plaintiffs' vakeels themselves when called upon said they knew nothing at all about the matter. There was subsequently an examination of the mookhtars, which did not throw very much more light upon it, but in that state of things the Judge was not satisfied, and he refused to accept the compromise, and then he went on to hear the suit. One other witness, one of the uncles of the plaintiffs, was examined, and the Judge came to the conclusion,—and upon the evidence as before him it is hardly disputed that the conclusion would be a correct one,—that the original compromise of the first suit was a compromise which by no possibility could stand, and that it must be set aside; and the defendant raising no defence that, if it was set aside, the decree obtained in the original suit was not a right and valid decree, the judgment was that they should have the benefit of that decree.

From that decree there was an appeal to the High Court, and the High Court sent a letter to the Judge below, requesting him to hear further evidence upon the question whether the plaintiff had assented to the filing of the solehnamah. That was all the matter that he was to enquire into, as the Judges of the High Court say, and their Lordships of course must give credit to what they say; although in the petition of appeal a complaint is certainly made that the first Judge in the Court below had not postponed the trial for the purpose of enabling further evidence to be given by the defendant. The Judges of the High Court, in their ultimate judgment, say that no such application was made to them, but that the only application respecting a re-hearing which was made to them was as to whether the solehnamah had been filed with the authority of the plaintiffs.

On that the case went down again to the Court below, and it appears by the judgment of the learned Judge of that Court that time was again given for the parties to appear. He summoned the plaintiffs, and he examined the plaintiffs, and also their mookhtar, for the purpose of seeing whether they had assented to the filing of the compromise. They deposed that they had not assented to it, that there were certain conditions to be performed before the deed was filed, that the defendant had refused to perform those conditions, and that it had been filed by the mookhtar of the defendant without their consent at the time and against

their will. The Judge of the Court below reported that conclusion to the Supreme Court. Then the case came on again before the High Court, and they were clearly of opinion, as the Court below had been, that the original compromise had been obtained by fraud. They were also of opinion that the compromise in this suit had been improperly obtained; and then, an objection having been raised under the Statute of Limitations, in order to avoid all question that might be raised under the Statute of Limitations, they altered the form of the decree without changing the names of the parties in the decree, so as simply to declare that the defendant was a trustee for the plaintiffs, and that the plaintiffs were entitled to the benefit of that decree.

From that decision an appeal has been brought, and the two questions that have been substantially argued before us (independently of the third question as to amount, which will be alluded to presently) were first, that the Judge of the Court below had erred in not giving further time on the 9th May for the hearing of witnesses as to the non-payment of the Rs. 51,000; and, secondly, that he had erred in not giving the defendant an opportunity when it came down to him the second time to hear witnesses as to the validity of the compromise in the suit itself.

Now, both these objections are really objections to matters of practice, and unless their Lordships could see, and see very clearly, that justice had not been done, they would not interfere with the decision of the Court below on a question like this.

Now, the first question is, did the Judge of the Court below act improperly in not giving the defendant further time to produce witnesses to prove that he had paid the Rs. 51,000? Now, how does the case stand? In the first place, in his original answer he nowhere alleges he had paid it; and certainly it is very difficult indeed to believe that if he had paid it, more particularly if, which their Lordships are disposed to think he must prove in order to have a defence to this suit, he had paid it to the plaintiffs when they came of age, or at least that the money had reached them when they came of age, it is difficult to believe that if he really had such a defence as that he would not have plainly alleged it. Then, secondly, it appears that the learned Judge of the Court below when he consented to the postponement of the trial, did most distinctly warn the parties that when the proper time for hearing came, if the compromise was not held to be valid, he should go on and hear the case. Next, it appears that on the 29th April, a variety of witnesses were examined in Court by both sides, which seems to show most clearly that both parties understood at that time, when the compromise had apparently been effected, that still if it was not held to be valid the suit would go on to be heard.

Next, it is said by the learned Judge in the Court below that a commission had gone to Dacca, and that no witnesses had been examined under it, and that that was the fault of the defendant; and then, besides that, the High Court say that this objection was never urged before them when the case came up before them for the first time; and if further enquiry was to be made, the defendant ought to have insisted on that when it came up for the first time, and not have allowed it to go back for further examination on one point, and then when it comes on again, say it is to go back for another further examination on another point. And, indeed, both the Courts below appear to have been thoroughly satisfied that this alleged want of witnesses hearing was a mere excuse, and that the whole object was an object of delay and to keep the plaintiffs out of their just claims, and their Lordships are disposed to agree with that conclusion,—at any rate they cannot dissent from it.

Then, did the learned Judge in the Court below err on the second question by not giving the defendant an opportunity of hearing witnesses to prove that the second compromise, the compromise of this suit itself, had been validly entered into? He gives his reasons himself. He states what he did:—"As, however,

the High Court of Judicature has, in accordance with the objections raised in appeal in consequence of respondents not having been represented, in letter No. 3871, dated 12th December 1865, requested that this Court ascertain whether the deed of solehnamah was filed with the cognizance and consent of the plaintiffs, and make a report, this Court, in compliance with the said orders, so as to remove all doubts and objections, on receipt of the order required the personal attendance of the plaintiffs, who having arrived from Dacca, and having this day, the 6th January 1866, attended Court and being questioned"—then he states the substance of their evidence, and of the evidence of their mookhtar. Then he goes on to say—"The defendant, through his pleader Bykant Chunder Bose, also files copy of the counterpart of the solehnamah, and wishes also to file a list of witnesses to establish that the compromise did actually take place; but as the list was not filed on the 18th December 1865, the personal attendance of the plaintiffs was required within ten days, and since a further postponement was made, this Court does not consider postponing the report called for any longer for proofs." Therefore it appears that originally the defendant asked for leave to file a list of witnesses to establish that the compromise did actually take place, which, as it turned out, was not a matter which the plaintiffs denied. That list was to be filed by the 18th December. It was not filed on the 18th December. Then ten days' further time was given, that is, to the 28th December, and then it was ultimately not heard on the 28th December, but was further postponed till the 6th January. The defendants then, apparently, were not ready with their witnesses, and when the Judge was determined to go on they asked for still further time. Then the Judge comes to the conclusion that that is all a shuffle, and that they do not really want to bring the witnesses and that the whole proceeding was for the mere purpose of delay. It appears quite evident that their Lordships cannot dissent from that conclusion. The High Court came also to the same conclusion, and, independently of this question, of whether the learned Judge of the Court below had given a proper opportunity to the defendant of being heard, it hardly appears to be arguable that this deed of compromise in the first suit itself can possibly stand. The very admitted facts show that it cannot stand. Here the guardian of two infants makes what appears to be an alleged sale on the face of it, to a perfectly independent person. After that sale is made, the case goes on just the same as if no compromise had been effected at all. There is an elaborate judgment of the Court in the original suit, disposing of all the objections that had been raised in it, when in point of fact it appears now that there was no real suit at all at that time, and the whole thing was a fiction, the defendant having brought the suit himself. It is impossible that a proceeding so obtained can possibly be supported in any Court. If there really had been an honest compromise made, the practice of the Court is quite plain as to how that compromise ought to have been carried out; it ought to have been carried out by proper deeds and filed in Court, particularly where infants were concerned, so as to have had the assent of the Court at the time instead of its being totally concealed from them. Therefore it is plain it must be set aside, and there is not the least reason to suppose that any portion of this Rs. 51,000 was paid. There is strong evidence that none of it was paid, and there is no evidence at all to the contrary. Therefore their Lordships are of opinion on the merits that this appeal ought to be dismissed with costs.

But then a further question was raised. It was argued by the Counsel for the appellant, though that question has never been raised in either of the Courts below at all, that on the face of the original plaint it appeared that the judgment in the original suit had been obtained for a very much larger sum than on the facts, as explained in the plaint in the original suit itself, the plaintiffs could possibly be entitled to. It was not substantially denied by the Counsel for the defendants that, if the facts actually happened as they appear to be recited in the

original plaint to have happened, the mother of the plaintiffs instead of being entitled to one-third of the whole amount of the dower would only be entitled to one-eighth. The result of the calculation, as their Lordships have made it out, is that instead of the plaintiffs being entitled to Rs. 62,913 with interest, which is the sum for which the original decree was given, they would only be entitled to Rs. 30,333 with interest. Their Lordships, after consideration, are of opinion that if that is accurate, the plaintiffs, who come for equitable relief in setting aside this invalid sale on the ground that it is fraudulent, if it appears on the original plaint that they have by a pure mistake obtained judgment for a great deal larger sum than they ought to have done, ought not to obtain the benefit of that mistake. But their Lordships cannot be perfectly certain as to how the facts in that respect really are, because it certainly seems extraordinary that this point appears never to have been raised either in the original suit or in the present suit in any of the Courts. The original plaint is not in the record, but only the recital of it. Therefore, what their Lordships propose to do under those circumstances is to recommend to Her Majesty that the decree of the High Court be affirmed with costs, but subject to the following proviso and declaration; that is to say, inasmuch as it has been represented by the Counsel for the appellant on the hearing of this appeal that, assuming the pedigree of the family to have been as stated in the plaint filed in the original suit of Meer Abdool Mujeed Chowdry, the share of Eaden Missa in the estate left by Ruheemun Nissa was, according to Mahomedan law, one-eighth only instead of one-third as stated in the said plaint, and that the share of each of the respondents, the plaintiffs in the present suit, in the estate left by the said Eaden Missa being according to Mahomedan law one-fourth, the said respondents were on the face of the plaint entitled by Mahomedan law to at most one-sixteenth of the sums in question, instead of the proportion therein mentioned, that is to say, to the sum of Rs. 30,333-5-4, instead of Rs. 62,913-9-3; and inasmuch as the record in the said appeal does not afford sufficient grounds for determining the correctness of such representations, it is ordered that execution is not to be issued for any greater amount than the said sum of Rs. 30,333-5-4, with interest thereon, from the 29th July 1859, and the costs payable by the appellant in the two suits and the costs of the appeal, unless and until the said respondents shall show to the satisfaction of the High Court, that according to Mahomedan law and the pedigree of the family, they were at the time of the institution of the original suit entitled to some larger sum than the said sum of Rs. 30,333-5-4, in which case execution may be issued accordingly.

The 3rd July 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

*Consideration money—Sale—Registration—Denial of execution—
Act XX of 1866.*

*On Appeal from the High Court at Calcutta.**

* From the judgment of Kemp and Phear, *J.J.*, in Regular Appeal No. 282 of 1867, decided on the 30th March 1868 : not reported.

Futteh Chund Sahoo
versus
 Leelumber Singh Doss and others.

An instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question,—for what in equity did presently operate as a sale of the property,—is an instrument which by s. 2 Act XX of 1866 is required to be registered, and cannot be received in evidence under s. 49 if it has not been registered.

Where a person who is alleged to have executed a deed denies before the Registering Officer that the deed was executed by him, the Zillah Judge, having regard to the provisions of s. 84 and the form of the petition given in the Schedule to the Act, has jurisdiction to determine such a question.

In this case the appellant brought his suit, which was in the nature of a bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a deed of absolute sale executed; and he added that the suit was also for issuing “an order for its registration.” Their Lordships understand those words to import a prayer that the deed of absolute sale when executed might be ordered to be registered; and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted with a view to meet the difficulties which it was apprehended might be occasioned by the prior registration of the defendant's document of a date subsequent to that of the instrument on which the appellant sued. The Court of first instance found that this instrument was not one which the Registration Act now in force required to be registered and admitted it accordingly in evidence, and upon the merits made a decree in favor of the plaintiff. The case then went by appeal to the High Court, and the objection was there taken that the instrument being one which the Act requires to be registered and which had not been registered, it was not receivable in evidence, and that therefore there was no foundation for the plaintiff's suit. The decision of the Court below was accordingly reversed, and the suit dismissed with costs. The appeal before us is against that decision.

It appears to their Lordships that although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act recently passed in India is extremely stringent. Their Lordships have, in the first place, no doubt whatever that the instrument in question is one which by s. 2 of the Act, is required to be registered; that it is an instrument acknowledging the payment of the consideration money for what was to be ultimately an absolute sale of the property in question, for what in equity did presently operate as a sale of the property. The forty-ninth Section of the Act says that no document that has not been registered under the Act, supposing it is one which ought to be registered, is receivable in evidence. The procedure which the Act prescribes is of this kind:—The party seeking to register a deed is, under the thirty-sixth section, to go first before the Registrar, or, as in this case, a Sub-Registrar. If the Sub-Registrar refuses to register the deed, there is then an appeal from his refusal, upon whatever reasons it is founded, to the Registrar, the next higher officer, and if that person confirms the order refusing the registration, the eighty-fourth section gives to the party aggrieved the power of going by petition to the Zillah Judge. In the present case the Sub-Registrar and afterwards the Registrar refused to register the instrument, because the parties, the respondents, by whom it purported to have been executed, denied that they had executed it. It has been argued that the Act affords no means for trying such an issue as was thus raised; and consequently that unless the unregistered instrument be admitted in evidence in a regular suit wherein the fact of its execution can be tried, the right of the party claiming under it would be defeated by the false and dishonest denial of his own signature by the opposite party. Their Lordships, however, looking to the words of the eighty-fourth section, and the form of the petition given in the schedule, and in particular to the fourth paragraph of that

form, which contains the words "the said C D appeared personally before the Registrar and falsely denied the execution of such instrument," think that the Zillah Judge would have jurisdiction to determine such a question. Power is expressly given to him to summon the parties, and their Lordships imagine that there must also be power to summon witnesses, if witnesses should be necessary. How the Zillah Judges may deal with this statutory jurisdiction, their Lordships are unable to say. It seems, however, reasonable to suppose that if they saw that a *prima facie* case of execution of the deed was made out, they would direct the document to be registered, and refer the parties to try the question of forgery or non-forgery in a regular suit. Such a decision would not finally bind the rights of the party denying the execution of the document; and, on the other hand, it would not preclude the opposite party from proving in a less summary proceeding that the denial was false. Their Lordships must assume, in the absence of any proof to the contrary, that the Judges exercise this jurisdiction in a reasonable and proper manner.

Well, then, how do the facts stand upon this case? The appellant went before the Sub-Registrar, and he appealed to the Registrar. He then, unfortunately for himself, through bad advice or some other cause, omitted to proceed as the Act directs under the eighty-fourth section, in which case he might have obtained the registration of the deed in the way I have suggested, and brought this suit relying on a non-registered deed. He failed to pursue the remedies given him by the Act, or at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful though stringent statute, the Judges of the High Court have miscarried in ruling that the document, not having been registered, was inadmissible in evidence, and that the plaintiff's suit had wholly failed. Their Lordships feel that this may be a very hard case; they would willingly have relieved the party if they could, but to make any special order, such as that suggested by Mr. Bell, seems to their Lordships to be beyond the functions and province of an Appellate Court. It may be that the appellant may be able partially to obtain relief, since part of the consideration money seems to be still in his hands. Their Lordships, however, dealing with this appeal, have but one course before them, which is humbly to recommend Her Majesty to dismiss the appeal with costs.

The 4th July 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Evidence—Long possession—Issuonovisee returns.

*On Appeal from the High Court at Calcutta.**

Farquharson

versus

The Government of Bengal and others.

The plaintiff, the purchaser of a putnee under a sale for the non-payment of the rent of the putnee, sued the defendant, who was in possession of the land included in the putnee, for a right to increase the rent of the land and have a proper rent payable to him out of the land. He relied solely on three

* From the judgment of Bayley and Markby, *J.J.*, in Regular Appeal No. 13 of 1866, decided on the 23rd July 1867,—8 W. R. 232.

issumnovisee returns for three separate years, in each of which returns the land said to be in possession of the Ghatwal, the defendant's predecessor, was entered as 100 beegahs. The defendant adduced the evidence of two aged witnesses, who stated that so long as they remembered the property the quantity of land in the Ghatwalee tenure was 3,000 beegahs. The Lower Court dismissed the plaintiff's suit, holding that the defendant had been in possession of 3,000 beegahs, and not 100 beegahs as alleged by plaintiff, and that the defendant had been in possession for more than 60 years. The High Court confirmed the decree of dismissal of plaintiff's suit.

HELD (in affirmance of the concurrent decisions of the lower Courts) that the long uninterrupted possession of the Ghatwal was clearly entitled to have greater weight than the issumnovisee returns.

This suit was originally brought to recover a large quantity, nearly 3,000 beegahs, of land. The plaintiff, who was the purchaser of a putnee under a sale for the non-payment of the rent of the putnee, claimed that under s. 11 Reg. VIII of 1819, having purchased under those circumstances, he was entitled to set aside all estates which had been created after the origin of the putnee, and to recover all the lands which were originally part of the putnee. However, it appearing that the defendant had been in possession of those lands for a very long time, the plaintiff afterwards admitted the defendant's right to the possession of the land, and sued for a right to increase the rent and have a proper rent payable to him out of the lands.

The evidence which the plaintiff produced in support of his case entirely consisted of three documents. At first only one document was produced, which was an issumnovisee of the year 1811. Subsequently two other issumnovisees were produced, which are returns made by the Police, and there is evidence to show that they are made generally on the information of the Ghatwalee holder, stating his name, the quantity of land which he holds, and the pujjak rent which he pays for it; and it appears in all the returns for those three years, that the then holder of the estate which the defendants now hold, the Ghatwalee holder, had returned that the quantity of his land was 100 beegahs. That was the sole evidence for the plaintiff. He did not produce any evidence at all to show how it happened that if 100 beegahs was all that the Ghatwalee holder was entitled to in the years 1811, 1812, and 1813, that quantity of 100 beegahs had been allowed to grow by encroachment unchallenged to the very large quantity of 3,000 beegahs at the time when the sale took place. On the other hand, the defendant produced evidence to show that as far back as living memory went, the whole quantity of 3,000 beegahs has been held by him as part of his Ghatwalee land. He produced one witness of eighty years old and another of seventy-five years old who had known the land all their lives, who said that the Ghatwalee holder had held the whole 3,000 beegahs during all the time that they remembered the property. Both the Courts below believed those witnesses, there being no evidence whatever to contradict them, and thought that for sixty years the land had been so held. Then the question arose as a simple question of fact before the Courts below, taking the evidence on both sides, whether they ought to find that this original estate of the Ghatwalee holder consisted of 100 beegahs only, or of 3,000 beegahs. Both the Courts below found, as a matter of fact, on this evidence, that the original Ghatwal consisted of the whole number of beegahs of which the defendant was in possession, and that, therefore, the plaintiff was not entitled to maintain this suit.

Their Lordships entirely agree with these decisions. Not only does this case come within their ordinary rule, that on a mere question of fact where both the Courts below have agreed, and where there has been no mistake in point of law, they will not reverse the decisions of the Courts below, unless they can see that those decisions are clearly wrong; but their Lordships have come to the same conclusion. It appears to them that weight must be given to ancient possession, and that there may be a variety of causes to explain why this quantity was inserted in the returns in these years. They may have stated the amount under cultivation or producing profit only. It may have been that the police officer was careless and did not care about what he returned, or it may have been that the Ghatwalee

holder at that time had some reasons for giving incorrect information ; or possibly it may have been that the ancient Ghatwals originally held only 100 beegahs, but that the estate had increased to 3,000 beegahs many years before, and before the creation of the putnee, which, notwithstanding the Reg. VIII of 1819, would entitle the Ghatwalee holder to hold, as against the putneedar at least, the whole quantity. But whatever the reason may have been, their Lordships are of opinion that the long uninterrupted possession of the Ghatwalee holder ought clearly to have greater weight than these returns. Upon those grounds, therefore, they think that the judgment of the Court below must be affirmed.

With respect to the cases which have been referred to, all that they really show is this, that different Courts at different times have given greater or less weight to similar returns. All the Courts agree that they are admissible in evidence, and they have been admitted in evidence in this case. In each particular case the Courts have considered what weight ought to be given to them ; and it is nothing very surprising if the Courts at different times have not given exactly the same weight to these documents. Their Lordships are of opinion that the Courts in this particular case have given quite as much weight to these returns as they deserve, and the weight of evidence cannot be regulated by precise rules, as the admissibility of evidence may be.

Their Lordships will, therefore, humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 5th July 1871.

Present :

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Bond—Registration.

*On Appeal from the High Court at Calcutta.**

Baboo Gungapershad

versus

Mowjee Lall.

The mere circumstance of a bond not being registered is not sufficient by itself to counterbalance the evidence if it is generally satisfactory in proof of the validity of the bond.

This is an action on a bond which was given accompanied by a mortgage, and it also seeks to set aside a subsequent sale by defendant, who granted the bond of the property mortgaged to his wife ; and the defence was that the bond was a forgery and was never executed by the defendant. The Principal Sudder Amcen, the first Judge who heard it, and who also heard the witnesses, came to the conclusion that the bond was executed. The High Court came to a contrary conclusion ; and their Lordships have to determine on which side the evidence really preponderated, and with which of the two judgments they agree.

Now the signature to the bond was in the first instance proved by the plaintiff, by two of the attesting witnesses, and by the mookhtar who wrote the bond and framed it. The defendant denied that it was his signature, but he did not call any evidence at all to prove that the bond was not in his handwriting, neither

* From the judgment of Seton-Karr and Macpherson, *J.J.*, in Regular Appeal No. 65 of 1866, decided on 11th May 1866 : not reported.

did he produce any of his undoubted signatures in order that the Court might have the opportunity of comparing the disputed signature on the bond with his admitted signatures. Therefore, as far as depends on the direct evidence whether the bond was genuine or not, the evidence on the part of the plaintiff in support of the genuineness of the bond appears very greatly to preponderate because there is the evidence of the attesting witnesses and of the person who drew it; and there is nothing against it but the evidence of the defendant himself.

But then the circumstances under which the bond was alleged to be executed have to be considered for the purpose of seeing whether it is probable that such a bond should be executed or not. It appears that there were two sons of the defendant who carried on business; one of them appears to have been not more than fifteen years of age at the time of the trial of the suit, and therefore he must have been very considerably younger at the time when the bond was executed; and as respects the other son, it appears that he admits that he had no money of his own at all, and that all the money he had he procured from his father. There is some further evidence given as to what had happened in other suits, which may tend to prove that the defendant was a partner in the house of his sons, or rather, in fact, that he was carrying on business in his sons' name. The High Court appear to have believed that; at least they say that they do not come to any contrary conclusion on that part of the case. Then it appears that the sons, or the house of business, were unquestionably in some difficulties at the time when this bond was given; and it also appears that one of the brothers of the plaintiff had married a daughter of one of the defendants. Then the bond is given for two separate debts; one a debt of Rs. 25,000 due to the first plaintiff, and another a debt of Rs. 5,000 due to the second plaintiff. The first strong corroboration on the part of the plaintiff's case was the entries in the books of the defendant's two sons, and these unquestionably prove beyond all question that these two debts of Rs. 25,000 and Rs. 5,000 were due, and therefore there is no doubt that there was an actual debt of Rs. 30,000. They add up those two sums which are entered in the cash-book—"amount due to you, Rs. 25,000, besides which there is due to Musoodun Lall Rs. 5,000, in all Rs. 30,000," and then it mentions the date, which is the same date as the date of the bond; then it states the interest, and then it states Rs. 1,000 for Gungapershad's paper. The sums of principal are added together, and the two sums of interest and the sum for the stamp are also added together. That is very strongly relied upon, and their Lordships think properly relied upon, by the Principal Sudder Ameen, as showing that some security or another was given for the entire debt. Then one of the defendants, the elder son, who carried on this business, was called to explain this. No doubt he tries to give an explanation that a chitta was given for the Rs. 25,000, and a separate one for the Rs. 5,000, and that the Rs. 100 stamp was the stamp which was got for the Rs. 25,000. That, their Lordships think, is not altogether a satisfactory explanation. It was not brought forward by him in the first instance. It came out on cross-examination, and appears to be nothing more than the natural sort of explanation that a man might be driven to who saw what strong evidence this account gave against him.

Then, there is a further confirmation by the evidence of one of the defendant's witnesses, who appears to have been present at the time when the deed was executed by which the defendant professed to sell the property mortgaged to his wife; and there on cross-examination, he certainly appears to say—"Having written the deed of sale, I made it over to Mowjee Lall. Mowjee Lall took it away with him to his house. Mumtauz Ally, in that mujiles (assembly), and in the presence of Mowjee Lall spoke about the Tamoosook to Gungapershad, and the pledge on which Mowjee Lall said, 'He has to do with his own money, what business is it of yours?'" The great importance of that evidence rests on this, that it appears to prove by the evidence of a witness called on the part of the

defendant, that the bond was in existence prior to the time when the deed was executed by which the defendant sold his property to his wife: and if that were the case then that gives an answer to the theory of the High Court, who are of opinion that this bond was forged for the express purpose of defeating that deed in order that they might apparently have a mortgage which would take precedence of that deed.

Then the other matter that is relied upon as against the genuineness of the bond, is the stamps. It appears that there are two Rs. 50 stamps on it. They appear to have been purchased only a short time before, in the month of April, and they appear to have been purchased by a person who was one of the witnesses to the bond. That person was not called, and it does not appear whether he was a witness who, in fact, belonged to and was connected with the defendants, or whether he was a witness connected with the plaintiff; and it appears perfectly consistent that the defendant's sons, or the defendant, in their ordinary business having purchased two Rs. 50 stamps a short time before, had inserted it on this bond, and that is the reason why it is charged in the accounts.

Then, another matter which is strongly relied upon is the non-registration of the bond, and it may be admitted that, *valeat quantum*, that is evidence to some extent against the genuineness; that is to say, it seems more probable that it would have been registered, because it appears, by an Act which was then in force, unless it was registered it would not be binding, at any rate, as against a subsequent mortgage. That it would not bind as against a subsequent sale appears more doubtful, but at any rate, not as against a subsequent mortgage. On the other hand, it is said that it may have been understood at the time that it was not to be registered. The parties were at that time friends, and to a certain extent connections, and registering a bond of this kind might destroy the credit of the house and bring them at once to insolvency, and therefore it well may be that it was understood at the time it should not be registered. There appears some reason for that, because by the laws of registry, when a deed is registered the Registrar requires that both parties should be present, either by themselves or by somebody appointed by them; and therefore if a person executes a bond of this kind, and says—"I will give you a bond, and I will put a charge on my property, but I will not consent to have it registered," it must be an understood thing that it shall not be registered. If that is the understanding, the other side apparently cannot get the deed registered at all; at any rate, they could not do so without a suit, which there might be great difficulty under such circumstances in maintaining, and therefore it does not appear anything extraordinary that the defendant should have said—"I gave a bond for this debt of my sons, which I know I am in all probability liable for myself. I make it payable in two years. I get two years' credit, and I will charge my estate with it, but it must not be registered." There is nothing very extraordinary in an agreement of that sort being entered into. At any rate, their Lordships are of opinion that the mere circumstance of its not being registered is not sufficient by itself to overbalance the evidence which appears to their Lordships to be generally satisfactory in proof of the validity of the bond.

Then assuming the bond to be genuine, it is hardly necessary in this case to determine whether the subsequent sale would, if it were a really valid sale, prevail against the bond, for it appears very clear to their Lordships that the sale was a sham; in fact, that it was no real sale, and there is no satisfactory evidence of a farthing of money being paid under it, and it looks simply like a pretended sale made for the express purpose of defrauding the defendant's creditors. Their Lordships are of opinion that the defendant has produced no evidence at all which really is of any value in contradiction to the case of the plaintiff.

Their Lordships will recommend to Her Majesty that the judgment of the High Court should be reversed, and the judgment of the Principal Sudder Ameen should be affirmed, and that the plaintiff should have the costs before the High Court, and also the costs of this appeal.

did he produce any of his undoubted signatures in order that the Court might have the opportunity of comparing the disputed signature on the bond with his admitted signatures. Therefore, as far as depends on the direct evidence whether the bond was genuine or not, the evidence on the part of the plaintiff in support of the genuineness of the bond appears very greatly to preponderate because there is the evidence of the attesting witnesses and of the person who drew it; and there is nothing against it but the evidence of the defendant himself.

But then the circumstances under which the bond was alleged to be executed have to be considered for the purpose of seeing whether it is probable that such a bond should be executed or not. It appears that there were two sons of the defendant who carried on business; one of them appears to have been not more than fifteen years of age at the time of the trial of the suit, and therefore he must have been very considerably younger at the time when the bond was executed; and as respects the other son, it appears that he admits that he had no money of his own at all, and that all the money he had he procured from his father. There is some further evidence given as to what had happened in other suits, which may tend to prove that the defendant was a partner in the house of his sons, or rather, in fact, that he was carrying on business in his sons' name. The High Court appear to have believed that; at least they say that they do not come to any contrary conclusion on that part of the case. Then it appears that the sons, or the house of business, were unquestionably in some difficulties at the time when this bond was given; and it also appears that one of the brothers of the plaintiff had married a daughter of one of the defendants. Then the bond is given for two separate debts; one a debt of Rs. 25,000 due to the first plaintiff, and another a debt of Rs. 5,000 due to the second plaintiff. The first strong corroboration on the part of the plaintiff's case was the entries in the books of the defendant's two sons, and these unquestionably prove beyond all question that these two debts of Rs. 25,000 and Rs. 5,000 were due, and therefore there is no doubt that there was an actual debt of Rs. 30,000. They add up those two sums which are entered in the cash-book—"amount due to you, Rs. 25,000, besides which there is due to Musoodun Lall Rs. 5,000, in all Rs. 30,000," and then it mentions the date, which is the same date as the date of the bond; then it states the interest, and then it states Rs. 1,000 for Gungapershad's paper. The sums of principal are added together, and the two sums of interest and the sum for the stamp are also added together. That is very strongly relied upon, and their Lordships think properly relied upon, by the Principal Sudder Ameen, as showing that some security or another was given for the entire debt. Then one of the defendants, the elder son, who carried on this business, was called to explain this. No doubt he tries to give an explanation that a chitta was given for the Rs. 25,000, and a separate one for the Rs. 5,000, and that the Rs. 100 stamp was the stamp which was got for the Rs. 25,000. That, their Lordships think, is not altogether a satisfactory explanation. It was not brought forward by him in the first instance. It came out on cross-examination, and appears to be nothing more than the natural sort of explanation that a man might be driven to who saw what strong evidence this account gave against him.

Then, there is a further confirmation by the evidence of one of the defendant's witnesses, who appears to have been present at the time when the deed was executed by which the defendant professed to sell the property mortgaged to his wife; and there on cross-examination, he certainly appears to say—"Having written the deed of sale, I made it over to Mowjee Lall. Mowjee Lall took it away with him to his house. Mumtauz Ally, in that mujiles (assembly), and in the presence of Mowjee Lall spoke about the Tamoosook to Gungapershad, and the pledge on which Mowjee Lall said, 'He has to do with his own money, what business is it of yours?'" The great importance of that evidence rests on this, that it appears to prove by the evidence of a witness called on the part of the

defendant, that the bond was in existence prior to the time when the deed was executed by which the defendant sold his property to his wife: and if that were the case, then that gives an answer to the theory of the High Court, who are of opinion that this bond was forged for the express purpose of defeating that deed in order that they might apparently have a mortgage which would take precedence of that deed.

Then the other matter that is relied upon as against the genuineness of the bond, is the stamps. It appears that there are two Rs. 50 stamps on it. They appear to have been purchased only a short time before, in the month of April, and they appear to have been purchased by a person who was one of the witnesses to the bond. That person was not called, and it does not appear whether he was a witness who, in fact, belonged to and was connected with the defendants, or whether he was a witness connected with the plaintiff; and it appears perfectly consistent that the defendant's sons, or the defendant, in their ordinary business having purchased two Rs. 50 stamps a short time before, had inserted it on this bond, and that is the reason why it is charged in the accounts.

Then, another matter which is strongly relied upon is the non-registration of the bond, and it may be admitted that, *valeat quantum*, that is evidence to some extent against the genuineness; that is to say, it seems more probable that it would have been registered, because it appears, by an Act which was then in force, unless it was registered it would not be binding, at any rate, as against a subsequent mortgage. That it would not bind as against a subsequent sale appears more doubtful, but at any rate, not as against a subsequent mortgage. On the other hand, it is said that it may have been understood at the time that it was not to be registered. The parties were at that time friends, and to a certain extent connections, and registering a bond of this kind might destroy the credit of the house and bring them at once to insolvency, and therefore it well may be that it was understood at the time it should not be registered. There appears some reason for that, because by the laws of registry, when a deed is registered the Registrar requires that both parties should be present, either by themselves or by somebody appointed by them; and therefore if a person executes a bond of this kind, and says—"I will give you a bond, and I will put a charge on my property, but I will not consent to have it registered," it must be an understood thing that it shall not be registered. If that is the understanding, the other side apparently cannot get the deed registered at all; at any rate, they could not do so without a suit, which there might be great difficulty under such circumstances in maintaining, and therefore it does not appear anything extraordinary that the defendant should have said—"I gave a bond for this debt of my sons, which I know I am in all probability liable for myself. I make it payable in two years. I get two years' credit, and I will charge my estate with it, but it must not be registered." There is nothing very extraordinary in an agreement of that sort being entered into. At any rate, their Lordships are of opinion that the mere circumstance of its not being registered is not sufficient by itself to overbalance the evidence which appears to their Lordships to be generally satisfactory in proof of the validity of the bond.

Then assuming the bond to be genuine, it is hardly necessary in this case to determine whether the subsequent sale would, if it were a really valid sale, prevail against the bond, for it appears very clear to their Lordships that the sale was a sham; in fact, that it was no real sale, and there is no satisfactory evidence of a farthing of money being paid under it, and it looks simply like a pretended sale made for the express purpose of defrauding the defendant's creditors. Their Lordships are of opinion that the defendant has produced no evidence at all which really is of any value in contradiction to the case of the plaintiff.

Their Lordships will recommend to Her Majesty that the judgment of the High Court should be reversed, and the judgment of the Principal Sudder Ameen should be affirmed, and that the plaintiff should have the costs before the High Court, and also the costs of this appeal.

The 12th July 1871.

Present :

Sir James W. Colvile, Sir Joseph Napier, Lord Justice James,
Lord Justice Mellish, and Sir Lawrence Peel.

*Hindoo law of inheritance—Sister and her descendants—Act VIII of 1859 s. 7
—Splitting cause of action—Hindoo widow—Mortgage—Onus probandi.*

On Appeal from the late Sudder Dewanny Adawlut at Agra.

Rao Kurun Singh
versus
Nawab Fyz Ali Khan.

Kooer Gholab Singh
versus
Rao Kurun Singh.

A sister and her descendants find no place in the tables of succession framed according to the Mitacshara law.

It having been contended that this exclusion had its origin in error with reference to the alleged correct interpretation of the texts, it was held to be entirely opposed to the spirit of the Hindoo race to allow the words of the law to control its long-received interpretation as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country, and extremely mischievous to disturb, upon points taken in the Privy Council for the first time, any such course of decision.

A true test of the proper application of s. 7 Act VIII of 1859 to any particular case must be whether there has been any splitting of the cause of action.

Where, in the one case, two Hindoo widows, assuming an absolute power of disposition over their late son's and husband's estate, had granted the inheritance in portions of the estate to the defendants in the first suit, and in the other case the issue was whether they had duly exercised the limited power, which belongs to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes, the causes of action in the two cases were held to be essentially different.

The *onus* is on those who rely upon a mortgage from a person having only a limited power to grant it (a Hindoo widow, as in this case), to show that the money was raised for a legitimate purpose.

Their Lordships, in delivering their judgment in these two cases, will begin with that which was first argued, namely, the case of Kooer Gholab Singh *v.* Rao Kurun Singh.

The plaintiff in the suit and the respondent in this appeal sued in the Zillah Court of Allygurh, in the North-West Provinces, as heir of one Duleep Singh, to set aside certain alienations of the immoveable estate that had been Duleep Singh's up to the time of his death, made by his widow, who succeeded to the estate as his heir. The defendants were respectively the persons claiming under these alienations, and the mother of Duleep, who had concurred in them. The mother survived the widow, and was entitled, at the death of the latter, to succeed as heiress to her son Duleep. The Zillah Court decreed the suit in favor of the plaintiff. At the date of the decree the mother was dead, but she was alive at the time of the commencement of the suit.

The plaintiff and Duleep descended from a common ancestor. The plaintiff was fifth in degree, counting from that ancestor. In his line was his grandfather, who still lived, but was a lunatic at the time of the institution of the suit, and at the time of Duleep's death. The plaintiff's father was then dead. On appeal to the late Sudder Dewanny Adawlut at Agra, that Court affirmed the decree. From that decision this appeal is now brought.

On the argument of the appeal, nothing was addressed to the Court on the

facts to show that these alienations were valid, but the whole argument was addressed to the competency of the plaintiff to question them. The learned Counsel for the appellant objected that at the time of the suit the plaintiff was not entitled to the possession, and that the suit was one for possession, that he sued as guardian of his grandfather, and that he was not duly so constituted, and lastly, that he had shown no title as heir.

As to the first objection, the answer is, that this suit in its main object was brought to set aside certain alienations, and that as the nearest reversioner at the time when they took place was charged as concurring in them, the next presumable reversioner was entitled to question them, and the pendency of her life was not a fatal objection to the institution of the suit so far. And, as it appeared that when the decree gave him possession, he was then entitled to possession, the objection on this point resolved itself into one of form, not affecting the real merits of the case.

As to the second objection, there are two answers to it: first, that the grandfather was not the heir, but the plaintiff, and that if the latter had been obliged to sue on the grandfather's title, the objection also would have been one of form, and not affecting the merits of the case. The objection to the plaintiff's title as heir, which was taken in the Court below, on the ground of its remoteness from the common ancestor, was plainly untenable, and was not here insisted on. This objection, as taken below, necessarily assumes the plaintiff to be claiming as heir to the son, and to urge on the hearing of the appeal for the first time that the real title of heirship must be derived from the mother and not from the son, was to start a new ground of objection to title, which the plaintiff had had no opportunity of meeting in the Court below. The same objection also applied to the argument which was addressed to their Lordships, that a sister may inherit to a brother, and that that line of descent through the assumed sister from the brother was not exhausted by the plaintiff's proof. To admit such a line of argument would be also to expose the plaintiff to objections which, had they been raised below, might have been answered from what was known to be the law of the district, and by the want of proof that the person claiming to be the son of a sister, did in fact stand in that relation to the præpositus. It will be found from the judgment of the Sudder Court, p. 53, that what the Court understood to be the questions raised before them, and the sole issues raised before them were, first, "Should the plaintiff's cause of action be held to have arisen on the death of Duleep Singh or of Koondon Kooer, and is the suit within time or not? Second, Was Koondon Kooer competent or not to alienate the property in question? Third, Is the plaintiff so nearly related as to be entitled to inherit?"

Again, the argument at the Bar that the plaintiff was not the heir, but that the person who appears in the pedigree, and who was a defendant on the record, was a nearer heir of Duleep, depends first upon proof that Duleep was the sister's son, and next, of course, upon the point of law whether the sister's son is capable of inheriting. That it is by no means clear that Duleep was the sister's son, would appear from the statement which precedes the judgment of the Sudder Court, in which the Judges say that "in 1856 Mussamut Toolsa," that is the mother, "is said to have likewise executed a hibbanamah, bestowing Mouza Mohood Khera on her husband's sister's son, Doolut, and her own nephew Buldeo," there treating Doolut not as the sister's son, but, in fact, as the aunt's son. There was, therefore, no real proof before the Court of the relationship of this party to the præpositus, and if there had been such a proof, then, inasmuch as the point was not taken in the Court below, there was nothing whatever to show that the law would not have been as it is contended to be, namely, that that person was not entitled, under the law of the Mitaschara, to inherit. There was nothing to show that the interpretation of the ancient text of the law on which Mr. Pritchard relied, even assuming the relationship to be made out, did obtain in the North-

West Provinces, and there is every reason to suppose from what has taken place in this case, that it has not been received there. The silence of the defendant, supposing him to be in that degree of relationship which it is asserted he was, and of the Court on this point, would be inexplicable on any other hypothesis. Moreover, it is clear that the sister and her descendants find no place in the tables of succession, according to the law of the Mitacshara, which have been framed by several persons of authority, and in particular by that eminent Hindoo lawyer, the late Prossonno Coomar Tagore. The learned Counsel for the appellant seemed indeed to concede this, and to admit that the exclusion did prevail in fact ; but he contended that it had its origin in error, and pleaded for a return to what he contended was the correct interpretation of the texts, founding himself chiefly on the authority of Ballam Bhatta. But it is entirely opposed to the spirit of the Hindoo race to allow the words of the law to control its long-received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country, and it seems to their Lordships that it would be extremely mischievous to disturb upon points taken here for the first time any such course of decision.

Their Lordships, therefore, see no ground whatever for disturbing the decisions of the Courts below in this case, and will humbly advise Her Majesty to dismiss the appeal with costs.

In the other case two questions were raised ; the first upon the decree of the High Court, which dismissed the suit of the plaintiff, the appellant, in this case, upon the ground that the case fell within s. 7 of Act VIII of 1859, which says that "every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained."

Their Lordships think that the true test of the proper application of this section to any particular case must be, whether there has been a splitting of the cause of action ; and it is therefore necessary to consider what in each of these two suits was the cause of action, and whether the second suit can be said to have been brought upon a splitting of that cause of action.

Now, the first suit, as has already been shown, was brought against various defendants to impeach certain alienations made by the widow and mother of Duleep Singh. They were alienations by which the inheritance, subject to the interests of those persons, was transferred to certain foster-sons, or near relations, or dependents of the two ladies, so as to exclude the remoter heirs. The suit with which their Lordships are now dealing was brought to set aside and impeach a mortgage which had been granted by the ladies to the respondent in this case before the alienations which were the subject of the other suit. It no doubt appears in the description of the property, which was the subject of the first suit, that three of the villages forming part of that property were subject to the mortgage now in question, and the name of the mortgagee is mentioned. But it appears to their Lordships that the causes of action in the two cases were essentially different ; in the one case the widows, assuming an absolute power of disposition, had granted the inheritance in portions of the estate to the defendants in the first suit. In the other case, the issue was whether they had duly exercised the limited power which belongs to a Hindoo female having a Hindoo female's right of inheritance in the estate, of charging the estate for certain defined purposes.

The only ground upon which it can be plausibly contended that these two claims against distinct persons and of a very distinct nature really form parts of one cause of action, is founded upon the circumstance that in the first suit the defendant sued for the possession of the lands, the argument being that these mortgagees being parties then in possession, the suit for possession of the lands

ought to have contained a prayer for setting aside the mortgages. It is, however, to be observed that the suit, though in form a suit for the possession, was not properly brought and could not properly be brought at the time it was first instituted for that purpose. The prayer for possession was, if things had remained as they were when the suit was first instituted, one which could not have been granted. But the substance of the suit really was, as has been stated in the judgment delivered in the other case, to have those alienations of the inheritance, which, if not impeached, would have been fatal to the claim of the plaintiff as reversionary heir, set aside and declared invalid. That object was, as their Lordships think, perfectly distinct from that which is the object of the present suit, which is to have these mortgages declared invalid as against the person who has in the former suit established his title to the possession of the estate as heir, on the ground that they were securities, which those who granted them had not the power to grant as incumbrances upon the inheritance.

That being so, their Lordships have next to consider whether, the decree of the Sudder Court being incorrect upon the sole point on which it proceeded, there are sufficient grounds before them for affirming the decree of the Principal Sudder Ameen.

The case made is that this mortgage was granted by the widows, and that it was not within the power of a Hindoo widow to grant it, the money not being raised for any of those purposes for which the widow is allowed to pledge the estate. In such a case whatever be the precise degree of proof required from those who rely upon the mortgage, there is no doubt that those who take such a security from a person, having only a limited power to grant it, are bound to show, *prima facie* at least, that the money was raised for a legitimate purpose. The defendants accordingly plead at page 4, "The real circumstances of the case stand thus:— 'Mussamut Koondon Kooer and Toolsa Kooer, the heirs in possession of the entire property left by Rao Duleep Singh, borrowed Rs. 13,000 from our ancestor, under the necessity of liquidating the debt due from the deceased, and that incurred on account of his funeral ceremonies performed for the benefit of his soul, and in lieu of this sum they mortgaged the three villages in dispute to him, and thus saved the property.'" Upon that pleading it is to be remarked that no distinction is made between any of the items making up the Rs. 13,000, that the defendants pledged themselves to the borrowing of the whole sum for the purposes therein mentioned, and that in those purposes it is not very distinctly stated that any part of the mortgage money was borrowed for the purpose of saving the estate by paying an arrear of Government revenue. The case made at the Bar to-day, however, is that the mortgage is at all events partially good, inasmuch as Rs. 3000, part of the claim, was unquestionably borrowed for the purpose of saving the estate from a Government sale.

In all these cases it is to be expected that those who have to support the affirmative of such a case, should give some clear testimony by witnesses as to the nature of the transaction; and it is very remarkable that in this case the oral testimony on the part of the plaintiff is so entirely worthless that neither of the learned Counsel for the appellants thought fit to refer to it. That some evidence as to the nature of the transaction might have been given one would have supposed, because although the respondents are the children or remoter descendants of the original mortgagee, still, in those proceedings which have been relied upon as showing what the nature of the transaction was, and in particular as to the alleged bond for Rs. 3000, it is stated that it was taken in the name of Kullyan Doss, cashier of the respondent's ancestor. Kullyan Doss is not proved to be dead, nor is the absence of his testimony at all accounted for. There is really no evidence from any trustworthy person whatever employed in the family of the defendants, as to what the real transaction was. In lieu of that, we are referred to the various proceedings which have been read and relied upon by Sir Roundell Palmer. But

what is the documentary evidence, if evidence it can be called, as to the Rs. 3000, which is in fact the only item on which any substantial question seems to arise? It is the document at page 13. That is a plaint filed in a suit brought by the mortgagee against the two women, the widow and the mother of Duleep Singh, seeking to be maintained in possession as mortgagee. The account that it gives of the transaction is this: "The plaintiff files a regular suit in this Court against Mussamut Toolsa Kooer, the mother, and Koondon Kooer, the widow of Duleep Singh, the proprietors of Pergunnah Burowlee, to be maintained in possession as mortgagee, by insertion of his name as such in the revenue records of this district, and by allowing him to pay the Government revenue in respect of Mouzah Fuzulpoor, in Pergunnah Burowlee, assessed at Rs. 506, and to recover Rs. 328, the interest up to the end of the month of Jeith 1254 Fuslee, as well as Rs. 242, the mesne profits for the rainy season crop for 1255 Fuslee, which the defendant has forcibly realized from the lessees of the village, notwithstanding her having already given up its possession to plaintiff, according to the terms of the registered deed of mortgage dated 30th July 1846, engrossed on stamp paper, which is the basis of this action. Total value of suit, Rs. 1076. He founds his claim on the assertion that on the demise of Rao Duleep Singh, the proprietor of the talooqua of Burowlee, the aforesaid defendants became his heirs; and as owners of the entire talooqua and all other property left by him, and in the certificates of death filed in the revenue department in respect to every one of the villages forming the zemindarce of the deceased, the names of the ladies were entered as his successors." That mutation of names took place, as is shown by the proceeding of that date, on the 22nd February 1847; and on the face of the proceeding as well as by evidence which has been given in the cause, it appears that the proceeding was one which followed upon certain litigation between the widow, who was the immediate heir according to the Hindoo law, and the mother, who contested her title, which at last ended in a compromise, whereby one took two-thirds and the other one-third of the estate. This plaint goes on to state: "They then, for the payment of the Government revenue, asked the plaintiff for a loan, and, according to their request, he lent them Rs. 3000." Certainly the inference one would draw from this statement is that the loan was a joint transaction, that it was subsequent in date to the determination of the litigation by the compromise and the insertion of the names of the two ladies as the registered owners of the talook.

Then, again, this deed which is said to have been executed by them, and to have been registered on the 3rd August 1846, which is a date not quite reconcilable with what has just been said, or with what one would infer, is not produced. Neither that nor the mortgage for Rs. 13,000 has been produced. And their Lordships, looking at this documentary evidence on which the respondents rely, and contrasting it with the account given by the witnesses for the appellant, think that the case deposed to by the witnesses for the appellant, to whom credit was given by the Principal Sudder Ameen, is far more likely than anything which has been alleged on the other side, to be a true account of the real transaction. They are clearly of opinion that the respondents have failed to support that burden of proof which the law casts upon them, of showing that the mortgage was given in any part for the purposes for which the widow was entitled to pledge the estate.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal be allowed, that the decree of the High Court be reversed, and that in lieu thereof a decree be made dismissing the appeal to the Sudder Court and affirming the decree of the Zillah Court, with costs. The appellant in this suit and the respondent in the other suit must have the costs of both the appeals.

The 15th July 1871.

Present:

Sir James W. Colville, the Judge of the High Court of Admiralty, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

On Appeal from the High Court at Calcutta.

*Appeal to Privy Council—Agreement by Counsel (Breach of)—
Costs (nomine expensarum).*

Moonshee Ameer Ali

versus

Inderjeet Koer and others.

Where the certificate of the High Court was to the effect that, in consideration of the Court deciding the appeal before it upon one point only, *i.e.*, the validity of the mookhtarnamah, the Counsel for the appellant, in the presence and with the consent of the son and agent of the appellant, stated to the Court that he would not appeal from the decision as to the validity of the mookhtarnamah, it was held that there was good and sufficient consideration for such an agreement, and that the appeal having been brought in violation of good faith, could not be entertained, inasmuch as the real merits of the case had been withdrawn from the Court below.

In awarding costs, the case was held to be one to justify the Privy Council in using the power with which they were invested, of giving a sum of money *nomine expensarum*.

Their Lordships are of opinion that the preliminary objection taken to the hearing of this appeal ought to prevail. The certificate of the High Court of Fort William in Bengal is to the effect that in consideration of the Court deciding the appeal before them upon one point only, that is the validity of the mookhtarnamah, the Counsel for the appellant, in the presence and with the consent of the son and agent of the appellant, stated to the Court that he would not appeal from the decision as to the validity of the mookhtarnamah. Their Lordships upon consideration find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this, and a very important result to the parties, that by obtaining the decision upon the validity of the mookhtarnamah alone the case became a case not decided against Bisshen Singh, the party in whose right the appellant was suing. If the case had been heard by the High Court, and upon appeal the merits had been gone into, and the whole matter determined upon as in a suit by Bisshen Singh and others, Bisshen Singh and the persons claiming under him would not have been precluded from appealing to this Court, but might on the other hand have had two successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the mookhtarnamah, it was really substituting a nonsuit for an adverse verdict, leaving it open to Bisshen Singh and the appellant himself, if he can get a new and genuine document in his favor, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal, and there is no doubt that it was done with the actual consent of the son and representative of the appellant. The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought where the real merits of the case have been withdrawn from the Court below.

But their Lordships have had some difficulty in determining what should be done with regard to costs. Now their Lordships feel that where a certificate of this kind comes over with the record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a record

so situated before any expense had been incurred in preparing cases, or in delivering briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of this certificate without its being brought, either through the Registrar or by an application at their Lordships' Bar, to their attention. Disposing of it upon this preliminary but still very serious objection, their Lordships feel that they ought not to give all the costs as if the case had been fully heard upon the appeal, but still they think the appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested, to give a sum of money *nomine expensarum*, and, therefore, they will humbly recommend Her Majesty to dismiss the appeal, allowing to each of the three respondents the sum of fifty guineas for the costs of the dismissal of the appeal.

The 17th July 1871.

Present :

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Mortgage—Limitation—Purchaser.

*On Appeal from the High Court at Calcutta.**

Brojonauth Koondoo Chowdry and others

versus

Khelut Chunder Ghose.

B and *C* were respectively the first and second mortgagees of property which was mortgaged to them by *A*. The mortgages were in the English form and contained the usual proviso for redemption, and also a proviso that the mortgagor should continue in possession until default was made when an express entry was given to the mortgagee. During the continuance of the mortgages, *D* purchased the property in question from the assignee in insolvency of *E*, who had purchased it from *A*. *E*'s purchase was made upwards of twelve years before the institution of this suit and had been followed for upwards of twelve years by registration and mutation of names in the Collectorate. *A*, the mortgagor, made default, much more than twelve years before the commencement of this suit. *B* having obtained a decree for foreclosure in a suit which he brought against *A* alone, *C* paid *B* off, took a transfer of his mortgage, and in his turn sued *A* alone and obtained a decree for foreclosure. *C* then brought this suit against *D*, who pleaded twelve years' limitation in bar.

Held that *C* acquired no right against *D*, who was no party to the foreclosure proceedings, except that which was conveyed to him by his securities, and the right he had under the mortgage-deed was to obtain possession of the land, his cause of action as to which accrued when the mortgagor made default; and as that was more than twelve years before suit *C* was barred, the exception in s. 6 Act XIV of 1859, not applying to this case, *D*'s possession being in no sense possession by permission of the mortgagee.

In this case the only question to be decided is whether the High Court was justified in holding that the suit was barred by the Statute of Limitations.

The plaintiff was a mortgagee, originally a puisne mortgagee, but who had acquired the rights of the first mortgagee, as afterwards stated.

The defendant was the purchaser from the assignee in insolvency, of a person who had purchased the property in question from the mortgagor. The original purchase from the mortgagor was upwards of twelve years before the commencement of this suit, and for upwards of twelve years had been followed by

* From the judgment of Peacock, *C.J.*, and L. S. Jackson, *J.*, in Regular Appeal No. 196 of 1864, decided on 29th September 1866—6 W. R. 269.

registration and mutation of names in the Collector's book, the order for which was made on the 15th January 1850.

At the time of the sale the property was subject to mortgages, made in the form of an English mortgage, with the usual proviso for redemption, and a proviso that the mortgagor should continue in possession until default, and on default an express right of entry was given to the mortgagee.

Much more than twelve years before the commencement of this suit such default was made.

After the sale under which the defendant claims, the first mortgagee instituted a suit for foreclosure in the Supreme Court of Fort William. This suit proceeded to a foreclosure *nisi* on the 11th December 1850, and which was made absolute on the 9th February 1852.

The plaintiff, however, procured that foreclosure to be opened, paid off the first mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the mortgagor, and obtained his final decree for foreclosure on the 15th July 1862.

To these foreclosure proceedings the purchaser of the property in question was not made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage, the plaintiff commenced this suit against the defendant, who pleaded his twelve years' possession in bar. The plaint was filed on the 27th August 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the mortgagee, who was content to rest on his security, and the mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was contended that until the foreclosure put an end to the security as a security it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended that the defendant who derived his title under a purchase from the mortgagor could not be in a more favorable position than the mortgagor himself.

The foreclosure proceedings did not affect the defendant or the property in question, and it is difficult to see how a right of entry or cause of action against one man in respect of his property could be either lost or gained by proceedings against another man in respect of his property.

As against the defendant the plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage-deed was to obtain possession of the land, and the cause of action accrued when default was made.

The words of the Indian law are :—

"To suits for the recovery of immoveable property, or of any interest in immoveable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose."*

To this there is one exception in respect of mortgage, which is this :—

"In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt."†

This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, even to the case of the original mortgagor himself continuing in possession and paying interest to the mortgagee.

* Cl. 12 s. 1 Act XIV of 1859.

† S. 6 Act XIV of 1859.

The judgment of the High Court appears to be that the bar extends even to such a case where not provided for by that section. The ruling however was not necessary for the determination of this suit.

It may, however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation; and their Lordships, dealing with suits upon mortgages in the ordinary Courts of India, might, in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the defendant, the purchaser, was holding or supposed that he was holding by the permission of the mortgagee; and when both things concur,—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old,—it is impossible to say that such a possession is not protected by the Law of Limitations.

Therefore, without passing an opinion whether the broader and more general rule laid down in the judgment of the High Court can be supported, their Lordships have no doubt that the decision in the particular case is correct.

It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in India. Their Lordships do not share in that apprehension. It may be and probably is better that mortgagees keeping their securities locked up in their strong box and allowing the mortgagor to be the visible owner in possession for a long series of years, should occasionally, as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *bonâ fide* purchasers and persons claiming under them after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title perhaps half a century old because somebody has been paying interest on the mortgage money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the mortgagee to assert his title earlier.

Their Lordships will recommend that the judgment be affirmed, and the appeal dismissed with costs.

The 17th July 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, and
Sir Lawrence Peel.

Limitation—Del-credere agent—Cl. 9 s. 1 Act XIV of 1859.

*On Appeal from the High Court at Calcutta.**

Dukur Pershaud Bustoorree

versus

Mussamut Foolcoomaree Dabee.

* From the judgment of Peacock, C.J., and L. S. Jackson, J., in Regular Appeal No. 128 of 1866, decided 24th January 1867,—See 7 W. R. 67.

A suit against a *del-credere* agent on a balance of accounts in respect of dealings regarding which there is no express written contract is governed by the three years' limitation prescribed by cl. 9 s. 1 Act XIV of 1859.

This was a suit brought by the appellant, who was the manager of a factory in Moorshedabad, against the respondent, who carried on an old established business of broker, to recover a sum of Rs. 16,051 and interest alleged to be due on the balance of an account. The defendant had for several years sold the goods of the plaintiff's firm, and according to the finding of the Principal Sudder Ameen, the correctness of which was not disputed before us, had received a pucca or *del-credere* commission, which made her liable to the plaintiff for all goods sold which were not paid for by the purchasers. As there was no proof that any part of the price of the goods in respect of which this suit was brought had been received by the defendant, the claim against the defendant was only supported upon the ground that as she received a *del-credere* commission, she was liable for the price of all goods sold by her for the plaintiff. It was admitted that the cause of action for the last item in the account had accrued more than three years, but that there were items in the account which had occurred within six years from the commencement of the suit. The Statute of Limitation was pleaded, and the sole question to be determined is whether, under the circumstances previously stated, the suit is barred by the Indian Statute of Limitations, Act XIV of 1859. The High Court held that the case came within cl. 9 s. 1, as a suit brought for the breach of a contract; and the Chief Justice in giving judgment says:—"Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms upon which we find them carrying it on. It was an engagement on the part of the defendant that she would sell the plaintiff's cotton, and that she would guarantee the purchasers. That was a liability on the part of the defendant not arising from a wrong, but a liability arising out of an engagement which she must be assumed to have entered into with the plaintiff. It therefore falls within cl. 9 s. 1. It is a suit for a breach of a contract not in writing." It was urged before us on the part of the appellant that the High Court had put a wrong construction on the words "breach of any contract," as used in the Clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract from actions to recover debts, and that the enumeration in the Clause itself and in cl. 8 of several debts with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "suit for the breach of any contract," and that the present suit was in substance a suit to recover a debt or liquidated sum of money, and that the period of limitation was six years under cl. 18 s. 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in India respecting the proper construction to be put on the words "for the breach of any contract," in cl. 9. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real debtors for the price of the goods sold are the purchasers of the goods, and the broker is only sued upon his collateral undertaking that in consideration of the commission paid to him he will pay the price of the goods if the purchaser fails to do so. An action in such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion that the judgment of the High Court was correct, and they will recommend to Her Majesty that the appeal should be dismissed with costs.

The 18th July 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish,
and Sir Lawrence Peel.

*Resumption Suits—Reg. II of 1819 s. 30—Onus Probandi—Review—
Jurisdiction.*

*On Appeal from the High Court at Calcutta.**

Nobokisto Mookerjee

versus

Koylash Chunder Bhattacharjee and others.

Hurryhur Mookerjee

versus

Madhub Chunder Baboo.

N. as durputneedar, sued for a declaration that certain lands which defendants claimed to hold as lakheraj were held under an invalid title; the plaint stating that the suit was brought under Reg. II of 1819 s. 30 cl. 1. The first Court found that 2 beegahs 1 cottah of the land was not within plaintiff's putnee; that 12 beegahs 1½ cottahs had been enjoyed rent-free from before 1st December 1790; and that the rest was liable to assessment. The Lower Appellate Court confirmed the decision as to the 2 beegahs 1 cottah, but decreed the rest of the plaintiff's claim, finding that defendants had failed to prove a valid title, or that the land had been held rent-free for a period commencing before 1st December 1790. In special appeal the High Court remanded the case for re-trial, stating that the *onus* had been misplaced.

HELD that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the plaintiff, whose suit ought otherwise to have been dismissed; the invocation of Reg. II of 1819 s. 30 having the effect of causing the case to be tried according to the procedure and presumptions prescribed by that enactment to the prejudice of the defendant.

If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it lies upon the plaintiff to prove a *prima facie* case, *i.e.* his case being that his *mâl* land has since 1790 been converted into lakheraj, to give some evidence that his land was once *mâl*. This burden is not met by the mere fact of the lands being within the ambit of his estate.

It is competent to the High Court, on an application for review, to delay their final decision until a doubtful question of law has been settled by a Full Bench.

This appeal, and that of Hurryhur Mookerjee, appellant, and Madhub Chunder Baboo and another, respondents, were lately argued *ex-parte* before this Committee. The principal question involved in them is common to both, but inasmuch as in each some subordinate point peculiar to it was also raised, their Lordships will deal with them separately. They propose to take first the appeal of Nobokisto, though the last argued, because that record contains a judgment, pronounced on the 27th March 1865, in a third case, No. 268 of 1864 (2 W. R. 259), wherein the High Court stated fully the grounds upon which the ruling impugned by both these appeals is founded.

This suit was instituted by the appellant as a durputneedar. Its object was to obtain a declaration that certain lands which the respondents claimed to hold as lakheraj land were so held by them under an invalid title; that they were the *mâl* lands of the appellant, liable, as such, to pay rent to him, and to have them assessed accordingly. The suit was originally brought before the Collector, but, under the provisions of an Act of the Bengal Council (VII of 1862), was afterwards transferred to the Court of the Principal Sudder Ameen of Zillah Hooghly. The plaint expressly stated that the suit was brought under the 1st clause of s. 30 Reg. II of 1819. Their Lordships need not consider particularly the provisions of

* From the judgment of Seton-Karr and Campbell, *J.J.*, in Special Appeal No. 2750 of 1864, decided 13th April 1865.

that enactment. It is only material to observe that, in suits brought under it by a zemindar, or one to whom the zemindar's rights have been transferred, the whole burden of proving the nature and commencement of his title was understood to be thrown upon the defendant, the lakherajdar, whom the plaintiff, who disputes the validity of the tenure, might compel to produce the sunnuds and other ancient documents upon which such title rested. The sole proof of title which the defendant could require in the first instance from the plaintiff was that the lands in question were within the ambit of his zemindary or putnee, as the case might be. This issue the respondents in the present case did raise, and successfully raise, as to part of the land. As to the rest of the land, the only issue, except that of limitation, was whether it was the respondent's valid rent-free land or not; the whole burden of proof on this issue being cast on them.

The Principal Sudder Ameen, the Judge of first instance, found that of the land in suit 2 beegahs and 1 cottah were not within the appellant's putnee; that as to 12 beegahs and 14½ cottahs, other part of that land, the respondents had proved, by certain ancient documents, that they had held and enjoyed them as rent-free lands from long before the 1st December 1790; and that consequently the claim to assess them was barred by limitation. The residue, being 3 beegahs 17½ cottahs, he held liable to assessment. Both parties appealed against this decision to the Zillah Judge, who on the 21st June 1864 confirmed the decree of the Principal Sudder Ameen so far as it related to the 2 beegahs and 1 cottah, but reversed it as to the rest of the land, making as to that a decree in favor of the appellant's claim. The grounds of his decision were that the documents produced by the respondents were untrustworthy, and therefore that they had failed to prove either a valid title to hold the land rent-free, or that the land having been held rent-free for a period commencing before the 1st December 1790, the appellant's right to assess them was barred by limitation.

The respondent then preferred a special appeal to the High Court. Of the grounds stated for this, it is only necessary to notice the third and the fourth. The third is that the suit being brought, though improperly, under s. 30 Reg. II of 1819 was admittedly barred by limitation. The fourth that the *onus probandi* had been improperly thrown upon the defendants. On the 13th April 1865, the High Court remanded this cause, with five others, which it treated as being in the same category, to the Court of first instance, stating only that "the *onus* having been misplaced, these cases must go back to the first Court with reference to the principles laid down in case No. 268 of 1864." Before considering the propriety of this remand, which is the principal question raised by the appeal, it will be convenient to complete the history of this particular case. The appellant went again before the Principal Sudder Ameen amending his plaint pursuant to the order of remand, by striking out all reference to Reg. II of 1819, and making it a plaint for the resumption of land fraudulently made lakheraj after the 1st December 1790, and therefore falling within s. 10 Reg. XIX of 1793. The Principal Sudder Ameen thereupon framed fresh issues, the first of them being whether the land in dispute ever formed a portion of māl land at the time of the Government settlement, and whether at any subsequent time it had been fraudulently made rent-free; and on the 13th September 1865, dismissed the suit upon the ground that the plaintiff, the appellant, had produced no documents or evidence in the suit, and had thereby failed to support the burden of proof which this issue cast upon him. The appellant afterwards, in August 1865, obtained from the High Court a very special leave to appeal to Her Majesty in Council, on the ground that this suit, though the subject-matter of it was far below the appealable value, was one of a large class in which similar remands had been made. Their Lordships will assume that this leave to appeal was properly granted, and that the object of the appeal, or at least its principal object, is to test the correctness of the principle on which remands in this and similar cases have been directed,

and the burden of proof to some extent cast on the plaintiff in suits of this nature.

In order to do this, it is necessary shortly to review the law relating to lakheraj tenures within the provinces embraced by the perpetual settlement; and some recent decisions of the High Court of Calcutta concerning it.

The foundation of that law is well known to be Reg. XIX of 1793. That statute, after affirming in the strongest terms the *prima facie* or, so to speak, common law, right of the ruling power to a certain proportion of the produce of every beegah; after declaring all lakheraj tenures to be exceptional and in contravention of that right, that many of the existing tenures of that kind were invalid; but that all, whether valid or invalid, had been excluded from the decennial settlement; and that the jumma assessed upon the estates of individuals under that settlement was to be considered as exclusive and independent of all lakheraj lands whether exempted from the kheraj or public revenue, with or without due authority; proceeded thus to deal with the then subsisting lakheraj tenures. It divided them into two classes, viz., those created by grants made previous to the 12th August 1765, the date of the grant of the Dewanny to the East India Company, and those created by grants made between that date and the 1st December 1790. The former, by s. 2, were, subject to certain conditions, declared to be valid. The latter, with certain exceptions and subject to certain conditions, were, by the third section, declared to be invalid; and, as such, to be resumable and subject to future assessment. The Regulation then went on to subdivide the invalid and resumable tenures into two classes, viz., those which comprised lands not exceeding 100 beegahs, and those which comprised lands in excess of that quantity. The revenue which might thereafter be assessed on the former was declared to belong to the zemindar or talookdar within whose estate the lands were situate. The revenue which might thereafter be assessed on lands falling within the latter class was declared to belong to the Government. And thus the power of bringing a resumption suit to impeach a lakheraj tenure existing at the date of the decennial settlement, and to have revenue or rent assessed thereon came to belong to the Government, or to private proprietors according to the quantity of land comprised in such tenure. Having thus dealt with all the lakheraj tenures then subsisting, the Regulation proceeded to legislate against the future conversion of any rent-paying lands comprised in the decennial settlement into rent-free lands. This was done by s. 10, which is in these terms:—

(Their Lordships read s. 10 Reg. XIX of 1793).

It is obvious that this enactment relates solely to lands which, on the 1st December 1790, were māl or rent-paying lands; that it treats the grant of a rent-free tenure in such lands not as voidable, but as absolutely void; that it reserves to the Government no right in such lands unless they happened to be held khas; and that it positively declared that no length of possession should give validity to any such grant. It further expressly authorized the landowner to dispossess the grantee by the high hand without having recourse to the machinery provided by other sections of the Regulation for the resumption or assessment of resumable lakheraj tenures; or to any other legal proceeding.

The machinery provided for resumption suits by this Reg. of 1793 was modified by several subsequent Regulations, and in particular by Reg. II of 1819, which has been already mentioned. And in process of time landowners seeking to enforce their rights under s. 10 seem to have found it expedient to do so by means of legal proceedings rather than in the summary manner authorized by the latter clause of that enactment. An important distinction was, however, established by judicial decisions between a suit to enforce a claim under this 10th section and ordinary resumption suits, whether brought by Government or individual proprietors under the earlier sections of the Regulation. Whatever

doubts may at one time have existed, it became unquestionable, after the decision of this Committee in the case of the Maharajah of Burdwan* (4 Moore I.A., 466) that the right of the Government to resume a voidable lakheraj tenure comprising more than 100 beegahs was subject to the sixty years' limitation; and that by parity of reasoning, the right of a zemindar to resume a voidable lakheraj tenure comprising less than 100 beegahs was subject to the twelve years' limitation. On the other hand, the Courts construing the Regulation of Limitation in connection with that part of s. 10 Reg. XIX of 1793, which says that no length of possession shall give validity to such a grant, came (whether on sound principles or not it is immaterial here to consider) to the conclusion that the claim of a landowner under this section was subject to no limitation. Notwithstanding, however, these distinctions between the two rights, and between the suits to enforce them, a loose practice seems to have sprung up under which landowners claiming the right to assess lands held and enjoyed rent-free, brought their suits generally under Reg. II of 1819, without specifying whether they were seeking to enforce the right given to them by ss. 7 and 9 Reg. XIX of 1793, or that given to them by s. 10. The result was that the stringent provisions of Reg. II of 1819, and of the other Regulations *in pari materid*, were indiscriminately applied; and that in all cases the burden was cast upon the defendant of proving by the production of ancient documents that his tenure existed before the 1st December 1790. If he established this, he would probably succeed, whether his ancient lakheraj tenure was voidable or not, the suit, unless the plaintiff happened to be an auction-purchaser at a Government sale, being barred by limitation.

So stood the law and practice until Act X of 1859 was passed. Section 28 of that statute repealed so much of s. 10 Reg. XIX of 1793 as authorized the landowner summarily to dispossess the grantee of a rent-free tenure; it provided that every landowner who should desire to assess any such land, or to dispossess the grantee should take proceedings before the Collector, which were to be dealt with as a suit under that Act; and it fixed a period within which all such suits were to be brought.

Between the passing of this Act and the beginning of the year 1865, the Courts of Bengal seem to have been somewhat divided upon several questions touching the proper mode of enforcing the claims of zemindars and other landowners, under s. 10 Reg. XIX of 1793; and some, at least, of such questions were finally referred for adjudication by a Full Bench, consisting of seven Judges of the High Court, in an appeal of Sonatun Ghose and others v. Moulvie Abdool Furer. This case, which was numbered No. 869 of 1864, was decided on the 25th January 1865, and is reported in 2 Weekly Reporter, p. 91. The Judges were divided in opinion, each delivering a separate Judgment, in which the law on the subject was elaborately reviewed. But the following was the final judgment of the Court. All the Judges held that, before the passing of Reg. II of 1819, the Civil Courts under their ordinary jurisdiction were competent to entertain regular suits by zemindars for the declaration of their right to resume revenue illegally alienated subsequent to 1790, and for possession of the land held rent-free under grants or titles, which had their origin subsequently to the 1st December in that year. Four of the Judges against three held that such suits were unaffected by the passing of s. 30 Reg. II of 1819 of which the proper operation was limited to suits for the resumption of lakheraj existing prior to the 1st December 1790. And four of the Judges against three held that the jurisdiction of the ordinary Civil Court to try the suit was not taken away or affected by s. 28 Act X of 1859.

The second of these rulings is that which is most material to the decision of the present appeal; the necessary consequence of it being that a suit to enforce a claim arising under s. 10 Reg. XIX of 1793, if brought under s. 30 Reg. II

* See p. 8, *ante*.

of 1819 in order to get the benefit of the procedure there prescribed, is improperly framed.

The same case came again before a Full Bench of seven Judges,* somewhat differently composed, on the 22nd February 1865. They unanimously held that they were bound by the decision of the 25th January 1865, so far as it went. But they further decided that the regular suit which, notwithstanding s. 28 Act X of 1859, might still be brought to assess or resume invalid lakheraj created since the 1st December 1790, was not subject to limitation; and further, that in every fresh suit it lay upon the plaintiff to prove that the case was one falling within s. 10 Reg. XIX of 1793. And the Court added:—

“He must prove his allegation that the land held by the defendant, and which he claims to be lakheraj, is part of the māl land of the plaintiff; if he prove that fact, and show that it was assessed to the public revenue at the time of the decennial settlement, it may be presumed that the right under which the defendant claims to hold as lakheraj commenced subsequently to the 1st December 1790, unless the defendant gives satisfactory evidence to the contrary.” In another case, decided the same day by the same Judges (2 Weekly Reporter, p. 207), they adhered to the ruling in No. 869 of 1864, to the effect that s. 30 Reg. II of 1819 related only to suits for resumption of lakheraj created prior to the 1st December 1790, and held that, as a consequence of that ruling, every suit alleged to be brought under s. 30 was necessarily not one to which the rule created by s. 10 Reg. XIX of 1793, of exemption from limitation, applies. They further decided that the plaintiff, having erred in stating that the suit was brought under s. 30, should, if he wished to do so, be allowed to amend his plaint, and that, in such case, the cause should be remanded for re-trial; but that if the plaintiff did amend his plaint, he must show on the face of it, as required by the Law of Procedure, when his cause of action accrued, and if it accrued beyond the period ordinarily allowed by any law for commencing such a suit, upon what ground an exemption from the law was claimed.

There has been, so far as their Lordships are aware, no appeal from these decisions of a Full Bench of the High Court. They have since given the law to the Division Benches of that Court; and the order of remand, of which the present appeal complains, is one of many which have been made in accordance with them. The judgment in the case No. 268 of 1864,† which is set forth at page 77 of the Appendix, is, in fact, only a recapitulation of what had been decided and laid down in one or other of the above-mentioned decisions of the Full Bench.

No attempt was made at the Bar to impugn the correctness of the first decision in No. 869 of 1864. It must be held, therefore, to be settled law that the provisions of s. 30 Reg. II of 1819 do not apply to such a suit as the appellant's; and the only questions which the appeal raises are whether, this being so, the High Court has been right in remanding this and other causes similarly circumstanced for re-trial; whether on such a re-trial the burden of proof should be cast in the degree in which the High Court would cast it on the plaintiff; and lastly, whether there is anything in the particular case which renders such an order of remand, though otherwise correct, improper.

Their Lordships are very clearly of opinion that the remand for re-trial upon an amended plaint was not only correct, but an indulgence to the plaintiff, whose suit, if not so remanded, ought to have been dismissed. The invocation of s. 30 Reg. II of 1819 is not mere matter of form to be rejected as surplusage. The effect of it is to cause the case to be tried according to the procedure and presumptions prescribed by that enactment, and the enactments *in pari materia* greatly to the advantage of the plaintiff, and, consequently, to the prejudice of the defendant. It follows that, if the procedure was not applicable to the case, there had been a mistrial.

* 2 W. R. 205.

† 2 W. R. 259.

Again, their Lordships think that no just exception can be taken to the ruling of the High Court touching the burden of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a *prima facie* case. His case is that his māl land has, since 1790, been converted into lakheraj. He is surely bound to give some evidence that his land was once māl. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the māl assets of the decennial settlement of the estate. His *prima facie* case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790.

It may be objected that the result of this ruling may be that plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the plaintiff to give *prima facie* proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the defendants, or those from whom they claim, have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if in such cases effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations which have now been decided to be inapplicable to suits of this nature, and by relieving defendants from a burden which every year made it more difficult to support.

The only other point to be decided on this appeal is whether there is any peculiarity in this case which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. Leith argued that the defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the appellant's estate. But such an admission is obviously not sufficient to meet the burden of proof thrown upon the plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been māl lands. In fact, the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint, the decree dismissing his suit was right.

In the other appeal, that of Hurryhur Mookerjee, the suit was also, on the face of it, brought under s. 30 Reg. II of 1819, though to enforce a claim under s. 10 Reg. XIX of 1793. In fact, in this case there was a preliminary proceeding under s. 28 Act X of 1859. The defendants (the respondents) undertook to prove that their tenures existed before December 1790. The Principal Sudder Ameen decided, on the 9th April 1863, that they had failed to do so, and decreed in favor of the appellant. That decree was affirmed on appeal by a Division Bench of the High Court on the 14th March 1864. An application for a review of judgment was made on the 10th June 1864, on the ground, amongst others, that the appellant having stated that the lands were his māl lands, the Court had erred in throwing the *onus* of proof on the defendants. The review was admitted on this ground; and on the 24th August 1865, the Court made an order in these terms:—"A notice will issue to the other side, when the case will be argued whether or not our decision, which has been overruled by a subsequent ruling of the Full Bench, should not be altered." And on the 6th September 1867, the Court made the second order for a remand, saying: "The *onus* being on the zemindar, he will be permitted to amend his plaint; and he will have to prove that the land is māl, by showing that he has received rent for the same."

Their Lordships conceive that subject to the point which will be subsequently

noticed, the question whether this remand was correct, must be governed by their decision on the other appeal. They do not think that the order is vitiated by the specification of one amongst the various methods by which the plaintiff might prove his case. They do not conceive that the High Court really meant to limit him to that kind of proof. It was, however, argued by Sir Roundell Palmer that the remand of this particular case was improper because the cause had already been finally decided in the appellant's favor and ought not to have been admitted to a review, in order to give the defendants the benefit of what had been decided in other cases after such final judgment had passed. Their Lordships, however, observe that the application for a review seems to have been regularly made within 90 days of the date of the decree sought to be reviewed, pursuant to s. 377 of the Code of Procedure; and this being so, their Lordships conceive that it was competent to the High Court to delay, if they did delay, their final decision on that application until the law, on which so much doubt existed had been settled by the judgments of the Full Bench of the High Court, which have been already noticed. Therefore, in this case also, their Lordships think that the final order of the High Court was correct. They will, accordingly, humbly advise Her Majesty to dismiss both appeals. As the respondents have not appeared in either, it is unnecessary to say anything about costs.

The 18th July 1871.

Present:

Sir James W. Colvile, The Judge of the High Court of Admiralty, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Insolvent Father—Conveyance to Son (for benefit of family)—Father's creditors.

*On Appeal from the High Court at Calcutta.**

Faez Buksh Chowdry

versus

Tukeerooddeen Mahomed Ahassun Chowdry.

Where a father, being in insolvent circumstances when he purchased a property, mortgaged it, and the mortgagee who had foreclosed and had become the absolute owner of the property, not caring (out of consideration for the father and the family) to insist on retaining the whole value of the property so acquired, but willing to allow it to go back to the family on being satisfied or secured the real amount of his debt, made a conveyance of his interest under the foreclosure in consideration of money raised by the son, it was held that the arrangement was made for the benefit of the family, and that the father's creditors had no equitable or moral right to the property.

In the judgment delivered in the case to which their Lordships have been referred, viz., *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (reported in 11 Moore),† there is this passage—"Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony." That principle is sufficient to dispose of this case, which differs from the case referred to in this respect,

* From the judgment of Bayley and Shumboonath Pundit, *J.J.*, dated 15th January 1866, reported in 5 W. R. 43.

† Also in 7 W. R. P. C. 10; 1 Suth. P. C. R. 651.

that in the case now to be decided, there is not, in their Lordships' opinion, any legal evidence to create suspicion, or any doubt to be entertained with regard to the substantial honesty of the transaction.

It appears quite clear that the father, whose judgment-creditor obtained this property, was in insolvent circumstances; that he had not a farthing of money with which to purchase the property in question; that the property was then in the hands of a mortgagee, who had foreclosed, and had become the absolute owner of the property, so that it was his to deal with as he thought fit.

Having probably, as was suggested by the High Court, kind considerations for the father and the family, he was minded not to insist on retaining the whole value of the property so acquired, but to allow it to go back to the family on being satisfied or secured in some way or other the real amount of the debt for which he had seized the property.

In that state of things the way in which the transaction was completed was this,—the son gets a man to lend him part of the money in consideration of a putnee and a bond. The son gives a mortgage to the original mortgagee for parting with the interest which he had obtained under the foreclosure; he gives his bond and then the conveyance is made to the son.

Their Lordships think, in accordance with the judgment of the High Court, that this was done for the benefit of the family. The whole circumstances show that it was open to the mortgagee and to the family to do it, not by a conveyance to the insolvent father, or in trust to the insolvent father, which would give it to the creditors, who had no right, equitable or moral, with regard to this property, but to give it in such a way as best to effect their object, that is, to give it to the son, who seems to have been the proper man to carry out the arrangement for himself and for his family.

Under those circumstances, their Lordships think that the judgment of the Principal Sudder Ameen was right; and they will therefore humbly recommend to Her Majesty that the judgment of the High Court ought to be reversed, and that in lieu thereof there should be an order dismissing the appeal from the Sudder Ameen, with costs.

The appellant is to have the costs of this appeal.

The 18th July 1871.

Present:

Sir James W. Colville, The Judge of the High Court of Admiralty, Sir Joseph Napier, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Ghatwalee tenure—Resumption by Zemindar—Auction-purchaser—Chakeran or service land—Reg. VIII of 1793 s. 41, Hereditary—Construction.

*On Appeal from the High Court at Calcutta.**

Kooldeep Narain Singh

versus

The Government of India and others.

* Where a ghatwalee tenure existed in its present form before the Decennial Settlement, the zemindar was held to have no right to resume the lands on the mere suggestion that the services have ceased or that they are no longer necessary, and that too even if the Government, who had clearly a joint interest

* From Full Bench ruling dated 8th September 1866, reported in 6 W. R. 199.

with the zemindar in the continuance of the services when necessary, were not (as in this case) disputing the zemindar's right.

If the auction-purchaser, who has acquired the right of the zemindar, has any right at all to destroy the tenure, it must be by virtue of s. 41 Reg. VIII of 1793 relating to chakeran or service land.

The omission of words of inheritance does not show conclusively that the sunnud was not hereditary.

This is a suit brought by an auction-purchaser to resume possession of certain villages held under the tenure known as the ghatwalee tenure. It does not appear to be an ordinary suit for resumption and re-assessment; for the plaintiff claims a right to the possession of the land from the date of the auction sale, with mesne profits from that time; but the substantial question raised in the cause is, whether the appellant, as auction-purchaser, having acquired the rights of the zemindar, with whom the original settlement was made, is entitled to resume and put an end to the Ghatwalee tenure. It has been found as a fact by the Courts below (and their Lordships must assume that finding to be correct), that this tenure existed in its present form before the Decennial Settlement. The original sunnud granting the ghatwalee tenure is far more ancient. The first document produced goes back to the year 1743, and that sunnud appears to refer to and recite a former sunnud. There is no mention in this document of the rent reserved, but there does appear to their Lordships to be, as there appeared to the Judges of the High Court to be, on the record proof that the rent payable in respect of these mouzahs at the date of the Decennial Settlement was the present rent of Rs. 61. The auction-purchaser, therefore, coming in by virtue of the sale, would appear to have no right to disturb this tenure in the ordinary way in which an auction-purchaser can sweep away encumbrances created since the Decennial Settlement. The only advantage which he gains by the character of auction-purchaser is, that he is relieved from any difficulty arising from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former zemindar, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the zemindary. It would seem, therefore, that if he has any right at all to destroy the tenure, it must be by virtue of that clause which has been cited from Reg. VIII of 1793 s. 41, relating to chakeran or service lands. That enactment does not seem to have been much discussed below, but their Lordships fail to see upon what the title of the auction-purchaser can depend, if it does not depend upon that. Their Lordships further consider it to have been properly found by the Courts below that this tenure is an hereditary tenure. It is true that the sunnud which is produced contains no words of inheritance, but it is in their Lordships' knowledge that before the acquisition of the Dewanee, before the British power became the ruling power in India, it was extremely common where a tenure was in fact hereditary, when it practically passed as hereditary from father to son, to take out a new sunnud upon each descent. Therefore it appears to their Lordships (and they are under the impression that it has been so decided here, as it appears to have been decided in the High Court), that the omission of words of inheritance does not show conclusively that the sunnud was not hereditary. Then there is the strongest possible evidence that these tenures have descended from father to son; that they have, in fact, been hereditary, and their Lordships are, therefore, of opinion that the conclusion to which the High Court came upon that point was correct.

The question, then, is whether, upon the suggestion that these ghatwalee services have ceased to be necessary, the zemindar has a right to resume the lands, and to turn out the persons who have enjoyed them for such a long period of time. Now, their Lordships think that the principle which should govern this case is that which was laid down in the case of *Forbes v. Meer Mahomed Tuquee*,* which has been referred to. They concur in the view entertained by the Chief Justice, and, in fact, by all the Judges who sat with him, that, under the circum-

* 14 W. R. P. C. 28; and *ante* p. 358.

stances of this case, the right does not accrue to the zemindar on the mere suggestion that the services have ceased or that they are no longer necessary. They are by no means prepared to say, that if the Government, who had clearly a joint interest with the zemindar in the continuance of the services when necessary, were not here disputing the zemindar's right, that the zemindar would, as between him and the ghatwal, have any right so to resume the land ; they are disposed to think that, upon the principle laid down in the case just referred to, that right would not exist. The case which has been cited in support of a right so to dispossess the ghatwal is a case decided on the 5th July 1866, the case of Neelanund Singh against Nusseeb Singh and other respondents. That case was decided by two of the learned Judges who sat in the High Court in the case now under appeal, Mr. Justice Kemp and Mr. Justice Jackson, who seem to have considered that the land being held in lieu of wages and on a *quasi* contract for service, the zemindar was at liberty to determine the tenure when the services were no longer required. In that case, however, the ghatwals were said to hold the land, not under a sunnud conferring an hereditary and indefeasible right, but "on the payment of a quit rent, with enjoyment of the profits of the land in lieu of wages, and possession, however long, would not entitle them to hold the land at a fixed jumama, or to retain a portion of the land after they have ceased to perform the duties for which the land was assigned to them." It would appear, therefore, that the particular tenure there in question was very different from the present tenure. If it were of the same nature, it is clear that the two learned Judges who decided that case have departed from their former opinion, since they have concurred in the judgment now under appeal. Mr. Justice Jackson indeed differed from the rest of the Court as to the conclusion that the tenure was hereditary,—he did not think that the evidence was sufficient to make that out,—but in all other respects he joined with his brethren in pronouncing the judgment now under appeal. It seems to their Lordships, that they would be taking upon themselves a very great responsibility, if, upon a question of this kind, a question of tenure peculiar to India, and upon which the judgment of Indian Courts is so valuable, they were to overrule the unanimous and carefully considered judgment of a full bench of the High Court, particularly when that judgment appears to them to be entirely consistent with the general principles of justice and equity. They must therefore humbly recommend Her Majesty to dismiss this appeal with costs.

The 20th November 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish,
and Sir Lawrence Peel.

*Hindoo widows—Inheritance—Marriage—Legitimacy—Acquiescence—
Presumption—Evidence—Practice.*

On Appeal from the High Court at Madras.

Ramamani Ammal

versus

Kulanthai Nauchear.

In a rival claim between two Hindoo widows of a deceased husband, plaintiff sued as mother and guardian of her infant son, to establish his right as son and heir of his father. The defence was that the mother was not the wife of her alleged husband ; that she was a dancing-girl or a prostitute, and

incapable of contracting a marriage even if she had gone through the form of a marriage; and that her son was not legitimate, and could not inherit. Plaintiff's marriage *de facto* with the deceased was established, and supported by his recognition of their children as legitimate; but the incapacity of the children to inherit was sought to be proved (1) by plaintiff's virtual acknowledgment of defendant's title as heiress upon the grant to defendant unopposed by plaintiff of a certificate of heirship, and (2) by plaintiff's incapacity to contract marriage.

As to the 1st, the Privy Council held, that it was not the practice of the Courts in India or of that tribunal to press against either an infant or a Hindoo female a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title.

As to the 2nd, the Privy Council considered, that the legal presumption in favor of a child who was born in his father's house of a mother lodged and apparently treated as a wife, who was treated as a legitimate child by his father, and whose legitimacy was disputed after the father's death, was a safe and proper one to be made, and that the opposing case had not, as it ought to have, been strictly proved.

Their Lordships took the opportunity of repeating that the ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, nor an entire history thrown aside, because the evidence, or some of the evidence, of some of the witnesses was incredible or untrustworthy; and that evidence should receive its due weight, and not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation.

This is an appeal from a decision of the High Court at Madras, which reversed a decree of the Civil Judge of the Zillah of Madura in favor of the appellant. The suit was brought by the appellant, as mother and guardian of her infant son, to establish his right as the legitimate and sole son and heir of Sivaswami Taver, of Ramnad, to inherit the property, moveable and immovable, of his father, valued in the plaint at Rs. 94,795. The plaintiff claimed as a widow, stating herself to have been the second wife of the deceased, and made title to the sub-division zemindary of Ramnad on behalf of her son. The first defendant was the childless widow of the late zemindar,—according to the appellant's representation, the senior, and to her own, his sole widow. The other defendant, who was joined as a defendant on a ground not established, viz., his having possessed himself of part of the estate of the deceased after his death, was a first cousin of the late zemindar. Both defendants disputed the marriage of the plaintiff and the legitimacy of her son.

The statement of both defendants was that the plaintiff was a dancing-girl; and treating that *status* or caste as continuing, they both insisted that she could not be the wife of her alleged husband, that her son could not, since she was a prostitute, be the son of the late zemindar, and could not have any title to inherit, even had a marriage between the zemindar and the child's mother been celebrated in fact. They denied that any marriage had taken place. It is unnecessary to repeat the very language of these statements, which, as translated, is coarse and unbecoming. It is plain that the case insisted on was that the plaintiff herself was a dancing-girl, not merely the child of one, at the time when her connection with the zemindar commenced, which the defendants represented as a connection with a dancing-girl, a prostitute by profession, attached to the Temple Service.

Their statement contains no intimation of her having abandoned that calling prior to the birth of these children, or at all. The language used plainly imports a continuing *status*; that the Judge so understood the statements appears from the issues which he framed.

The term "dancing-girl" was not used in the answers. A fouler name was there used, and it seems to their Lordships to have been designedly employed to mark a distinction between an intercourse with a concubine and one with a common prostitute, which might influence the decision of a question of filiation and legitimacy.

The issues were, first, whether the plaintiff was a Vellala woman or a dancing-girl.

Secondly, whether the plaintiff was legally married to the zemindar.

The third issue was one of law as to the validity of the marriage, should it be proved.

The fourth issue was one of fact as to the second defendant's possession of the property which he was alleged to have appropriated. This issue was found for the defendants. The finding is not appealed against; and this part of the case, except as the charge affects the honesty of the plaintiff's claim, need not be considered.

The plaintiff claimed to be by birth a legitimate child of one Shunmuga Pillai, a Soodra man, of the Vellala, one of the sub-divisions of the Soodra caste. As such, she would be a Vellala woman. The defendants insisted that she was a mere dancing-girl connected with the service of the Hindoo idol, at a pagoda situate at Tiruchuly, the place of her birth and of her father's residence, who was the headman of the village. The Judge uses, in the issue which he framed, the term dancing-girl, as distinct from the Vellala class, to denote a particular class of women described in treatises on Hindoo law as incapable of contracting marriage.

The parties went to trial on the issues before stated. The proofs and conduct of the case of the defendants were applied to and influenced by them.

That her alleged son really was the plaintiff's son was made out by such unquestionable evidence that it was strongly pressed on their Lordships that the defendants had in fact never intended to represent her as not having the *status* of a concubine, or the children as not having the *status* of illegitimate children; but had only denied that she was the wife, and that the children were legitimate. Their Lordships are unable so to read the case made by the pleadings with the light thrown upon it by the evidence of her exposing herself openly on the balcony with all the outward marks and costume of a professional dancing-girl, and such evidence as the following: "As Tanga Nauchear is the daughter of a dancing-girl, I did not hear who her father was. As she is a dancing-girl's daughter, who can be called her father? I know Muttu Doraiswami, second plaintiff, his mother is Ramamani Ammal. I have not heard who his father is." The case originally made and attempted to be established was that of professional prostitution and of promiscuous intercourse, so that in Hindoo law and opinion, as well as in English, it would be impossible to predicate any paternity of the offspring.

The statement that she was a dancing-girl was designed to affect her case in two ways, first as to the *factum*, and then as to the legality of the alleged marriage.

The evidence that she was not a dancing-girl was adduced by the plaintiff, in support of her case by anticipation to rebut that of the defendants, which their Counsel stated to have been principally directed to prove this her original condition of life. If a marriage *de facto* were proved by the plaintiff's witnesses, it lay on the defendants to show conclusively that such *de facto* marriage could not legitimate the children of it, and thus, in that event, the failure to substantiate this issue would be fatal to the defence on the question of legitimacy.

The plaintiff called many witnesses, twenty-four in number, thirteen of whom deposed to the marriage; amongst these not fewer than five witnesses of the zemindar's family, nearly allied to him, *prima facie* at least, unimpeached and credible witnesses, such as a Court would ordinarily desire to hear on a question of this kind in issue before it, and would be most disposed to trust, proved their actual presence at the marriage. Her father, her whole brother, and her half-brother proved the plaintiff to be of the Vellala caste, and a member of their common family.

The Civil Court of Madura, of which Mr. Pochin was then the Judge, believing these witnesses, necessarily decided that the marriage was proved, and also that the plaintiff was never a dancing-girl. On appeal to the High Court, that decision was reversed upon the first point. On the second point, the High Court did not come to a positive conclusion that the plaintiff had been a dancing-girl, but stated that they inclined to that opinion, an expression indicating distrust of

the defendant's witnesses to the fact that several of them had actually seen her officiating in that character.

The zemindar was not of the Vellala caste. His caste, also an inferior Soodra caste, was that of the Malavars. The union in marriage of persons of these two sub-grades of Soodras seems to have been uncommon, and the legality of such marriage was doubted at the time when the zemindar is said to have married the appellant. The marriage between such a man and a mere dancing-girl has been described as "impossible." The Judges of the High Court express much doubt whether a marriage between the zemindar and a Vellala woman would be legal, but they do not directly affirm its illegality. On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the Soodra caste. This uncertainty, which undoubtedly prevailed at one time, as to the legal rights flowing from such matrimonial connections, has an important bearing on the proof of a part of this case, and will subsequently be considered.

The case before their Lordships is one of conflicting evidence and of conflicting decisions. The opinion of Mr. Pochin, the Judge who tried the case, is opposed to that of two Judges of the High Court. They differ as to the habits of natives in their domestic relations, as to the credibility of witnesses, the weight of evidence, and the proper inferences to be drawn from conduct. The decision of the case by their Lordships must necessarily involve a somewhat close examination of part of the evidence, and of the grounds of the opinions of the Judges of the respective Courts.

It was urged on behalf of the appellant that Mr. Pochin, who saw and heard the witnesses, could better judge of their respective claims to belief than the Appellate Tribunal. On the other hand, it is stated that, as he was an European, his advantage in that respect over the Appellate Court was less than that of an intelligent native Judge. It is due to Mr. Pochin to observe that he appears to have been extremely diligent and laborious in the conduct of his investigation. In a case of great uncertainty and difficulty, where no evidence is exempt from suspicion, if in all parts of the case his conclusions have not the concurrence of their Lordships' opinion, such difference of opinion should not weaken his just claims to respect. The decisions of both Courts will receive the most anxious and respectful attention.

The first in order and weightiest of the objections made to Mr. Pochin's conclusions by the Judges of the High Court, as well as by the Counsel for the respondent in their very able argument before their Lordships, is that he had failed to observe the total improbability of the story told by Shummunga Pillay, the father of the appellant, as to her introduction into the family by the deceased zemindar, and to draw the inferences which should rationally and justly have been drawn from that strange story. Their Lordships, on this part of the case, agree with the judgment of the High Court, which pronounces the story of the treaty for marriage and introduction of the bride incredible as it is told. They think that the story as told does not give a true history of the circumstances under which this lady first came to enter and reside in the zemindar's house; and they also think that the statement of the father of the appellant as to the origin of his connection with her mother warrants an inference not much at variance with the observations of the High Court upon it. There may have been family matters which a husband and father would be studious to conceal. The existence of such matters would afford an explanation of the conduct of the parties in the celebration of the alleged marriage, more satisfactory than that suggested by Mr. Pochin,—viz., that the inferiority of the fortune and social position of the father of the appellant to that of the zemindar might account for an introduction and reception of a bride not usual in native families, an explanation which certainly is not satisfactory to their Lordships.

The story of the marriage must be viewed as full of suspicion in its very outset, and therefore requiring a more than ordinary degree of jealous scrutiny, a jealousy which must extend itself to the testimony of the witnesses of the marriage.

Their Lordships are led by the judgment under review, and by some portion of the argument that has been addressed to them, to state, as has often been stated before by this Committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that its due weight must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicious and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence, or some of the evidence, of some of the witnesses is incredible or untrustworthy.

On the subject of the marriage, in fact, of the zemindar to this lady, the plaintiff, their Lordships think that the judgment of Mr. Pochin is fully supported by the evidence; and that so very strong a *prima facie* case is made in favor of the marriage as to require the most conclusive evidence for its overthrow. It must be borne in mind that, whilst the evidence of the marriage given by many apparently credible witnesses having presumably no motive to misrepresent the fact or to deceive the Court, and incapable of being themselves deceived about it, is direct and positive, that by which it is met is, for the greater part, indirect and inferential, turning on the improbability and inefficacy of the marriage of a dancing-girl. The evidence in support of the marriage is that of numerous witnesses of respectable position and character, members of the family, the very witnesses whose evidence in like cases is looked for by a Court, and the absence of which weakens every case where such absence is found; confirmed, moreover, by the treatment by the zemindar of his children as legitimate, which, in the opinion of their Lordships, the marriage of his daughter, Tanga Nauchear, sufficiently proves. This treatment alone, unless answered, would, after the death of the parents, suffice to establish a claim to a direct lineal succession against a reversioner, and must receive its due weight here.

Upon the question of recognition of his children as legitimate, their Lordships are compelled to express their dissent from the conclusions of the High Court. The marriage of the daughter of the Rajah, as legitimate, is a fact sufficiently proved. The husband and his father have both been examined. The evidence of the husband leads directly to the conclusion that he married his wife as legitimate, concluding her to be so. He says that he would not have married her had she been the daughter of a dancing-girl. This statement is such as might be expected from him. The father confirms him, and presumption from experience confirms both. The witness himself is unimpeached; on what ground, then, should his statement be set aside? The Judges of the High Court say, in effect, that as he was marrying the daughter of a powerful man, his scruples might therefore give way; but what is this but opposing a conjecture of the Court itself to positive testimony against its truth; the conjecture itself seems to derive no support from the wealth or power of the zemindar, for, relatively to the husband and his family, the zemindar was not a man high above them in fortune or rank, nor does the alliance seem to have been above the degree or the reasonable expectations of one of the husband's family.

Again, the High Court observes that the marriage was not like that of a legitimate daughter, as it was not celebrated with the ceremony of the Homan, which, however, the husband says did accompany it. He is contradicted, indeed, on this point; but though this conflict of testimony might induce doubt in the minds of the Judges, still they were not justified, in this balanced state of the

evidence, in reasoning concerning the *status* of the bride, her mother, and brother, on the basis of the absence of this ceremony. Other circumstances which ordinarily attend the marriage of a legitimate daughter, as the existence of an alliance equal and honorable, the presence of near relatives and friends on both sides, were proved; and nothing, even had the ceremony of the Homan been omitted, would have indicated a marriage between unequals in degree.

The other circumstances which have been argued on the side of the appellants as proofs of recognition by the father of his children as legitimate,—viz., the *benamée* transactions,—afford no certain indication of the sense in which the terms son and daughter were used by the father. Their Lordships cannot, however, agree with the Judges of the High Court in thinking that these documents support an inference of illegitimacy. They are obviously *benamée* transactions, so common as to require no explanation why, in a particular instance, they were adopted. In an acknowledged case of legitimate birth they would have excited no attention. They afford no sort of evidence that the zemindar designed them at all to be a provision for children. As these children, even if illegitimate and incapable of inheriting, would have been entitled to maintenance and provision in his lifetime, gifts not exceeding such an allowance of maintenance as would have been fair and usual, would have been no material advancement of their interests. It is unnecessary to enter upon any examination in detail of the family co-membership, position, and respectability of those witnesses, members of the family, who depose to their residence at the marriage. The judgment of the High Court gives them due weight abstractedly of the particular ground on which it justifies its rejection of their evidence. The propriety of this rejection of a whole body of evidence otherwise unimpeached must now be considered.

The Advocate-General, who was Counsel for the plaintiff, had admitted that the Agent of the Superior Rajah of Ramnad supplied the necessary funds for carrying on her suit. It was obviously an admission made in a spirit of rectitude, involving, as made, no acknowledgment or sense of any violation of any law or duty whatever. Such an act may be viewed in very different lights; it might bear the character of a generous support, on the part of a powerful head of a house compassionating the helpless state of a child contending for a just inheritance, and acknowledged by its father in his lifetime as a legitimate son. It might, on the other hand, be capable of being viewed as a spiteful and vindictive act, an unprincipled maintenance of a wrongful suit. What presumption was there in this case to lead the mind to entertain either view? The manager of the Rajah was not a party to the suit. His conduct was in no other respect before the Court. No ground existed for supposing him capable of what would have been a very criminal conspiracy, liable to severe punishment. His name was inserted in a list of the plaintiff's witnesses, which fact seems to conflict with the statement of the pleadings, that his enmity produced the claim.

The witnesses themselves, whom the hypothesis supposes to be all perjured, the Court below had believed, seeing them, and observing no signs of falsehood in them. The hypothesis of the High Court is, that the Rajah's agents had got up the cause from enmity. One witness for the defendants, it seems, had opposed the Rajah's adoption. This was held evidence enough; and it is assumed that this agent had influence enough to make all these *prima facie* respectable men come forward to support in Court a notoriously false case by deliberate perjury, for their guilt admitted of no concealment on the hypothesis of mere well-known concubinage and illegitimacy. Let it be conceded that the father of the present plaintiff had wilfully given an untrue account of the first introduction of his daughter into the zemindar's family, yet other grounds might be supposed, if mere supposition could in any case be made for concealment and untruth on the subject of his family connections, which would not be inconsistent with the marriage of his daughter to the zemindar.

But, it may be said, a marriage with a dancing-girl was incredible. The High Court has not found the fact that she was a dancing-girl, and this foundation is wanting to their rejection of this evidence: they should first have been convinced of that. A marriage *de facto* then being established and supported by recognition by the deceased zemindar of these children as legitimate, the very strongest evidence would be required to show that the law denied to these children their presumable legal *status*, on the ground of their mother's incapacity to contract a marriage. The first point taken in this part of the case was that the incapacity to inherit had been virtually admitted by the acknowledgment of the first defendant's title as heiress. This point was relied on by the Judges of the High Court, and was strongly urged on the argument of this appeal. The certificate of heirship granted to the elder widow under the circumstances and unopposed was declared to be a tacit admission of absence of title in the claimant in this suit. Considerable weight is due *primâ facie*, to such a submission to an adverse title as the objection supposes, but the weight depends on the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting a step injurious to it, which are ordinarily in the possession or reach of either of two rival claimants. One of the plaintiffs in this case is an infant; the other is a Hindoo female. Against neither is it the practice of the Courts in India to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences. The contrary doctrine has been constantly affirmed and acted on, both in Indian Courts and before this Tribunal. In addition to this it must be observed that, if a supposed acquiescence in one place be contemporaneous nearly with a claim not abandoned, it amounts to little or nothing.

This case affords ground for the conclusion that the germ of this litigation existed in the palace at the time of the zemindar's death, and was never afterwards abandoned. The hypothesis that the claim sprung up, first, from the spite of the Rajah's agent, is inconsistent with the occurrences in the family at the time of the Rajah's death. The brother of the first plaintiff was before and at the time of the death in the palace. He sent for his father, who came, and was present at the funeral ceremony. This summons and presence leads to the conclusion that in some mode the lady's own family were acting on a supposed right to be included amongst the family connections. It is most improbable that the daughter's husband would admit her illegitimacy, and his assertion of his wife's legitimacy would be, virtually, that of her infant brother, whose maternal grandfather and uncle were present. The performance of the obsequies, by delegation, by the son-in-law of the deceased zemindar, whilst the second defendant was at hand, who was the elder widow's nephew, and her manager subsequently, leads to the same inference of a then existing claim by the child's friends. And if this claim were then being urged, though not acquiesced in, the hypothesis of its after-origin is inadmissible. There is no evidence that it was ever intentionally abandoned; for temporary helplessness and want of funds may very easily be supposed to have been the causes of inaction and delay for a time. The excuses made for the choice of the son-in-law are feeble and unconvincing. One relative might be unpunctual, but why should all be behind their time?

Can this marriage *de facto* be supposed an idle, and, in a Hindoo point of view, profane ceremony? Such, it is conceded on all sides, it would have been if the marriage was with a dancing-girl in the sense of the statements and issue.

Their Lordships entirely concur with the opinion of the Judge who tried the cause, that the evidence on the part of the defendants to prove the plaintiff a dancing-girl at any time of her life fails. He has given his reasons for thinking her not a dancing-girl, which it is unnecessary to repeat; they are corroborated by others of considerable weight, which at least balance the inference drawn from

her name, age, and puberty. The whole brother was a witness. His caste is that of his father. It is not to be presumed that his father, the head of his village, would violate the ordinary feelings of people of his caste, and make a distinction between children of the same womb, leaving the daughter to lead a licentious life from which, according to the hypothesis, he had withdrawn her mother. The children of this man's acknowledged and admitted marriage prove that the children of both connections were brought up together as one family. This theory, therefore, of her original *status* as a dancing-girl of the Temple has a formidable presumption opposed to it at its outset. The Judge has remarked on the conflicting character of the evidence given in support of it on the non-production of the alleged mother of the plaintiff. Mr. Benjamin strengthened very materially the inference which the Judge drew therefrom, by referring to the abstract of the defendant's evidence and the unexplained omissions to produce evidence from the Temple. Their Lordships feel strongly that if a few years only before the suit she had been an avowed public dancing-girl attached to the Temple, clear and abundant evidence of that fact might have been given.

Considerable reliance was placed in the argument before their Lordships on the evidence of Abdool Kadur, which will, therefore, be considered more particularly than that of the other witnesses who depose to the plaintiff having been a dancing-girl. This witness was represented correctly as a Government official, as one who *prima facie* was entitled to credit as an independent and respectable person. He deposed to the plaintiff having actually appeared and danced before him at Tiruchuly in the years 1847, 1848, and 1849. His story, when subjected to a careful examination, appears to their Lordships to bear a strong resemblance to those admissions which the wants of a case often produce. Being an official, his only connection with Tiruchuly was that he went on circuit there with his master. Nothing is shown to induce the belief that the dancing-girls would more engage his attention or thoughts than would be the case with ordinary official persons before whom such appearances took place to do them honor. It is not represented by the witness that any special cause for distinguishing this particular dancing-girl from the rest existed, that she was eminent above the others in beauty or grace, or that her after fortunes fixed in his memory what otherwise might have been a fleeting impression. Yet after the long interval of eighteen or nineteen years he is deposing to the name, parentage, and appearance of one individual dancing-girl. This is unexplained. It may be that, if his evidence had been obtained in the careful manner in which evidence is ordinarily brought out in an English Court of Justice, these improbabilities might disappear, and his evidence prove to be supportable for the reasons urged to support it before their Lordships; but their Lordships have no assurance that the evidence is capable of being supported by these considerations, that her after fortunes led to the remembrance of her, or that she otherwise possessed any superiority over her comrades. The witness proceeds to give another account of the matter, for he represents that he heard from Shunmuga Pillai that she was his daughter. "He said he kept her mother, and also gave me his daughter's name." No explanation has been given, and none suggests itself to their Lordships' minds to account for a communication so utterly improbable. It is shown that Shunmuga had, from his first intercourse with her, withdrawn the mother from her former life, whatever it was, and had placed her in his house. Such a communication by her Hindoo Headsman to a stranger and a Mussulman is opposed to all experience of native habits: when and how did it occur? what produced it? The witness does not state that Shunmuga was present and pointed her out: or otherwise account for that supposed fulness of description which would identify the particular dancing-girl. He deposes further to another conversation equally improbable and at variance with native usages; and, lastly, represents himself as casually producing this most important evidence, which, if true, would fix on the plaintiff the *status* of a common dancing-

girl, in an interview with the vakeel which had reference to another cause, one of his own, with nothing whatever to lead to a discovery of evidence so important to the vakeel, and so little likely to have been then casually disclosed. Such testimony is very common; it is possible in a given case that it may be true, but it is of so dangerous a nature, and presents so few claims to be believed, that evidence of the kind is little regarded even though the witness deposing to it be in no other way discredited than as one deposing to evidence on which a Court cannot rely.

The presumption against her imputed *status*, which the marriage of the daughter affords, and the whole evidence, lead their Lordships to affirm on this point the conclusion of the Judge below that the plaintiff herself was not a dancing-girl, and was not one incapacitated to contract marriage.

The observations of Mr. Pochin concerning the habits of native families from which the Judges of the High Court dissent, seem not to have been applied by him to the case of a concubine treated with respect and attention little inferior to that of a wife. He was dealing with a case presented to him of a dancing-girl, and was applying his mind to the statements, issue, and evidence before him. Both tribunals may be correct enough with respect to that which each was considering. The High Court, however, is inconsistent with itself in some respects, for whilst it entertained the gravest doubts whether a marriage, if celebrated, would have had any validity, it regards the acts of the plaintiff and her advisers as unaffected by the like uncertainty. The Judges suppose the plaintiff must have known that if a marriage had taken place, her son would be legitimate, a matter which certainly was involved in considerable uncertainty, which their judgment shows them to have shared.

The legal presumption in favor of a child born in his father's house of a mother lodged, and apparently treated, as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made; and the opposing case should be put to strict proof. The legal presumption as to the *status* of mother and son accords with the actual finding of the Court below, which had before it very strong proof indeed of recognition and actual marriage. This decision was reversed on grounds which impute to many witnesses, *prima facie*, not likely to have committed it, a very serious criminal conspiracy, subjecting all the parties to it to severe punishment. This imputation was one unwarranted by any proofs in the cause, and militated against the ordinary rule that crime is not to be presumed.

Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed, and that in lieu thereof an order be made dismissing the appeal to that Court from the decree of the Zillah Judge with costs, and that the appellant have the costs of this appeal,

The 21st November 1871.

Present:

Sir James W. Colville, Sir Joseph Napier, Sir Montague Smith,
and Sir Lawrence Peel.

Recovery of possession—Enam—Mortgage—Long enjoyment—Evidence.

On Appeal from the High Court at Bombay.

Ramrudeegowda
versus
 Dessai Saheb.

This was a dispute, which arose in 1823, between two branches of a family respecting a Mahratta village. The plaintiffs (appellants) claimed the property on the allegation that the respondents held it as mortgagees, and that they (appellants) were entitled to redeem. The respondents claimed to have held the village in question as an *enam* free from the payment of Government revenue; and as they had held it on this title since 1824 up to the commencement of the suit, the Privy Council refused to disturb their title, thus fortified by long enjoyment, without clear and unmistakable proof of the alleged mortgage.

The suit in this case was brought by the appellants to recover a village called Amravuttee, which appears to have been part of a larger estate or *muttun*, and also certain allowances, of which very little has been said in argument, and very little explanation given, but which may be assumed to be certain profits incident to the right of the manager of one of these Mahratta villages. Mr. Doyne in his reply has dwelt principally upon the fact, which may perhaps be taken to be admitted upon these proceedings, that the respondent who has held this village so long does not pay the Government revenue in respect of it, that being paid by the owner of the whole *muttun*. He has also dwelt, more slightly, upon the suggestion made in the Courts below, that by reason of some adoption the respondent's ancestor was taken out of the family of the original owners of the *muttun*, and transferred to another family. There has been no finding with respect to the last point in any of the three Courts below, and it may therefore be left out of consideration.

We have not had much explanation of the nature of these tenures; but certainly it has not been supposed in any of those Courts that the first point dwelt upon by Mr. Doyne,—namely, that relating to the payment of the Government revenue,—was at all inconsistent with the respondent's case; and it appears to their Lordships to be quite conceivable that, if such a transaction as that on which the respondent relies really took place, the village may have been transferred to the respondent's family as an *enam* held, as far as the general owners of the *muttun* are concerned, free from any contribution to the Government revenue, although upon the whole *muttun* Government revenue may have been assessed either before or after the acquisition of these territories by the East India Company. Therefore it seems to their Lordships that the determination of this appeal depends upon the question whether any evidence has been given to prove the mortgage title upon which the appellant relies.

It appears that in 1823 the present contention first arose between the two branches of this family. Those whom the respondent represents then held this village; and it appears by Mr. Thackeray's order that they then claimed to have held it for nearly sixteen years upon the title set forth at page 3 in the recital of Mr. Munroe's order. On the other hand, the persons whom the appellant represents then came forward, asserting that the other party held it as mortgagee, and that he was entitled to redeem. In that state of things Mr. Munroe made the order, which in point of form was certainly an irregular order,—namely, that the other party should give up possession of the village alleged to have been pledged or mortgaged,—upon an undertaking of the plaintiff to pay what might ultimately be found due.

That order went by appeal from Mr. Munroe, who was the Deputy Collector, to the Collector, Mr. Thackeray; and if the question raised were a question of jurisdiction there could be no doubt in their Lordships' minds that according to the known and ordinary course in these non-regulation provinces, in fact, it may be said throughout the territories of the East India Company, where there is jurisdiction in a Deputy Collector there would be an appeal to the next superior officer in the Revenue Department,—namely, to the Collector, and so on, as it appears in this case there was, from the Collector to the Commissioner.

A question is then raised touching the prosecution of this appeal to Mr. Thackeray and the regularity of this order. But the presumption is *omnia rite acta fuisse*; and the evidence shows that both parties were heard, and that everything was done as regularly as things are done in a country governed as that country then was.

The papers went up to Mr. Thackeray. It is admitted in three documents that his decision was passed in the presence of both parties, that the respondent before him had an opportunity of being heard; and the result was the reversal of Mr. Munroe's order, and a direction that restitution of the village should be made to the appellant, which was done.

Whether that was a conclusive determination upon the title or not, it seems to their Lordships hardly necessary to decide. It was a clear adjudication of the right of possession at that time; and whether title could have been tried, as in regulation provinces, afterwards by a regular suit, it is not necessary to determine. But there was a clear adjudication that the possession upon the asserted title was in the respondents, the possession taken from them was restored, and there was (which is the essential thing to be considered) a clear reversal of whatever was found by the order of Mr. Munroe in favor of the alleged mortgage which is the foundation of the appellant's title.

It appears, then, that since the year 1824 up to the commencement of the suit the estate had been held by the respondent's branch of the family on the title on which they rely. The only way in which their title thus fortified by long enjoyment can be disturbed is by clear and unmistakable proof of the alleged mortgage.

There is really, when Mr. Munroe's order is out of the case, not the slightest evidence that the village was held upon a mortgage title.

Under these circumstances their Lordships think that the attempt to disturb the concurrent judgments of the Courts below wholly fails, and they must humbly recommend Her Majesty to dismiss the appeal, with costs.

The 24th November 1871.

Present:

Sir James W. Colville, Sir Joseph Napier, Sir Montague Smith,
and Sir Lawrence Peel.

Mortgage—Proof of Bona Fides.

*On Appeal from the High Court at Calcutta.**

Woomesh Chunder Roy

versus

Gooroodoss Roy and others.

Suit by mortgagee (respondent) after foreclosure of mortgage against mortgagors, incumbrancers, and present appellant who was in possession of part of the mortgaged property as purchaser at an execution sale. Mortgagors admitted plaintiff's title. Appellant pleaded that the mortgage was a collusive transaction between mortgagors and mortgagee in fraud of creditors. The Principal Sudder Ameen found that the mortgage was not a *bonâ fide* transaction, but the High Court reversed his decision; and the Privy Council, upon a consideration of the evidence, came to the conclusion that the Principal Sudder Ameen was right, because it was not only necessary for, but also in the power of, the respondent to adduce better evidence than he had given in this case in order to make out the reality and *bona fides* of the transaction on which he relied.

* From the judgment of Loch and Seton-Karr, *J.J.*, in Regular Appeal No. 271 of 1864, decided 5th December 1864,—1 W. R. 272.

The respondent in this case brought his suit to recover possession of the property included in his mortgage deed, having perfected his title under that deed by the usual proceedings in foreclosure. He brought the suit against the mortgagors, against some other incumbrancers whose case it is unnecessary now to consider, and against the present appellant, who was in possession of part of the mortgaged property as purchaser at an execution sale. The mortgagors admitted the title of the plaintiff the respondent. The appellant, however, defended his possession by insisting that the mortgage was from the first a collusive transaction, an arrangement between the mortgagors and the mortgagee designed to protect the property of the mortgagors from the claims of their creditors. One of the issues framed in the suit is whether that proposition is correct or whether the mortgage transaction was *bona fide*? The Principal Sudder Ameen, the Judge of first instance, found that issue in favor of the appellant, but a division bench of the High Court reversed his decision. It does not appear to their Lordships to be necessary to consider upon whom the burden of proof in such a case must fall, because they think that in the present case the facts are sufficiently before them to enable them to give a judgment upon them, and that there were sufficient circumstances proved and apparent in the case to render it necessary for the respondent to give better evidence of the *bona fides* of the transaction on which he relied than he has given in this case. Their Lordships observe, among other things, that by the petition filed by one of the mortgagors at page 70, the transaction, though spoken of as a real transaction, is spoken of as one of those arrangements under which the parties had every hope and probability of getting back the lands in future from the Baboo "in case we can pay the amount due to him."

Their Lordships also find that the respondent did so far undertake to prove what the consideration really was that he examined one or two witnesses upon that point. Those witnesses prove no more than that a colorable consideration passed in the shape of certain notes at Sreedharpore, a payment which may easily be explained by the admitted relation between the parties, and is one of those payments which would be ostensibly made before witnesses of that character in order to give color to the transaction. But part of the alleged consideration for the original mortgage was a balance found upon a settlement of account, and no evidence whatever is produced as to the fact of the settlement of that account or to show in respect of what transactions it was settled, or that a balance was really struck and found due to the respondent upon that occasion.

Then again, the High Court, in its judgment reversing the decision of the Principal Sudder Ameen, relies upon the sum of money which was paid into Court, whether Rs. 15,000 or Rs. 16,000 does not very clearly appear, in order to stay the first execution of Panchanon Bose and another; but that payment throws no light upon the original transaction, certainly does not go to establish that that original transaction in its inception was a *bona fide* transaction, or the ordinary transaction of mortgagor and mortgagee, in which the parties would be dealing at arm's length with each other. On the contrary, if anything, it tends the other way, because if the respondent had then completed his title by foreclosure, if he was in a position to claim this land against all persons by virtue of a *bona fide* mortgage title made absolute by foreclosure, what possible motive was there for advancing a very much larger sum than the sum originally secured by the mortgage?

Their Lordships, considering the whole of the evidence, are obliged to come to the conclusion that the Principal Sudder Ameen was right in finding that, as against the appellant, this was not a *bona fide* mortgage, but one of those transactions into which a friendly party might have been induced to enter in order to protect the young men, the mortgagors, from the demands with which they seem to have been pressed. The case is not presented, perhaps, in quite so satisfactory

a way as it might have been in respect to the amount and nature of these demands. The Principal Sudder Ameen speaks of them in terms which the evidence, as sent over on this record, hardly supports; but there is, even upon the face of the plaint, an admission of outstanding demands sufficient to show that there may have been a motive that the property should be protected in the way in which it has been attempted to protect it.

Their Lordships think that, had the transaction been what it purported to be, the respondent, who might have given his own testimony, who might have called the person spoken of as his Moonshee and as having taken a principal part in the original transaction, and who might have examined the mortgagors and others, had it in his power to adduce far better testimony than has been given in this case, in order to make out the reality and *bona fides* of the transaction.

Their Lordships therefore are of opinion that the decree of the High Court cannot stand, and that it ought to be reversed. All that the present appellant asks is, that the decree of the Principal Sudder Ameen should be affirmed. Against that decree, so far as it was favorable to the respondent, the plaintiff in the case, there was no appeal to the High Court; and therefore nothing which their Lordships do here will in any degree disturb that decree, or alter or affect whatever relations may under it exist between the mortgagee and the mortgagors or anybody who may hereafter claim under them.

Their Lordships therefore will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the High Court, and to affirm the judgment of the Court below, the Principal Sudder Ameen, with the costs of the appeal to the High Court. The appellant must also have the costs of this appeal.

The reservation at the end of the Principal Sudder Ameen's decree concerning the right to four annas of the property asserted in another suit seems to be unnecessary, because whether the appellant held three-fourths by virtue of his execution sale, and one-fourth by virtue of the decree in that other suit, or whether he holds the whole as purchaser at the execution sale, seems to be, for the purposes of this suit, an immaterial consideration.

The 9th December 1871.

Present :

Sir James W. Colville, Sir Joseph Napier, Sir Montague Smith, and
Sir Lawrence Peel.

*Barrister (Suspension of)—Powers of High Court—Marriage—Legitimacy—
Scotch Domicil—Indian Domicil.*

On Appeal from the High Court at Allahabad.

In re Thomas Newton, a Barrister.

Appeal from orders of the High Court suspending appellant from practising as an Advocate of the Court upon a report by a District Judge imputing improper conduct to appellant in the matter of an application made by him on behalf of a client for letters of administration to the estate of her deceased son.

Admitting that the District Judge was competent to report and complain to the High Court of the supposed *mala praxis* of a practitioner over whom he had no direct power, and that the High Court was justified in taking action on that report and complaint by calling upon appellant to explain his conduct,—and allowing that the omission of the High Court to place the conduct of the further proceedings against appellant in the hands of a third person was, for the reason stated by the Judges, (namely, that they had not the means of doing so), not a fatal objection to the subsequent proceedings,—the Privy Council disapproved of the course taken by the Court in acting upon letters which came to

their knowledge in the course of the first enquiry and framing new charges against appellant and thus assuming the functions of accuser and Judge.

Upon the merits, the Privy Council were of opinion that, although appellant had been guilty of an irregularity in advising his client to make endorsements upon promissory notes as administratrix before she had obtained letters of administration, yet as he had been acquitted by the High Court of having acted with *malus animus*, which was a necessary ingredient in every fraudulent act, his conduct, though censurable, did not bear the character which the heavy sentence passed upon him would stamp upon it; at the same time, their Lordships expressed their unwillingness to weaken the hands of the Courts of India in repressing professional misconduct, and maintaining the high standard of honor amongst those who were admitted to practise before them.

Quære.—Whether a person, if his domicile of origin were Scotch, does not lose that domicile and acquire an Indian domicile by settling as an indigo-planter in India and there dying; also, whether a son of a Scotchman retaining his domicile though resident in India, can, if born out of wedlock, become legitimate *per subsequens matrimonium*.

This appeal is brought by Mr. Thomas Newton, a Barrister-at-Law and an Advocate of the High Court of Judicature for the North-Western Provinces, against two orders of that Court dated, respectively, the 13th and the 27th August 1870.

The particular terms of these orders will be afterwards considered. It is sufficient for the present to state that they were made in the exercise of the power vested in the Court by s. 8 of the Letters Patent constituting it; and that by the latest of them Mr. Newton was suspended from practising as an Advocate of the Court until the further order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the order, to apply for permission to resume practice, which on the production of satisfactory proof of good conduct in the meantime (it was said), would be conceded to him. The effect, therefore, of the order was to suspend Mr. Newton from practising as an Advocate of the Court, certainly for five years, and possibly for a longer and indefinite period.

The following are the proceedings which resulted in this suspension:—

On the 19th July 1870, Mr. Bramly, the officiating Judge of Allyghur, forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. Newton on behalf of one Mrs. Saunders for letters of administration to the estate of her deceased son, Paterson Tandy Saunders, imputing improper conduct to Mr. Newton in that matter, and submitting to the Court whether such conduct was becoming a barrister. The precise nature of the charges against Mr. Newton will appear from the next proceeding.

On the receipt of this communication, the High Court passed an order, dated the 30th July 1870, calling upon Mr. Newton, on the 10th August following, to answer the matters stated in Mr. Bramly's letter and report "whereby it had been brought to the notice of the Court that he, Thomas Newton, had been guilty of grossly improper conduct in that, whilst acting as Counsel for Mrs. Saunders, on application to Mr. Bramly for letters of administration of the estate of her deceased son to be granted to her, he, well knowing the said Mrs. Saunders not to be the administratrix of the deceased Paterson Tandy Saunders' estate, obtained from the said Mrs. Saunders, and endorsed and put in circulation, a Government loan note for the sum of Rs. 3,000 belonging to the estate of the said Paterson Tandy Saunders, and also certain other Government loan notes, the property of the said estate, the said Government notes having been endorsed by Mrs. Saunders as administratrix, although the said Thomas Newton was aware that administration of the estate and effects of the said Paterson Tandy Saunders had not been granted to the said Mrs. Saunders; whereby also it had been brought to the notice of the Court that Mr. Thomas Newton had been guilty of grossly improper conduct in the discharge of his professional conduct as an Advocate in having wilfully deceived the said Mr. Bramly in the course of the hearing of the said application for letters of administration, by informing him, on or about the 9th July 1870, that he was greatly surprised to hear that the said Paterson

Tandy Saunders was illegitimate, whereas he, the said Thomas Newton, was well aware of the illegitimacy of the said Paterson Tandy Saunders, with some circumstances of aggravation concerning this latter charge which it is unnecessary to state."

Mr. Newton appeared before the Court under this order, and made a verbal statement in explanation of both charges; evidence was taken, and a number of letters were produced in the course of the enquiry. On its termination the Court acquitted Mr. Newton of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and, having commented on his conduct in respect of various new matters which had come out in the course of the enquiry, and on the perusal of the letters produced, determined to take further proceedings against him. The result was that, on the 13th August 1870, an order, being the first of those under appeal, was drawn up in the following terms (Order, p. 2) :—

" IN THE MATTER OF THOMAS NEWTON, AN ADVOCATE OF THE COURT.

"It appearing to the Court that the above-mentioned Thomas Newton, an advocate thereof, has been guilty of grossly improper conduct in the discharge of his professional duty as an Advocate in procuring his client, Catherine Saunders, to endorse as ' administratrix to Paterson Tandy Saunders' estate ' three Government promissory notes, of the aggregate value of Rs. 14,000, or thereabouts, viz., No. 001111 of 1854-1855, for Rs. 1,000; No. 001111 of 1856-1857, for Rs. 10,000, both bearing interest at 5 per cent., and No. 001111 of 1859-1860, for Rs. 3,000, bearing interest at (5½) five and-a-half per cent., and belonging to the estate of Paterson Tandy Saunders deceased, he, the said Thomas Newton, well knowing that the said Catherine Saunders was not the administratrix of such said estate, and in endorsing and putting in circulation one of the said notes, to wit, the Government promissory note No. 001111 of 1859-60, for the sum of Rs. 3,000, bearing interest at 5½ per cent. And also in drafting a certain letter, dated on or about the 14th April 1870, and in procuring the same to be copied by one Maria Hill, and signed and sent by the said Catherine Saunders to the firm of Gillanders, Arbuthnot and Co., of Calcutta, which said letter contained a statement or introduction in the words following, to wit:—' With reference to your kind offer to advance money for the coming indigo season,' which statement or introduction was known to the said Thomas Newton to be false, and inserted with the intention of inducing the said firm of Gillanders, Arbuthnot and Co. to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said Catherine Saunders to pay to him, the said Thomas Newton, out of the moneys if and when so advanced a sum or sums of money on account of his fees as an Advocate, and also in procuring employment as an Advocate by means of a threat contained in a certain letter written and sent by the said Thomas Newton to the said Catherine Saunders, and dated on or about the 27th January 1870, in the words following, to wit:—' If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.' And generally in his behaviour and conduct in connection with his employment as an Advocate by the said Catherine Saunders at divers times in the months of January, February, March, April, May, June, and July 1870. Now the said Thomas Newton is hereby ordered to attend at the sitting of this Court to be held at the Court House, Allahabad, on Saturday, the 27th August instant, at eleven of the clock in the forenoon, to show cause why he the said Thomas Newton should not be suspended from the practice of his profession as an Advocate of this Court within the jurisdiction of this Court."

Mr. Newton duly appeared to show cause against this Rule; and, on the 27th August 1870, the Court gave final judgment. It acquitted Mr. Newton on all but the two first charges, viz., the imputed misconduct in inducing Mrs. Saunders to endorse the Government Notes; and the imputed misconduct in causing her to write the letter to Gillanders, Arbuthnot and Co.; and finding that these two charges had been wholly or in part established against him, passed the order of suspension, which is the second of those under appeal.

Exception was taken at their Lordships' Bar to this course of procedure. It was argued first, that the order of the 30th July 1870 was objectionable, inasmuch as it prejudged the appellant's case, by assuming that he "had been guilty of grossly improper conduct." Their Lordships, however, are of opinion that, although this order may not have been very happily worded, the true construction of it is, that Mr. Newton was thereby merely called upon to answer the matters stated in Mr. Bramly's letter and report; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the order; and that there was no intention on the part of the Court to prejudice the case, or to prevent Mr. Newton from having the full benefit of

any explanation of the matters charged, which he might be able to offer. That this was so, is shown, their Lordships think, by the subsequent proceedings.

It was next objected that the Judges improperly placed themselves in the anomalous position of being at once accusers and Judges ; and that they ought to have committed the conduct of the proceedings against Mr. Newton to some third person. And in support of this latter proposition, the case of *Emerson v. The Judges of Newfoundland*, 8 Moore P. C., was cited. In that case, whilst litigation between an attorney and his former client was still in some sort pending though after payment under protest of the sum claimed, the Court, of its own mere motion, and not the application of the opposite party, and without previously calling upon the attorney to explain his conduct, served him with a notice to show cause, within four days, why he should not be struck off the rolls : refused to enlarge the rule, and give him further time to prepare his defence ; and on his failing to show cause within the four days, made the rule absolute. It is obvious that several of the circumstances which induced this Committee to reverse that order do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord Kingsdown said that an explanation should have been required ; and that upon that explanation proving insufficient, " the proper course would have been that some person should have been instructed on behalf of the Crown to apply to the Court for a Rule to show cause why further proceedings should not be taken."

Looking to the substance of the objection as applicable to this case, their Lordships think that there is a broad distinction between the charges originally brought by Mr. Bramly, and those made for the first time by the order of the 13th August 1870.

The High Courts in India exercise peculiar powers of superintendence and control over the subordinate Courts, and the proceedings therein. It was, their Lordships apprehend, in the regular course of practice that Mr. Bramly should make the report which he did make of proceedings in his own Court ; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a practitioner over whom he had no direct power ; but who, by virtue of being an advocate on the rolls of the High Court, had the right of appearing in the Lower Court ; and their Lordships are of opinion that the High Court was perfectly justified in taking action on that report and complaint, by calling upon Mr. Newton to explain his conduct.

Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. Newton in the hands of a third party is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement ; and they are disposed to think that even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings.

Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on letters which came to their knowledge in the course of the first enquiry, should have thought fit, on the instant and without further enquiry, to frame new charges against Mr. Newton, and thus assume the functions of accuser and Judge. A very strong and clear case may arise, in which such a course would be justified. But the inconvenience of it is great ; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed.

Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form, would be far from satisfactory ; and they therefore proceed to consider it upon its merits.

They are relieved from the necessity of considering any but the two charges

upon which Mr. Newton was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the order of the 13th August 1870 he was also acquitted, the Court being of opinion that though the conduct imputed to Mr. Newton by those charges may have been inconsistent with the rules and traditions which regulate the conduct of barristers in this country, and may not have been altogether unobjectionable even in India, it did not amount to that *mala praxis* on which the Court, having regard to the position and functions of an Advocate in the North-West Provinces, could fairly found any proceeding of a penal character.

Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. Newton, viz., that of having counselled Mrs. Saunders to write to Messrs. Gillanders, Arbuthnot and Co. the letter of the 14th April 1870.

The facts admitted or proved concerning this letter are as follows :—

Mrs. Saunders was a native woman who, after cohabiting for several years with Mr. George Saunders, an indigo-planter, in the Allyghur District, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th October 1856. Under the will of her deceased husband she seems to have been tenant for life of his indigo factory and other property. She had several children by him, born either before or after the marriage. One of them was a son, Paterson Tandy Saunders, who, under his father's will or otherwise, was possessed of several Government notes aggregating Rs. 14,000. Another was a daughter who had been married first to a person of the name of Nichterlein, and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. Kelly. George Saunders had been indebted to Mr. Nichterlein's estate, which was in the hands of the Administrator-General. Mrs. Nichterlein before her second marriage, had made a gift of her share of this debt to her mother, or to her father's estate; but this gift was disputed by her second husband; and the original debt and the effect of Mrs. Nichterlein's gift appear to have been, at the beginning of 1870, subjects of pending or contemplated litigation. Mr. Saunders had likewise a cross claim against Nichterlein's estate for the proceeds of indigo of a former season.

On the 15th December 1869, Paterson Tandy Saunders died, under age and unmarried. Shortly after his death, and on the 10th January 1870, Mr. Newton, who had acted in at least one law-suit on behalf of Mr. George Saunders, and appears to have kept up friendly relations with the family, wrote to Mrs. Saunders condoling with her on the death of her son, and volunteering, if he were not then retained to act for her in that matter, some advice concerning the litigation between her and the Administrator-General.

It further appears that she was then pressed for money, and that she required funds both for the purposes of the indigo factory, and for carrying on the suit pending or about to be commenced, and that in respect to the latter Mr. Newton was to receive certain fees. In these circumstances she, under the advice of Mr. Newton, wrote and sent to Messrs. Gillanders, Arbuthnot and Co., merchants of Calcutta, the following letter :—"Coel Factory, Allyghur, 14th April 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming indigo season, I write to enquire whether you would place at my disposal Rs. 30,000. On hearing from you I will commence my indigo advances."

On the first enquiry, that of July 1870, it came out on the evidence of Miss Hills, the governess and amanuensis of Mr. Saunders, that if any money had been received from Gillanders, Arbuthnot and Co., Mr. Newton's fees would have been paid.

Messrs. Gillanders, Arbuthnot and Co., however, declined to make any advance, and nothing came of the application to them.

The Judges of the High Court, nevertheless, saw fit to make this transaction

matter of charge against Mr. Newton. The view of it which they took when they framed the charge in respect of it, which is contained in the order of the 13th August 1870, was thus stated by the acting Chief Justice: "Again you induced an uneducated woman whom you were advising—whether wisely or unwisely matters not—to carry on certain litigation whereby you hoped to secure to yourself what I must call under the circumstances the exorbitant fee of Rs. 3,800, to write to a Calcutta firm a letter drafted by you, containing a false assertion, whereby that firm was to be induced to advance to Mrs. Saunders, for the purpose of her indigo factory, certain moneys, and which moneys that firm would naturally consider was to be employed for the legitimate purposes of the factory, whereas a large portion was to be paid to you for the purposes of carrying on litigation. It is abundantly clear that Gillanders, Arbuthnot and Co., had never promised to advance moneys to Mrs. Saunders. That lady, from her manner to-day, we cannot doubt, had never heard their names before. The Court cannot but come to the conclusion that the statement made in the letter to Gillanders, Arbuthnot and Co., as to their previous offer of assistance, was to your knowledge false, and that it was made for the purpose of obtaining money to pay your fees."

When, however, cause was shown against the rule, it came out that Mrs. Saunders, so far from having never heard the names of Messrs. Gillanders, Arbuthnot and Co., had been in correspondence with them at various times between 1866 and 1870, and had had various business transactions with them. It was further urged that the assumption that Gillanders, Arbuthnot and Co. had offered to advance money to Mrs. Saunders if erroneous, had deceived, and could deceive nobody. And the High Court in its final judgment expressed its willingness to assume "that it was from information given him by Mrs. Saunders that he (Mr. Newton) introduced the passage relating to a former offer of advances." The gist therefore of the offence imputed to Mr. Newton in respect of this transaction is reduced to this, viz., that he, knowing that a portion of the moneys to be received from Gillanders, Arbuthnot and Co. was to be employed in payment of his fees, drafted for his client a letter calculated to induce that firm to believe that this advance was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the letter cannot be taken to constitute such grave professional misconduct as would justify any part of the severe sentence passed on Mr. Newton. The letter is an application in the most general terms from an indigo-planter for an advance of money for the coming season. It is clear that Mrs. Saunders did want moneys for the purposes of her factory. Their Lordships are not aware that such an application implies any undertaking that the money, if advanced, is to be earmarked; is not to be mixed with the general funds of the planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of indigo. If the lender chooses, he can of course take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance. But here the loan was declined. All that is established is that Mrs. Saunders pressed for money to provide both for carrying on her factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this letter under Mr. Newton's dictation, meaning to apply part of the money in the first instance to the payment of his fees in the suit. Looking to all that is established in respect of this letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion that the order against Mr. Newton cannot be maintained on this charge.

They next proceed to consider the graver charge against him of having induced or advised his client to endorse the Government notes as administratrix of Pater-

son Tandy Saunders, when she was not entitled to assume that character. The facts proved which particularly relate to this transaction are as follows:—

On the 5th April 1870 Mrs. Saunders wrote to Mr. Newton inclosing one of the notes belonging to the estate of Paterson Tandy Saunders, and standing in his name, being a note for Rs. 10,000, and asking him to get the note renewed in her name, and broken up into ten notes for Rs. 1,000 each. On the 9th April 1870 Mr. Newton wrote to Mrs. Saunders to the effect that he had spoken to Mr. Clarke, the Treasury Officer at Allyghur, who had informed him that the note could not be renewed, nor interest paid upon it, until she had taken out administration to her son's estate. Thereupon Mr. Newton was instructed to make and did make, as Counsel for Mrs. Saunders in Mr. Bramly's Court, the application for letters of administration to the estate of her deceased son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd May. On the 6th May, the day before the usual citations were issued by the Judge, Mr. Newton, who had advanced some small sums to Mrs. Saunders, received from her the security for Rs. 10,000, and two other Government notes standing in Paterson Tandy Saunders' name and part of his estate, all being endorsed by her as administratrix of that estate. At the same time she executed to him a receipt admitting the loan of Rs. 200, and he executed to her a receipt for the notes; being the two receipts at page 8 of the Appendix; and Miss Hills, in her account of the transaction, has deposed as follows: "Mr. Newton wrote the endorsements in pencil on the notes, and told me to write it small on the pencil marks; and I said at the time, 'Mrs. Saunders has not got the administratrixship, how can I write that?' and he said, 'Whatever blame there is will fall on me.' I said nothing more. I then wrote the endorsements. Mrs. Saunders signed them."

The endorsements were special to Mr. Newton. One of these notes, being one for Rs. 3,000, he afterwards specially endorsed to the Delhi Bank, and that bank having demanded in Calcutta a renewal of it, enquiry was made concerning the fact of the grant of administration to Mrs. Saunders, and so the transaction was brought to the notice of Mr. Bramly.

In the meantime a question had arisen in Mr. Bramly's Court touching the legitimacy of Paterson Tandy Saunders, and whether administration of his estate ought to be granted to Mrs. Saunders as his mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain that Paterson Tandy Saunders was born out of wedlock; but it is suggested on behalf of Mr. Newton, that he might, nevertheless, as the son of a Scotchman retaining his domicile though resident in India, have been made legitimate *per subsequens matrimonium*.

Their Lordships think that it is fortunate for Mr. Newton that the determination of this case does not depend upon this point. If it appeared that Mr. Newton, knowing that Paterson Tandy Saunders was born out of wedlock, had applied for letters of administration as if the deceased had been born in wedlock, and pending that application had caused Mrs. Saunders to endorse those bills in the character of administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. Saunders, in the expectation that he might ultimately succeed in showing that the *status* of Paterson Tandy Saunders was to be regulated by Scotch law, and that under that law, though born out of wedlock, he was legitimate, their Lordships are of opinion that his conduct would have been almost without excuse. For the proof of legitimacy and of the right of Mrs. Saunders to administration, and to a beneficial interest in any part of her son's estate, would in that case have depended on the determination of a disputable, and, possibly, very nice question, viz., whether Mr. George Saunders, if his domicile of origin were Scotch, had not lost that domicile, and acquired an Indian domicile by settling as an indigo-planter in India and there dying. In the cases of *Campbell v. Campbell*, L. R. 1 Eq. 383, and *Munro v. Munro*, 7 Cl. and Fin. 842, one of the principal

issues was, whether the father of the person whose legitimacy was in question had retained his Scotch domicil. And in both cases the facts on which the issue was determined were very different from those on which the like issue would have been tried in the case of Mr. Saunders.

But, in truth, this was not the defence of Mr. Newton in the High Court, nor need it be his defence here. The case which he made there was that when he first made the application for letters of administration, and when he caused Mrs. Saunders to endorse the notes, he did not know or believe that Paterson Tandy Saunders was born out of wedlock; and, therefore, had good reason to believe that in a few days she would possess the character which the endorsement attributed to her. And this fact has been found in his favor by the High Court. On the occasion of the first hearing, the Acting Chief Justice says, "When you procured your client to sign the promissory notes as administratrix, you doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the act as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge's report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your client, enables us to assume in your favor that, when you procured your client's signature as administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her son's property."

If the High Court had found upon sufficient evidence that Mr. Newton had advised Mrs. Saunders to make the endorsements as administratrix, knowing that she had no title, or a doubtful title, to obtain the grant of letters of administration, their Lordships would have felt that the sentence upon Mr. Newton ought to be confirmed. But the finding of the High Court negatives this knowledge; and upon this finding of the High Court, their Lordships feel that, although in this matter Mr. Newton has been guilty of a grave irregularity which, in their opinion, is well deserving of censure, he has been acquitted of having acted with the *malus animus* which is a necessary ingredient in every fraudulent act, and therefore, that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of India in repressing professional misconduct and maintaining a high standard of honor amongst those who are admitted to practise before them, have come to the conclusion that in this case it is their duty humbly to advise Her Majesty to allow the appeal, and to reverse the last of the orders against which it is brought, and that in lieu thereof to order that the rule to show cause of the 13th August 1870 be discharged. They do not propose to recommend the reversal of that order, inasmuch as such reversal would imply that no rule to show cause ought to have been made. They make no order or recommendation as to costs.

The 9th December 1871.

Present:

Sir James W. Colville, Sir Robert J. Phillimore, Sir Montague Smith,
and Sir Lawrence Peel.

*Religious trust—Partition—Hindoo law—Revocation—Joint family property—
Insolvent sebit—Bond fide purchaser—Registry—Mutation of names—
Revenue settlement—Possession—Proprietary right—Revenue sales.*

On Appeal from the High Court at Calcutta.

Juggutmohinee Dossee
versus
 Sookhemony Dossee and others.

Plaintiff (appellant) sued to establish a religious trust created and confirmed by two deeds of dedication. HELD that a family trust of this nature had never, in modern times at least, been ruled to require the assent of the State; and that as the trust in this case appeared to be established as to the lands dedicated, it lay on respondent to show some subsequent legal conversion of the lands to the ordinary uses of property, by better evidence than a second deed of partition operating as a revocation of a former one, which second deed was not only not proved but discredited on every judicial examination of it. A partition being favorably viewed by the Hindoo religion and law, and wanting no extrinsic support, their Lordships were of opinion that the alleged presumption against the first deed of partition, that it was a mere device because one member of the family was indebted, might more reasonably be removed than maintained by due attention to that fact; whereas, the second deed did afford grounds for suspicion, inasmuch as it made no reference to the first deed, and, professing to be the ordinary partition of a joint family property, appointed an insolvent as the *sebat*.

As to respondent's contention, that he was a *bond fide* purchaser for value without notice, the Privy Council considered that the very origin of his title, as well as the contention on the mutation of names in the Collector's Registry, proved that the respondent must have had notice of the original trust, and that as he was not shown to have made any enquiries as to his grounds for supposing that the trust was legally at an end, he could not exonerate the property from the trust which attached to it.

HELD also that a settlement with Government for revenue did not establish proprietary right in the land; that the settlement and possession under it being evidence of a right to possession, were also so far evidence of proprietary right, but did not necessarily constitute it, much less could they divest and destroy trusts to which the settlor was subject; and that antecedent trusts had been impressed by judicial decisions on estates acquired even under revenue sales, notwithstanding that such sales had the effect of clearing away preceding titles.

A former abuse of trust in another instance (their Lordships observed) could not be pleaded against a trustee who sought to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he was seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *sebat*.

This is an appeal from a decree passed by Mr. Justice Kemp and Mr. Justice Campbell, forming a Division Bench of the High Court of Calcutta, affirming a decree of the Judge of East Burdwan, by which the suit of the plaintiff, now represented by the appellant, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence. Mr. Kemp expressed his to be in favor of the plaintiff as to part of the relief which he prayed against Kallidoss, the only respondent who appears on this appeal; but as the Judges were not unanimous the decision given in the Court of first instance stands unreversed.

The plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands; he made title to the possession of these lands, for which he sued on this special ground, that they had been dedicated to the religious service of the family idol, by virtue of two instruments of dedication in the Christian years 1813 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by his suit he sought to have declared. This was the foundation and main character of his claim, though somewhat inconsistently with the nature of the dedication he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession under these instruments of dedication.

He asked also to be appointed *sebat*. His plaint embraced other charges of breach of trust relating to other properties, which are no longer insisted on. The properties which this appeal relates to are one called Lot Pilkhundee, to which respondent makes title as a purchaser *bond fide* for value without notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as *lakheraj*, were resumed by the Government as held under an invalid *lakheraj* title, and were permanently settled for with Government by Sookhemony Dossee. The appeal against her was heard *ex parte*. All these properties were comprised in, and dedicated by, the two instruments of dedication beforementioned.

The first *sebat* was the husband of Sookhemony, and after his death she held

a portion at least of the dedicated lands by the title of *sebait* in succession to her husband. Notice of the trust, if it be valid, is clearly established against her.

Her claim as to the lands resumed is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered.

The title of Kallidoss to Lot Pilkundee is derived through successive alleged alienations under a deed, which will be described as a second deed of partition, by which, as he contends, a valid partition of the family property was first constituted.

He admits that a deed, purporting to be one of partition between the five brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the plaintiff had been in fact made under those instruments of dedication beforementioned, but he seeks to avoid the effect of all upon the same grounds which were unsuccessfully advanced in the case lately decided by their Lordships on appeal, when the earlier deed was established as the valid deed of partition of the family property. The decision, which is partly stated in the appellant's case, and which was read in full on the argument, need not be further referred to, except to state that the facts there decided cannot be considered to have been established against Kallidoss, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burden of proof, the general Law of Limitation, the special Law of Limitation under Act XIII of 1848, the claim to possession, and the limitation of that claim to a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names, and to have possession decreed to the plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1813, confirmed by that of 1820. It is not constituted by the first partition deed. If any vice existed to defeat this partition deed, that vice would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real and not merely a colorable dedication.

The two deeds which create and confirm the dedication are *prima facie* valid. Nothing is proved to lead to the belief that they are at variance with the usages of the country or family, or that regard being had to the value of the property dedicated, and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family, of the portion of the family property thus set apart, such as to generate distrust of its reality.

It was argued that such dedications of property without the assent of the State should be regarded as merely revocable appropriations of which the founders might vary the use. No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature.

A family trust of this nature has never, in modern times at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in Norton's Leading Cases on Hindoo Law, part ii., p. 406.

The argument of Mr. Leith, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first deed of partition, viz., that they constituted in effect one instrument, and rested on the sole foundation of the first deed of partition, was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere

contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on.

The trust declared on appears then to be established as to the lands dedicated by these two prior instruments; and it lies on the respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second deed is said to work this conversion, and the question arises which of the two deeds of partition is to prevail.

The first deed of partition is an instrument which, but for the existence of the second, would have been exposed to no suspicion.

The partition is favorably viewed by the Hindoo religion and law. It wants no extrinsic support.

An alleged presumption against the first deed that it may have been a mere device because one member of the family was indebted may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an enquiry into the state, condition, extent, and uses of their joint property; and no suggestion has been made that the partition under the first deed was unequal.

The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property; it appoints as a *sebait* one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindoo family having several and more competent members, from the fear of the scrutiny to which it might lead if the creditors of the *sebait* traced the property to his possession. Again, as a dedication, in fact, was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this deed seeks to effect. All comparison, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument.

It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second deed has either actually declared it invalid or stated it to be subject to grave suspicion. A decision against the plaintiff generally in this suit would be, in substance, deciding against a trust, *prima facie*, well established, on evidence of a subsequent deed of revocation not only not proved but on every judicial examination of it, discredited. Their Lordships, therefore, think that a trust was created by the deeds of dedication of the Pilk-hundee property.

It remains to be considered whether the respondent can support the decree in his favor upon the ground that he is a purchaser for value without notice. Now the very origin of his title, as well as the contention on the mutation of names, prove that he must have had notice of the original trust. The devolution of the title to him from Gooroochurn under the second deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany an attempt in a Hindoo family to put property out of the reach of an apprehended claim. He is not shown to have made any enquiries as to the grounds for supposing that the trust was legally at an end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of Sookhemony to hold the resumed lands free from this trust on the grounds advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary

right in the land, but is made with Government as to their claim to their *khcra* or revenue. The settlement and the possession under it being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not divest and destroy trusts to which the settlor was subject. The claim supposes a mere settlement for revenue to have the same effect in clearing away preceding titles which a sale under the Revenue Laws works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this tribunal, on estates acquired even under these revenue sales. (See the cases referred to in Mr. Justice Macpherson's work on mortgages, p. 86, 5th edition.) Sookhemony could not get rid of her *sebait* title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore the claims of the plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the laws as to limitation of suits, or from the terms of the settlement for revenue with her.

It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged that the evidence shows that the family had, in several instances under the first deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties, since the identity of the name was perfectly consistent with properties held separately under *malguzari* and under *lakera* titles, which might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property not designed otherwise than for the benefit of the endowment would not be questioned in a Court of Justice. The correctness of each position cannot be gainsaid, and the argument for the respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships, on the evidence, to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *sebait*. The Court could not with any propriety say, we will decline to protect the property and leave it further exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the plaintiff with its administration.

The title being one founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *prima facie* at least, attaching to it, the *onus* of the proof was on them. They did not discharge themselves by proving a deed as to which Mr. Justice Campbell declares that he probably would not have made it the foundation of a decree in their favor. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the plaintiff's case. The old *sebait* title was recorded in the Collector's Registry. A mutation of names—in itself a change—was applied for on the part of Kallidoss, and resisted on the part of the plaintiff claiming as trustee. The plaintiff was, in effect, referred to a civil suit, and the very reason of such a reference, viz., that the matter is not in the jurisdiction of the revenue officer, cannot, either in reason or law, invert the ordinary course of proof and presumption in a civil suit to establish a trust. Their Lordships think the judgment of Mr. Justice Kemp, on the facts of the case, correct, and the decree which, but for the supposed Law of Limitation, Mr. Justice Kemp would have given as to the resumed lands, as well as to Pilkhundee, is that which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed ; that the decrees of the High Court and of the Court below be reversed, so far only as they dismiss the claim of the plaintiff to set aside the alienation of Lot Pilkhundee, and to have the trusts of the dedication instruments declared, and that it be declared that the lands specified in the schedule to the plaint, and the said Pilkhundee were and continue dedicated under the instruments of dedication of 1813 and 1820 to the religious uses specified in those instruments of endowment ; and now add a declaration that this decree is to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper *sebaait*.

Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a plaintiff recovers part of his demand, and that the appellant should have the costs of this appeal.

The 9th December 1871.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier and
Sir Lawrence Peel.

Judgment in rem—Marriage—Legitimacy.

*On Appeal from the High Court at Calcutta.**

Jogendur Deb Roy

versus

Funinder Deb Roy Kut,

Plaintiff, a younger son, failed in a former suit to recover possession of a Raj and of the property belonging to it from his elder brother on the ground that he, plaintiff, was legitimate, and his brother illegitimate. He proved the former but not the latter ground. He now sues for the same object on the ground not only of his brother's illegitimacy, but also of his priority of right by reason of the superior nature of the marriage of his own mother ; and the question was whether the judgment in the former case was not a judgment *in rem*. It appeared to the Privy Council very doubtful whether there existed in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving a judgment *in rem* ; but without considering whether an ordinary Zillah Court could pass a judgment *in rem* determining the legitimacy of a party against all the world, they held that the judgment pleaded in bar in this case could not be treated as one of that nature upon any principles whether derived from the English law or from the law and practice of India.

This appeal is brought by Jogendur Deb Roy Kut, the defendant in the suit out of which the appeal rises, against a decree of the High Court which overruled a decree of the Zillah Court, whereby a judgment in a former suit which had been pleaded was declared to be a bar to the further prosecution of this suit, and directed that the cause should be remanded to the Zillah Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only point which is now legitimately before their Lordships. Mr. Doyne indeed suggested that their Lordships might give certain directions concerning the further trial of the suit if it went back to be tried in the Zillah Court, but that course would be entirely contrary to the practice of this tribunal. The ground of appeal to the High Court was that the learned Judge was wrong in holding that the decision of the late Sudder Court, dated 8th February 1853, was

* From the judgment of Kemp and E. Jackson, *J.J.*, 24th July 1868.

a judgment *in rem*, and as such a bar to the present suit. The High Court's judgment is to this effect:—"The Judge holds that that judgment of the Sudder Court was a judgment *in rem*, declaring the title of the defendant Mokurund Deb to the disputed Raj, and consequently that that judgment was a binding judgment not only against the party in that case, but against all the world, and it follows, according to the opinion of the Judge, that that judgment was decisive against the present plaintiff, and that the present plaintiff cannot consequently succeed." They then refer to the judgment of the full bench in the 7th Weekly Reporter, page 338, in which the law was laid down that judgments of this description were not judgments *in rem*, but judgments *inter partes*. They also say, "It is evident that the issues which were raised in the former suit are by no means identical with the issues which arise in this case. The plaintiff or his representative was in no way a party to the former judgment and was not represented in that suit, and the decree then passed can in no way be binding upon him. The decision of the Judge must be reversed and the case remanded to him in order that he may try the remaining issues which arise in it." Therefore it is perfectly clear that the question which I have stated is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion considering the nature of a judgment *in rem*, technically so called. It appears to them to be extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving what can be called technically a judgment *in rem*; but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now the circumstances of the former suit were these. Hill Rajah Surbodeb Roy Kut, the father of the respondent and grandfather of the appellant, died in 1850, and there arose a contest among the members of his family, children by various wives or concubines, as to who should succeed to the Raj, and, with the Raj, to the possession of the property. It is admitted that the succession is impartible, and on the death of a Rajah passes to the eldest of the sons of equal rank; and it is further alleged, though not perhaps admitted, that according to the custom of the family the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On Surbodeb's death Mokurund Deb (the father of the appellant), the eldest of his sons, was put into possession by a summary award of a Court of Justice under Act XIX of 1841. Upon that, Ranee Bissessuree, one of the three surviving wives of the late Rajah, in conjunction with another person, brought a suit on behalf of her infant son Rajender Deb, in order to have that order of the Court set aside and to recover from Mokurund Deb the possession of the Raj and the possession of the property that went with the Raj. The suit necessarily involved two issues; one of them was the legitimacy of the plaintiff, who insisted that his mother had been married to the deceased Rajah under the Gundharbo form of marriage. If he succeeded in proving that, he had to go a step further, and to prove that Mokurund Deb, his elder brother, was, as he alleged, illegitimate, that he was the son of a woman who had not been married to the Rajah at all, but the son of a slave girl.

The Court of first instance found in favor of the plaintiff in that suit. It went by appeal to the Sudder Court. The Judges of that Court were divided, but the majority found that the plaintiff in that suit had made out his title to be legitimate by the Gundharbo marriage; and as regards Mokurund Deb they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of marriage in the Brahmo form, which was what he

had pleaded. They seem to have thought that by reason of the declarations and acknowledgments of his father he must be taken to be legitimate; and that being at least in equal rank with the plaintiff in that suit, and being the elder, he was as between those two parties entitled to succeed to the Raj.

In the present case the plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit, as to the illegitimacy of Mokurund Deb, but he also raises the question of a priority of right by reason of the superior nature of the marriage between the original Rajah and his mother. The issues in the two suits therefore are not precisely the same. But if they had been precisely the same, their Lordships would still have been of opinion that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interests being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit as the first suit were brought here and tried according to the law of this country, there could be a pretence for saying that the judgment in it was anything like a judgment *in rem* or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It therefore seems to their Lordships unnecessary to consider whether an ordinary Zillah Court in India could in any case pass a decision which would have the effect contended for at the Bar in this case, viz., that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is therefore unnecessary to say anything about costs.

The 19th December 1871.

Present:

Sir James W. Colvile, Lord Justice James, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel,

*Sale of Ancestral Property—Necessity—Mortgage—Want of Consideration—
Procedure of Privy Council—Findings of Facts—Printing of Privy
Council Appeal Records in India.*

*On Appeal from the High Court at Calcutta.**

Mussamut Humeeda alias Bebee Khajoo

versus

Mussamut Amatool Mehdee Begum.

* From the judgment of Steer and Seton-Karr, *J.J.*, 20th June 1863.

Suit to set aside a sale of ancestral property by a minor's father and guardian as made without necessity and for the father's profligate expenditure, and without enquiry by the purchasers as to whether it was for the infant's benefit. Defendants alleged that the sale was made under pressure of a foreclosure suit on account of a demand under a former mortgage for an ancestral debt. Plaintiff having failed to establish his case, sought to go back and open the consideration for the mortgage made so long as twenty-two years ago; but the Privy Council (agreeing with the High Court), declined to allow plaintiff to do so, observing that whereas in this case, the question of fact has been tried upon evidence fairly warranting the conclusion to which the High Court has come, and there has been no adverse finding of facts, their Lordships will require a strong case to be made out before they will recommend Her Majesty to reverse such a decision.

Their Lordships referred to the extent to which the record in this case had been swelled with a quantity of superfluous documents, and expressed a hope that some means might be taken in India to prevent such a waste of the suitors' money.

This is an appeal from a decree of the High Court, dismissing the plaint of the appellant. The plaint had also been dismissed in the Court below, but upon a different ground. In the Court below, the Court of the Sudder Ameen, it had been dismissed on the ground of a legal objection, as to the splitting of suits. The legal objection so taken was disposed of in favor of the plaintiff in the High Court, but as against the plaintiff they found the merits in favor of the defendant.

The suit was brought by, or rather in the name of, a person who had been an infant, and who had, according to the statement in his own plaint, attained his majority in the year 1848. The suit was not brought until the year 1858, and was then proceeded with, not by the former minor, but by a person who had bought the right of him and who then prosecuted the suit on his own behalf.

The case of the plaintiff was that many years before, thirteen years before the suit was filed, a sale had been made by the minor's father and guardian for Rs. 17,000 without any necessity whatever, merely for the purpose of raising money for his own profligate expenditure, and that the purchasers took the property under that sale without any reasonable ground for supposing that it was made for the benefit or on behalf of the infant.

The case made by the defendants was this:—That it was not a sale for Rs. 17,000 money paid to the guardian and expended by him in a profligate manner; that if it was so expended as to any part, it was so to the extent of Rs. 2,500 only, the only money which they had actually paid; but that the real transaction connected with the sale, which alone was impeached before the High Court and now before their Lordships, was that that sale was made under the pressure of a foreclosure suit actually brought for the purpose of enforcing a demand for Rs. 14,500 out of the Rs. 17,000 which were due upon a former mortgage.

That former mortgage, which was for an ancestral debt, was a mortgage at that time due from the property, was a charge upon it, and was the subject of a suit; and the guardian under the pressure of that suit gets Rs. 2,500 in fact for the equity of redemption. As the High Court says, and it appears to their Lordships rightly enough, it is not suggested in the evidence that Rs. 17,000 was at all an inadequate price for the property. The guardian had no alternative but to pay the money, which he seems to have had no means of doing, or allow it to be foreclosed for Rs. 14,500, or to have done the best he could and sold it for the Rs. 14,500 and the Rs. 2,500 which he received at that time in money as guardian for his infant son. It does not appear to their Lordships that there could be any ground for questioning the transaction.

But then it is said that the mortgage transaction, which was the origin of the suit and the origin of the sale, was itself questionable, that is to say, that there never was any debt at all. But the Court enquired into that, and found that there was really an honest mortgage transaction for a debt amounting to Rs. 10,000, the origin of which was fully explained. It is true that at the time the mortgage was made there was a further sum advanced. The debt being

only Rs. 10,000, the mortgage was taken for Rs. 14,500. But that is not the case made by the plaintiff. The case is not that the estate was parted with for Rs. 4,000 less than it ought to have been, but that it was entirely a case of fraud, a sham transaction from beginning to end, that there never was such a debt, and that there never was any real foundation for the sale which was the ultimate result of the transaction which had commenced in the ancestor's lifetime.

Their Lordships entirely agree with the High Court that after so great a lapse of time, twenty-two years, it would be utterly impossible to allow a plaintiff in a suit which does not raise that point, in a suit which is based entirely on a case of gross fraud in respect to the sale itself, to go back and open the consideration for a mortgage made so long ago. The High Court were satisfied upon the evidence, and their Lordships are satisfied upon the evidence, that the plaintiff entirely failed to make out the case so far as it was upon him to make it out, and that the defendants did prove apparently a very honest case, exactly in accordance with their pleadings.

That being so, even if their Lordships were sitting as a Court of first instance, they would have very little hesitation in coming to the same conclusion at which the High Court has arrived. Their Lordships desire to repeat what has been frequently said at this board, that where a question of fact has been fairly raised and tried by the Courts in India, and there are concurrent decisions by the Courts there, their Lordships will not reverse those decisions merely upon a balance of evidence, or a probability that they in the first instance might have come to another conclusion, unless they are satisfied that there has been some miscarriage of law, or some very good reason for satisfying them that the Judges of the Courts below have come to a wrong conclusion as to the evidence. This case does not come strictly within that rule, as the decision of the High Court proceeded upon the merits and the evidence, the decision of the first Court being on a legal objection. But where, as in this case, the question of fact has been tried upon evidence fairly warranting the conclusion to which the High Court has come, and there has been no adverse finding of facts, their Lordships will require a strong case to be made out before they will recommend Her Majesty to reverse such a decision.

Their Lordships also desire to observe in this case that they have seen with great regret the extent to which the pleadings on the record have been swelled with a quantity of superfluous documents printed at enormous length in India, where apparently there is not the same supervision exercised with regard to the selection of papers for printing that there is in this country; many of these documents are utterly irrelevant, mere details of the copies of accounts of private expenditure of some parties in respect of collateral matters raised in the suit, and these should not have been printed at all. Their Lordships trust that some means may be taken in India to prevent such a waste of the suitors' money as is caused by swelling the record in this manner.

On the merits of the case their Lordships are of opinion that they must humbly recommend Her Majesty that this appeal should be dismissed with costs, and the decree of the High Court be affirmed.

The 20th December 1871.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Minor (Guardianship of)—Religion—Marriage—Education.

On Appeal from the High Court at Allahabad.

Skinner

versus

Orde and others.

Appeal from an order of the High Court confirming an order of the Zillah Judge, removing an infant ward and her property from the custody and guardianship of her mother and the mother's second husband. The minor was the issue of a Christian marriage, the child of a Christian father who was massacred at Delhi in 1857, and was under the protection of her mother who was of Mahomedan ancestry. In 1867 the mother and second husband, after co-habiting together for some time, both, became Mahomedans and contracted a Mahomedan marriage, the second husband being already the husband in Christian marriage of a living Christian wife. The Privy Council, without relying on the rule in force in the Courts of Chancery requiring that, in the matter of religious education, great and (in the absence of controlling circumstances) paramount weight should be given to the expressed or implied wishes of the deceased father, affirmed the order of the High Court, being of opinion that, from the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social *status*, and that therefore it was ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

The Privy Council agreed with the High Court in doubting the validity of the Mahomedan marriage, and suggested, in the selection of a school in such cases, the desirableness of having some independent person as guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

This is an appeal from an order of the High Court of the North-Western Provinces, in substance confirming an order of the Zillah Judge, removing an infant ward and her property from the custody and guardianship of her mother the appellant, and the second husband of that mother.

The application was made to the Judge under the provisions of the Indian Act, No. IX of 1861, which are as follows:—

"1. Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor, may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner, or his agent if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such minor shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

"3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their agents, if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case."

The Judge accordingly made the provisional order on the *ex parte prima facie* case presented to him, appointed a day for hearing it, heard it, and made an order, removing the ward from her mother. An appeal was presented to the High Court, which pronounced the order complained of. The Act gives no further power of appeal, but on the statement that the real question was as to the religious education of the ward, and that considerations of importance as regards the religious feeling of the Christian and Mahomedan populations of India were or might be involved in it, special leave was given by Her Majesty, on the recommendation of this Board, to present to Her Majesty in Council the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the High Court; and it is, obviously, of very great assistance to the Courts in India and to this Board to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this country have thought it best to act for the protection and welfare of infant wards. The

course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that in the matter of religious education great, and, *in the absence of controlling circumstances*, paramount, weight should be given to the expressed or implied wishes of the deceased father. It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power and to have imposed on him the duty of doing what in his judgment is best for the infant, and no other power or duty.

In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government. While Brahman and Buddhist, Christian and Mahomedan, Parsee and Sikh, are one nation, enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending in each case on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social *status*; and it is therefore ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

What are the facts of the present case? Beyond all question the ward was the child of a Christian father, the issue of a Christian marriage. She was left an infant of very tender years, her father being one of the victims of the great outbreak and massacre at Delhi in the year 1857. She remained thenceforth under the protection of her mother, a lady apparently of ancestry not Christian, and with no great knowledge of Christian tenets or attachment to Christian habits. But she was married to a Christian in a Christian Church, and does not appear to have professed any other faith or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up, and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred: The house of the widow became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and co-habited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalized thus—that the widow became a Mahomedan, that John Thomas John became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the widow, the appellant.

The High Court expressed doubt of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

But however this may be, their Lordships can entertain no doubt that when the connection between John Thomas John and the widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then

been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become in fact the home and guardianship of John Thomas John. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and John Thomas John and his wife, professing to yield to the suggestion, took the girl in June 1869 up to Simla, with the avowed object of placing her at a school—a Christian school there. They then represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the *purda*; and that at some period (the time is not exactly fixed) a Moulvie was introduced, who confirmed her in her resolution to become a Mahomedan. The young lady, who by this time had attained the age of 14 years, or thereabout, made a deposition, which is as follows:—

“DEPOSITION of Victoria Skinner, otherwise Nau Shaba Begum, before me, on solemn affirmation under Act V of 1840, on the 1st April 1870.

I know Mr. John. I first knew him when we came to Meerut, and for the past two years know him well. No one has ever persuaded me to be a Mussulman. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the *purda* by my own free will.

I went up to Simla with my mother and Mr. John. They wished me to go to school, and pressed me very much to go, but I would not consent.

I heard of the marriage of my mother to Mr. John, five or six days after it took place. I cannot say how long Mrs. James Skinner has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. Skinner's family must have known of it. I wish to return to my mother.

I believe Mrs. James Skinner to be a Mussulman; Mrs. Orde to be a Christian.

To Counsel for Petitioners.—My mother can read very little—small story books; but she cannot read Persian, nor write at all. She can only read the Urdu in print, not the written character excepting very good text-hand.

I have read easy books on religion in Urdu, but not studied them. I am studying the Koran with a teacher.

There was a picture of my father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I therefore destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the Hills. I heard that to keep pictures was prohibited after my return from the Hills, from a preacher a Moulvie, who came to the house and preached a sermon. No one advised me otherwise.

I had long thought of becoming a Mussulman, but when I was young did not understand the different religions; when I returned from the Hills, I turned my attention to it, and had the preacher called to preach. Almost all my family are Christians.

I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. Benu.

Since I have been in their house I have not had any letter of any kind from Mr. John.

I had some letters from my cousin Sophy who is in Calcutta and Charlie, which were on my table. These I sent for. Two from Charlie I sent for the day before yesterday, which were old, and I tore them up; the other from Sophy I sent for yesterday, and showed it to Mrs. Aldwell. The two from Charlie I sent for by Achakrai, and the one from Sophy by my ayah.

To Counsel for Petitioners.—I know Mrs. Benu. I have seen her several times since I came from Simla. I know her to be a Christian.

This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the country, Urdu, recorded by the Court in English, and was read over to the witness in Urdu, and by her acknowledged to be correct.”

The case of the appellant was, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and mother, and committing her to the care of a Christian strange schoolmistress.

The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July 1870 the order for the removal of the guardian, which would have been the only possible order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy,

of course, for a mother under such circumstances to procure from a young daughter the expression of a wish to remain with her and to become a Mahomedan like her rather than continue a Christian and go to a strange school ; and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to Simla and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are therefore of opinion that the order, in so far as it removed the ward from her mother and step-father, and placed her under a Christian guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that in their opinion the order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the ward concerning her future position ; and considering the present age of the young lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the order, their Lordships feel that it would be very difficult for an Appellate Tribunal in this country to interfere without injury as to the details of the particular guardianship and scheme which must so essentially be a matter of *quasi* parental discretion to be exercised on the spot by those best acquainted or best able to acquaint themselves with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court of India in similar cases, that while selecting a school (such, for example, as Miss Scanlan's in this instance), it would be desirable, where practicable, to have some independent person as guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

The 21st December 1871.

Present :

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Mahomedan Law—Long Possession—Title—Presumption—Inheritance—
Renunciation—Right of Widow.*

On Appeal from the late Sudder Court at Agra.

Hurmut-ool-Nissa Begum

versus

Allahdia Khan and Hajee Hidayat.

Suit in the nature of ejectment by principal respondent as residuary heir according to the Mahomedan law of a deceased person, to recover from his widow, the appellant, three-fourths of her deceased husband's estate, of the whole of which she had for upwards of eleven years been in possession. His title as residuary heir was put in issue, as well as other issues touching the widow's dower, &c. The Privy Council, thinking it of the utmost importance that those who had thus sanctioned a long

possession should not be allowed lightly to disturb it, or to escape from those legitimate inferences and presumptions which on a conflict of evidence arose from their own acts and conduct, decided in favor of the widow, holding that the respondent had failed to establish his title upon which he sued.

According to the Mahomedan law, there may be a renunciation of the right to inherit, and such a renunciation need not be express, but may be implied, from the ceasing or desisting from prosecuting a claim maintainable against another.

As a general rule, a widow takes no share in "the return," i.e. on failure of residuaries; but some authorities seem to hold that, if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc.

Their Lordships have carefully considered the evidence, and the arguments which have been addressed to them on the only question in this appeal which has yet been argued, and have come to a conclusion which will render the argument of the other issues unnecessary.

The reasons which have led them to that conclusion I have now to state:—

Allahdia Khan, the first and principal respondent on this appeal, instituted a suit in the nature of an action of ejectment against the appellant. He claimed, as the residuary heir according to the Mahomedan law of one Hydur Ali Khan, to recover from his widow, the appellant, three-fourths of her deceased husband's estate, of the whole of which, for upwards of eleven years, she had been in possession. His title as residuary heir was put in issue, and other issues were raised in the suit involving questions concerning the rights of the widow in respect of her dower, the amount of such dower, and whether certain of the lands claimed were part of the estate of the deceased, or had been acquired by her own funds.

The Zillah Judge having determined this first issue in favor of the defendant, deemed it unnecessary to try the others, but the late Sudder Court of Agra having overruled his decision on the first issue, tried and determined the whole case. Against their decree this appeal is brought.

In the course of the litigation two other persons were brought on the record: one as co-plaintiff, the other as co-defendant. Both were purchasers *pendente lite*; the one of part of the plaintiff's claim, the other of part of the defendant's interest. Each, therefore, must stand or fall with his respective vendor.

The only question, then, now to be considered is, whether the respondent, the plaintiff in the suit, has established his title as residuary heir of Hydur Ali Khan. Up to a certain point the parties agree as to the pedigree of Hydur Ali Khan. It is admitted that he was the son of Wajid Ali Khan, who was the son of Mahomed Ashruf Khan; but the respondents contend that Mahomed Ashruf Khan was the son of one Bheekum, who died, leaving three other sons, from one of whom (Hossein Khan) Allahdia Khan, the respondent, is descended. On the other hand, the appellant insists that Mahomed Ashruf Khan was the son of one Mahomed Hossein Khan, who had but two sons, namely, Mahomed Ashruf Khan and Mahomed Afzul Khan, who died childless, and consequently that there is no proof of the descent of the respondent and Hydur Ali Khan from a common ancestor.

Before considering the direct testimony on this disputed question of pedigree, it will be convenient to recapitulate certain facts which have been admitted or proved beyond doubt, and the inferences to be drawn from them. Hydur Ali Khan died at Benares on the 12th December 1852. Upon his death some officious person, styling himself "A well-wisher of Government," presented a petition to the Magistrate of the district, suggesting that the deceased had died without any legal heir of his caste (I think those are the words), or any lawful widow, and consequently that his property would pass to the Crown. The Magistrate directed the *kotwal* of the city to enquire into the facts and to submit a report thereon. This order is dated the 13th December.

I may here pause to observe that this proceeding was not likely to take place, if the deceased had notoriously any recognized relations in the line of

succession according to Mahomedan law. There must have been a notion not only that his marriage was incapable of proof, but that there was no person, at least on the spot, who could make out a title to the property as his heir; and so far the fact that this proceeding was taken at all, is in some degree more favorable to the case of the appellant than to the case of the respondent.

On the 16th December, the appellant presented a counter petition to the Magistrate, which was also referred to the *kotwal* for report. On the 18th December, that officer made a report to the effect that he had made the enquiry in the presence of the "Well-wisher," and of two persons described as witnesses cognizant of the facts of the case, including the respondent, Allahdia Khan; that the marriage of the appellant with Hydur Ali Khan had been established by the evidence of Abdool Ali Khan, who performed the ceremony, and of the two persons who were formal witnesses to it; that she was stated by the above parties to be the lawful heir of Hydur Ali Khan, and that the depositions taken were returned with the report.

Amongst these depositions were those of the respondent and of his nephew, Abdool Ali Khan, who seems to have taken the principal part, or a principal part, in bringing or prosecuting this suit.

The first deposition is to the effect that Hydur Ali Khan did marry the appellant, and therefore that it could not be said there was no heir to his property, since she, his heiress, was alive. The other proves the performance of the marriage ceremony. The Magistrate on this, and after a reference to a Principal Sudder Ameen known to have been a friend of Hydur Ali Khan, released the property from attachment on the 29th December 1852.

On this or some other occasion the appellant seems to have procured the two papers called "General Testimonials," which are at pages 96-7 of the record, to be signed by her friends and acquaintance. The first of these purports to have been signed by the respondent Allahdia Khan. Allahdia Khan, when called by the appellant, the defendant, denied his signature to this paper, a fact which does not tend to his general credit, inasmuch as his Counsel has admitted that his subscription of that document can no longer be disputed.

Again, in due time, after the recognition of his title, the appellant applied for and obtained, by proceedings for the mutation of names, the transference from her husband's name to her own in the books of different Collectorates of the several landed estates belonging to him. She also got herself substituted as his representative in more than one suit; and having thus obtained the sole possession of the property, she remained in undisturbed possession of it until the commencement of this suit on the 2nd February 1864.

Now, if Allahdia Khan were the residuary heir of Hydur Ali Khan (and if now such residuary heir, he was equally so in 1852), why did he fail for nearly twelve years to assert his title and to treat the appellant as the sole owner of the estate? It is said, and truly said, that he did not in his deposition, or the subscription to the testimonial, assert that she was the sole heiress of Hydur Ali Khan. It was also said that he could not have so treated her, inasmuch as being the widow merely of Hydur Ali Khan she could take only one-fourth of the estate with such a lien on the whole property as she might be entitled to for her dower. But it is to be observed that the latter proposition, which assumes that, if there were no residuaries, the three-fourths of the property would necessarily go to the Crown, may be contestable. As a general rule, a widow takes no share in "the return." But some authorities seem to hold that, if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the Fisc. In the present case, the Crown certainly did not press its claim against the appellant. However this may be, there is no reason why, when seeking to displace the attachment, Allahdia Khan should not have asserted his own title as residuary as well as hers as widow, the latter depending on proof of a marriage which has

been called in question ; nor is there any reason why afterwards, if he had a perfect title to three-fourths of the estate, he should have allowed her by mutation of names to get possession of the whole without taking the ordinary steps to assert that title before the Collector. And this conduct is made the more inexplicable by what he has put forward in this suit as his case ; for, if it be true that, as he has contended on this record, the widow had never been entitled to more than the small Fatimi dower of Rs. 260, and had released her claim for that to her husband on his death-bed, it follows that she had no possible claim for a lien on the estate for dower ; and again, if it be true, as he has also contended, that he had been recognized as a member of the family in the suit brought in 1832 by Hydur Ali against his step-mother, and had ever since been so recognized, his title as such was far less likely to be disputed by the widow when she was making common cause with him against the attachment than it is now after so many years of adverse possession.

No satisfactory explanation of his inaction has been given. A witness indeed, and a respectable witness, Mahomed Zahoor, has been called, who states, amongst other things, that a few days after the death of Hydur Ali Khan he made an ineffectual attempt to effect a compromise between Abdool Ali Khan and the appellant.

The second of the letters produced by this witness (the only one of the two letters which seems to have any bearing on the case), being dated as late as April 1864, obviously refers to a much later and equally ineffectual attempt at compromise soon after the institution of this suit.

But let it be granted that an earlier attempt was ineffectually made immediately after the death of Hydur Ali Khan, and therefore before the widow had obtained possession of the estate—what is the natural inference from that fact ? Why, that if the claim were well founded, it would not have been so summarily rejected by the widow, who was dependent in some measure upon the respondent and his nephew for the proof of the disputed marriage, and that, if rejected, it would have been at once asserted by him by intervention in the proceedings for mutation of names or by a regular suit. If, therefore, there was such a negotiation for compromise in 1852, it seems probable that it was based rather on an attempt to extort money from the widow by a threat of a claim than by the assertion of a *bond fide* claim which was certainly as capable of being proved then as it is now.

Their Lordships will now proceed to consider the direct evidence which the respondent has adduced in support of his title. He examined his mookhtar and nephew, Abdool Ali Khan, who, of course, have deposed to the pedigree as pleaded, but that witness, as the next in succession to the estate, is apparently *dominus litis*, and has almost equally with his uncle committed himself by his acts and conduct in 1852.

Another witness, Abdool Kadir Khan, the dealer in embroidered cloth, was examined.

He states that he is of the same caste, and distantly related to the family, but his precise connexion with it is not shown.

The next class of witnesses are the six who are examined under commission at Hoshiarpore, in the Punjab. Of these, five depose to a pedigree produced by the first of them, which is in some respects inaccurate since it represents Hydur Ali as the nephew, and not the son of Wajid Ali. The sixth speaks to another pedigree, which, though accurate in the last-mentioned particular, differs in some slight particulars from that scheduled to the plaint. All these witnesses are the cultivators or ryots settled in this village. They none of them profess to have any connexion with Hydur Ali Khan or the respondent, except that they are of the same caste or brotherhood, a term of the widest import, which in one part of the record is admitted to embrace almost all Affghans. The family seems

undoubtedly to have been Affghan by race, who migrated eastwards from the village inhabited by these witnesses ; the time of this emigration is left uncertain. Wajid Ali, who died in 1822, had before his death settled and become a landed proprietor in Zillah Ghazeepore, though he would seem at one time to have wandered as far south as Hyderabad.

It may be true, as stated by the Sudder Court, that trustworthy evidence concerning the pedigree might be more likely to be procured from the original *habitat* of the family than from Benares or Ghazeepore ; but the particular witnesses examined of Hoshyapore do not even state that Bheekum or any of his alleged descendants were known by them as inhabitants of that place, and give no details concerning the family by which their means of knowledge may be tested.

Their Lordships, therefore, concur with the Zillah Judge in thinking this testimony worthless. Nor has the Supreme Court attached much value to it.

If the case of the respondent had rested on the evidence already considered, it can hardly be supposed that the Sudder Court would have disturbed the finding of the Zillah Judge, or held that the respondent had established his title. The learned Judges themselves say : " We do not ourselves attach much value to the oral testimony on either side."

Now, if the evidence on both sides is untrustworthy, the plaintiff, on whom lies the burden of proof, must fail. It is clear that the judgment of the Sudder Court, so far as it is unfavorable to the finding of the Zillah Court, proceeds entirely on the materials which have now to be considered. These are the documents and depositions said to have been filed in the suit of Hydur Ali and his step-mother, and to be records or copies of records in the Court of Ghazeepore.

The short history of that suit is this : Some years after the death of Wajid Ali Khan, and apparently in or about 1832, his widow, Raba Begum, contested the legitimacy of Hydur Ali Khan, who, if his son, was his son by a different wife. Hydur Ali Khan brought his suit, in which the principal issues were his right as an acknowledged son to share in Wajid Ali's estate, and the right of Raba Begum to a large dower claimed by her. The cause was first tried and decided in his favor by the Civil Judge of Ghazeepore on the 31st December 1834, was appealed, remanded by the Sudder Court, re-tried, and finally decided in the plaintiff's favor by the Principal Sudder Ameen, who has been a witness in this cause, on the 26th December 1838.

The following are the documents which have been, as it were, imported from the record of this former suit and made part of the record in this suit.

The first is an alleged copy of a petition said to have been presented by Hydur Ali Khan, without date. The second was a copy of the deposition of Allahdia Khan. The third was a copy of the deposition of Noor Mahomed Khan. The fourth was the final judgment of the 26th November 1838. The fifth was a copy of the deposition of Makhanna Bebee or Begum, said to have been the mother-in-law of Waris Ali, which was filed at the last moment in the Lower Court. These were brought into the Lower Court, but the Sudder Court saw fit to admit the following further documents : A copy of the deposition of Khyrun, a slave girl who had been a witness for Raba Begum, but was cross-examined on the part of Hydur Ali Khan ; a letter, said to have been addressed to Allahdia Khan and Abdool Ali Khan : the first by Raba Begum at the time of Wajid Ali's death, with a postscript by another party ; a letter from Raba Begum to Noor Mahomed Khan, of the 20th May 1823 : the list of the papers filed in that suit, and the decree of the Zillah Court of Ghazeepore, dated 31st December 1834.

The questions that arise on all these documents are, can they be used at all as evidence in this suit against the appellant, and, if so, to what extent can they be so used, and what is the effect of them ? As to that there is a preliminary question, namely, whether they have been sufficiently shown to be what they

purport to be. The Sudder Court in its judgment seems to assume that they were proved to be what they purport to be, and were for all purposes legitimate evidence against the appellant. To the first of these documents it is now admitted by that judgment some suspicion attaches. The learned Judges say of their doubts concerning it, that those doubts cannot be positively answered, but that they (the Judges) cannot, therefore, confidently conclude the document to be a forgery. This is obviously an incorrect mode of disposing of the question, which was not whether the document was a forgery, but whether it had been proved to be a genuine document. The proof which is sufficient to establish the latter proposition may well be far short of that which was necessary to establish the former, and the defect of proof must of course fall on the party who propounds the document. The paper, as set out in the record, does not bear those marks of authentication which the Judges of the Sudder Court state that they found upon it. Their Lordships, however, are willing to assume that such marks were there. Notwithstanding this assumption, however, and considering the objections taken to the paper by the learned Judges themselves, the absence of Hydur Ali's name, the absence of any order passed upon it, and the want of any extrinsic evidence to show that it really was presented to Hydur Ali Khan, their Lordships have come to the conclusion that the Zillah Judge was right in treating it as of no value, and that it must be excluded from consideration.

Their Lordships have come to the same conclusion concerning the letters attributed to Raba Begum, on which it may further be remarked that the judgment of the Sudder Court in no way proceeds. The two judgments prove nothing, and are useful only as showing, as they undoubtedly do, that Allahdia Khan and Noor Mahomed Khan were examined as witnesses for the plaintiff in that suit.

There remain then the depositions, particularly those of the witnesses last mentioned. The Sudder Court, their Lordships think, has given too much importance in their judgment to those depositions. They obviously are not evidence of the facts stated therein, against the present appellant. They were taken in a suit to which she was not a party, upon issues wholly different from the issue raised in this suit; and she has had no opportunity of cross-examining the deponents. Nor do they seem to their Lordships to fall within the rule according to which declarations by a deceased party are admissible on a question of pedigree, or to constitute admissions binding on her deceased husband, whose heiress the appellant claims to be. The most that can be said is, that he produced these persons as witnesses and caused them to be examined upon his behalf upon issues upon which the pedigrees of the family and their relationship to it were not in question.

He cannot, therefore, their Lordships think, be taken to have made an admission binding on his heir of everything which these witnesses collaterally stated. The utmost which these depositions can be said to show is, that the alleged descent of Hydur Ali Khan and the respondent from Bheekum as a common ancestor is not a new story invented for the purposes of this suit, and that Hydur Ali may even to some extent have sanctioned the putting forward of that story by his witnesses. The depositions of the two women on cross-examination do not carry the case further. Admitting that these depositions to the extent which is stated may afford some slight corroboration of the direct evidence given for the respondents, their Lordships have come to the conclusion that, even with that corroboration, the evidence for him fails to meet the heavy burden of proof imposed upon him, not only by the nature of the case, but by the strong presumption arising from his acts and conduct already adverted to.

Their Lordships think it of the utmost importance that those who have thus sanctioned a long possession should not be allowed lightly to disturb it, or to escape from those legitimate inferences and presumptions which on a conflict of evidence arise from their own acts and conduct.

They may further remark that, according to the Mahomedan law, there may be a renunciation of the right to inherit, and that such a renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another. Their Lordships do not say that in this case the point was not taken in the Court below, the acts and omissions of the respondent can be taken to afford an implication of actual renunciation; but they do say that, having before them a case in which there is very weak and suspicious evidence in favor of the title, and evidence on the other side conflicting with it, which is not of a stronger character, notwithstanding the apparent respectability of some of the witnesses called for the defendant, they have to choose between the case for the plaintiff corroborated merely by those slight inferences which arise from the depositions already considered; and the case for the defendant corroborated by the very strong presumptions arising from the conduct and acts of the respondent.

They have already stated that, in their opinion, the Sudder Court has given more effect than ought to be given to the proceedings in the suit of 1832; they think that that Court has not given sufficient weight to the presumptions arising from the respondent's conduct. And, therefore, though unwilling, even when there is a conflict between the two Courts below, to disturb the final finding on an issue of fact, they feel bound to say that in their judgment the respondent has failed to establish the title upon which he sued, and that therefore the Zillah Judge was right in dismissing the suit.

The result will be that their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the decree of the Sudder Court, and to order that in lieu thereof a decree may be made dismissing the appeal from the decree of the Zillah Judge to that Court with costs. The appellant must also have the costs of the appeal.

The 21st December 1871.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Mahomedan law—Dower—Hypothecation of estate—Right of widow in possession
—Decree—Set-off (of unascertained sums)—Amount—Presumption.*

*Consolidated Appeals from the High Court at Calcutta.**

Bebec Bachun and others

versus

Sheikh Hamid Hossein and others;

Moulvie Abdool Azeez and others

versus

Sheikh Hamid Hossein and others.

The hypothecation of an estate for dower is a right that does not arise under the Mahomedan law as the consequence of the gift of dower.

The right of a widow in possession is founded on her power, as a creditor for her dower, to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received.

* From the judgment of Steer and L. S. Jackson, *J.J.*, 24th December 1863.

Setting off one unascertained sum against another is a mode of settlement which, if suggested to the parties as a compromise, may, with their assent, be a fit end of a litigation, but cannot properly be made the basis of a decree between hostile litigants.

As to the amount of dower in this case, the question was, whether it was fixed at Rs. 40,000 and one gold mohur, as alleged by the widow, or at 500 dirrums, under the Mahomedan law, as contended for by the respondents. The respondents, however, after the husband's death, became aware of the widow's claim for dower; and although they opposed the widow's claim to possession, yet, after she had obtained possession, they took no steps for ten years to interfere with her possession, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty. The Privy Council, therefore, treating this conduct of the respondents as indicating not only a consciousness on their part that the dower had been fixed at a considerable amount, as inferred by the High Court, but also a consciousness on their part that what the appellant asserted to be the amount was a true and proper amount, were of opinion that there was reasonable evidence to support the appellant's case to the dower she claimed.

The principal questions in these appeals arise from a claim made by the appellant, as the widow of Sheikh Villayut Ally, a Mahomedan, to a dower of Rs. 40,000 and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late husband until her dower is satisfied.

Other claims have been made by the parties in these suits, some of which have been included in the present appeals, and to which it will be necessary hereafter to advert.

The appellant and Sheikh Villayut Ally, who both appear to have belonged to wealthy Mahomedan families in Behar, were married in 1820.

The husband died in March 1851, without issue, leaving the appellant his only widow.

It is not now disputed that, on his death without issue, the appellant became entitled as co-sharer to one-fourth share of her husband's estate, and that the other three-fourths descended upon Mussamut Raheebun, a sister of Villayut Ally, who died shortly after her brother, leaving the present respondents her heirs.

In April 1851 proceedings were instituted by the appellant in the Collectorate Courts to obtain the entry of her name in the Register in place of her husband's. She alleged in her petition that she was in possession by right of inheritance, and also *on account of her dower*. Objection was made on the part of the respondents, but it did not prevail; and the lands were registered by the Collector in the name of the appellant "without specification of share."

An appeal was made on behalf of the respondents to the Commissioner, who affirmed the decision of the Collector, declaring in his order that, if the objectors (the respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court.

The order of the Commissioner bears date on the 11th March 1852.

These proceedings relating to the possession of the lands are material not only to show that the appellant obtained the insertion of her name and possession soon after her husband's death, but principally because it is clear from them that she claimed to hold not merely her one-fourth share, to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower."

The respondents, who were parties (objectors) in these proceedings, notwithstanding that they had the fullest notice of the appellant's pretension to hold the estate for her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

On the 31st December 1862, both the suits which are the subject of these appeals were commenced, one by the respondents as the heirs of Mussamut Raheebun (deceased), sister and heiress of Villayut Ally, against the appellant (the widow) to recover three shares of the estate, admitting her right as widow to one-fourth share. The other was a suit by the appellant against the respondents to establish her claim to dower, on the alleged ground that her claim to dower might otherwise be barred by the law of limitation.

The appellant in both suits asserted that the dower agreed to be given on her

marriage was the sum of Rs. 40,000 and one gold mohur; and she claimed to hold the estate until this dower was paid; whilst the respondents alleged that, in the family of Villayut Ally, the dower was always fixed at 500 dirrums, and that this was the agreed amount of dower on this marriage.

The claim of Mussamut Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower,—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower, nor was there any agreement on the part of the husband to pledge his estate for the dower. But the appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and that the respondents cannot recover the possession of their shares unless that satisfaction has taken place.

It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein v. Mussamut Khodejee* (10 Weekly Reporter, Civil Rulings, 368). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This seems to have been the ground on which the claim of the widow to retain the possession was put in *Ameeroon-Nissa and others v. Moorad-oon-Nissa and others* (6 Moore's Indian Cases, 211).^{*} Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause—What is the amount of the dower?

The question raised in the second issue in the dower suit was, whether the dower was fixed at Rs. 40,000 and one gold mohur, as alleged by the widow, or at 500 dirrums, under the Mahomedan law, as contended for by the respondents.

In the possession suit, the issue (4th) was, whether Villayut Ally owed Mussamut Bachun Rs. 40,000 and one gold mohur, for dower or not.

After a great deal of evidence had been given in the suits, the Principal Sudder Ameen held that the appellant had not made out that the dower was fixed at Rs. 40,000; and he also held that the statement of the respondents that the dower was fixed at 500 dirrums "was conjectural."

On the appeal the Judges of the High Court were of opinion that they could not declare that the appellant was entitled to demand "the immense sum of dowry which she claims;" but they say—"In a Mahomedan marriage between contracting parties of rank and influence, there must be of course some dowry, and it was probably a handsome one."

They also say: "The omission of the defendants to sue for their share of the inheritance indicates a consciousness on their part that Bachun had a claim of dower to be satisfied from the estate; and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the judgment of the Lower Court in this case, with costs against Bachun."

Their Lordships are unable to consider this judgment of the High Court as a final or satisfactory determination of the main question in the suit. The learned Judges, whilst holding that the evidence did not satisfy them that the dower was fixed at Rs. 40,000, declare that it "was probably a handsome one," and that the conduct of the respondents indicates that it was "doubtless considerable." It appears to their Lordships that the widow, on the view taken by the High Court,

^{*} See Appendix No. 1.

was, at all events, entitled to a proper dower, to be ascertained according to Mahomedan law. But no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and therefore that the decree so founded ought not to stand in its present shape.

Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule, not to interfere, unless upon very clear grounds, with the findings upon questions of fact, where the Courts of first instance and of appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The appellant called nine witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given was a deferred dower of Rs. 40,000. About an equal number of witnesses called by the respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 dirrums. It is clear from the evidence that Villayut and Bachun were both "in opulence from the time of their fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 dirrums; indeed, the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long before holding that the appellant had established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the district, and also from the conduct of the respondents themselves.

The evidence of what was customary principally came from the respondents' witnesses, and its truth may therefore be relied on. It shows that, in the province of Behar, and in the caste of Sheikhs, Rs. 40,000 was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the witnesses. One witness, Sheikh Shahamut Ally, says:—"In the caste of Sheikhs in the province of Behar and in Mahoonnee, the custom is usually Rs. 40,000 and one gold mohur, and the custom of inconsiderable dowers is of recent date."

It was pointed out by the learned Counsel for the respondents that, in some instances, this large amount of dower was fixed in marriages between persons who, apparently, were not wealthy; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it.

Three cases, also coming from Behar, were referred to from the reports of the Sudder Dewanny Adawlut, where this sum of Rs. 40,000 was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause; but as matter of history, they are consistent with the testimony of the witnesses.

Their Lordships must not be understood to decide that the evidence of what was customary in the district would be sufficient in itself to fix the amount of dower, for if there had been no evidence of an agreed amount, it would have been necessary to make enquiries into the usual amount of dower in the family of the appellant; but it is impossible not to see that this sum of Rs. 40,000 was a most usual amount to be fixed, and that fact gives probability to the statements of the witnesses for the appellant, who proved that such was, in fact, the dower agreed upon on this marriage.

Their Lordships are also disposed to attribute great weight to the presump-

tions which naturally arise from the conduct of the respondents. It is plain that, from the pleadings in the Collector's Court, and from other transactions, they became aware shortly after Villayut's death of the claim for dower, and, although they opposed the widow's claim to possession, showing they were alive to their rights, yet after she had obtained it they took no step for ten years to interfere with her possession.

The proper inference from this conduct is, that they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 dirrums, which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty.

Whilst the Judges of the High Court treat this conduct of the respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference which we think may be fairly done, that it is also indicative of a consciousness on their parts that what the appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim.

In the result their Lordships have come to the conclusion that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of India, that the amount of dower set up by the respondents has been disproved.

Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the appellant to the dower she claims.

The appellant also objected to the decree in the suit for possession, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the appellant's Counsel in support of this contention, and there seems to be no ground for impeaching the concurrent decrees of the two Courts on this point.

Their Lordships will humbly report to Her Majesty that the appeals should be allowed in both suits, so far as they relate to the claim for dower; that the decrees under appeal should be reversed; and that it should be declared in both suits that the dower agreed to be given on the marriage was the deferred dower of Rs. 40,000 and one gold mohur.

With regard to the suit for possession, their Lordships have considered whether they ought to advise Her Majesty to direct an account to be taken in that suit; but, considering the way in which the litigation has been conducted, that no account has ever been asked for by the respondents, and that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case already cited from 6 Moore's Indian Appeals, p. 211; and to advise Her Majesty that that suit, so far as it prays possession, should be dismissed as against the appellant, without prejudice to any suit that may be instituted by the respondents for an account and administration of Villayut Ally's estate, consistently with the above declaration as to the appellant's dower.

Their Lordships are further of opinion that the order to be made in the appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits; the order, therefore, which they will humbly recommend Her Majesty to make will be the following:—

That the appeal be allowed, and that the decrees under appeal be reversed, and the following decree be made in both suits:—

That it be declared that the dower agreed to be given on the marriage of the appellant with Sheikh Villayut Ally, deceased, was the deferred dower of Rs. 40,000 and one gold mohur; and that the appellant, being in the possession of the estates of the said Villayut Ally, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied.

That it be further declared that the whole of the property claimed in the suit wherein the respondents are plaintiffs, with the exception of Mouzah Poondareek and Mouzah Kurareea, and the sum of Rs. 300 in the decree of the Principal Sudder Ameen mentioned, belonged to and formed part of the estate of Sheikh Villayut Ally deceased; and that the respondents, as the representatives of Mussamut Raheebun deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the said appellant in respect of her before mentioned dower.

That it be ordered that the suit of the said respondents, so far as it seeks to recover possession of the shares of the said estate, do stand dismissed as against the appellant, but without prejudice to any suit that may hereafter be instituted by them for an account and administration of the estate of Villayut Ally, or to enforce their rights therein consistently with the above declarations.

That the costs of both the said two suits in the Zillah and High Courts should be apportioned between the parties, according to the practice of those Courts in cases wherein a litigant is only partially successful; and that the costs (if any) which have been paid by the appellant under the decrees under appeal should be repaid to her.

That the causes be remitted to the High Court, with directions to carry out this order.

The appellant having failed as to part of the subjects of her appeal, no costs will be given in this appeal.

The 21st December 1871.

Present:

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Minors—Duty of guardians—Compromise—Burden of proof.

*On Appeal from the High Court at Calcutta.**

Baboo Lekraj Roy

versus

Baboo Mahtab Chund and others.

It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates; and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer, if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate whether well or ill founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after 16 years without distinct proof of fraud.

In this case the burden of proving his allegations that the suit was fictitious, and the compromise of it fraudulent and collusive, lay upon the plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. But as the lower Courts fell into an error in point of law in assuming that the burden of proof of the debt lay upon the defendant, the Privy Council reversed their decisions and dismissed the suit with costs.

* From the judgment of Morgan and Shumboonauth Pundit, J.J., 5th January 1865.

The principal facts of this case are as follows:—

Salamut Roy, a merchant and banker, employed Laljee Mull as the principal manager of his business. On the death of Salamut Roy, Laljee Mull continued to manage the business, which was carried on in the name of Surbeshurry, the widow, and Lekraj Roy, the infant son of Salamut Roy. Laljee Mull adopted Mahtab Chand, the infant son of his brother, Inderjeet Mull, and appointed, by will, Inderjeet Mull and Gunga Pershaud, a gomastah in his service, the guardians of his adopted son. Laljee Mull died in August 1845, and on the 26th September 1845 a certificate, under Act XX of 1841, was duly granted to the guardians, notwithstanding the opposition of Surbeshurry.

In January 1846, Surbeshurry, as the mother and guardian of Lekraj Roy, instituted a suit against Inderjeet Mull and Gunga Pershaud to recover from the estate of Laljee Mull the sum of Rs. 176,152 7 annas 4 pies, being the amount of alleged defalcations or misappropriations on the part of Laljee Mull. After various proceedings had taken place in this suit, and witnesses had been examined on both sides, it was settled by a "Ruffanamah," or deed of compromise, whereby it was agreed that Rs. 74,000 should be paid by the defendants in instalments. This "Ruffanamah" was filed on the records of the Court on the 11th January 1847 and confirmed by a decree.

Mahtab Chand came of age in October 1861, and on the 3rd January 1863 commenced the present suit against Lekraj Roy, the son of Surbeshurry (who had died in 1850), to recover from him all that had been paid, together with interest thereon, under the above deed of compromise, amounting to Rs. 68,753 15 annas 6 pies, on the ground that the suit of 1846 was a fictitious one, and that the compromise of it was fraudulent and collusive between Surbeshurry and the guardians of Mahtab Chand.

Judgment was given in the plaintiff's favor, to the full amount of this demand, in the Zillah Court; and that judgment was subsequently affirmed in the High Court. Against this judgment the defendant appeals.

There is no allegation of fraud against the defendant, who, at the time of the transaction which is impeached, was a child of 10 years old. The plaintiff took upon himself the burden of establishing fraud and collusion on the part of the defendant's mother, and his own guardians, one of whom was his natural father. It was contended that, inasmuch as the guardians were dealing with the property of an infant, it was incumbent on the defendant to show that such dealing was for the infant's benefit; and the case of *Hunooman Persaud Panday v. Mussamut Babooee Munraj Koonweree** (6 Moore's Indian Appeals, 393), followed by *Lalla Bunseedhur v. Koonwur Bindeseree Dutt Singh*† (10 Moore's Indian Appeals, p. 454), was referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the guardians was clearly established, and that in the former the question turned on the power of guardians to charge an infant's estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the guardians, who were also administrators of the estate (having received a certificate in pursuance of Act XX of 1841), to pay all just debts of the testator.

Their Lordships have carefully examined the evidence on the part of the plaintiff, and are unable to find in it anything amounting to proof, that either the institution of the suit or the compromise was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a decree of the Court. The evidence by which the plaintiff seeks to set aside that decree which had been in force for sixteen years is that Gunga Pershaud filled the double character of guardian of the plaintiff and

* 18 W. R. 81 (*foot-note*), and p. 29 *ante*.

† See p. 39 *ante*.

gomastah to Surbeshurry, that Inderjeet Mull was a man of weak understanding, under the influence of Gunga Pershaud, and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption, of the *mala fides* of Gunga Pershaud, while, on the other hand, there is a strong presumption against Inderjeet Mull entering into a conspiracy for the purpose of defrauding his own son.

Their Lordships have further examined the evidence of the defendant, with a view to ascertain whether it supplies the defect of proof on behalf of the plaintiff. It undoubtedly appeared that the defendant absented himself in order to escape examination, that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of arbitrators, to whom the accounts of Laljee Mull were submitted before the compromise in the former suit. It is further stated by the Judge of the Zillah Court that the accounts when produced disclosed upon the face of them only a balance of about Rs. 18,000 as due from Laljee Mull, upon which two observations arise—first, that, whatever the defalcations of Laljee Mull may have been, they would not necessarily have appeared on the mere inspection of the books; and, secondly, that if a defalcation to the above amount appeared on Laljee Mull's own showing, the defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the witness called by Gunga Pershaud, apparently with the view of contradicting the plaintiff's case, which was that Inderjeet Mull was a tool in his (Gunga's) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon Inderjeet. Although the plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the defendant, still their Lordships cannot regard the case of the defendant as supplying that proof of fraud which the plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid down, that a very strong case on the part of the appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion that the Judge of the Zillah Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive, lay upon the plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *prima facie* evidence of this before the burden of proof was shifted to the defendants. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships, have given undue weight to the non-appearance of the defendant (a mere child at the time of the transaction in question), and to his reluctance to produce the books, their Lordships consider that they are not infringing the rule above referred to by deciding in favor of the appellants.

On these grounds their Lordships will humbly report to Her Majesty that

the decrees of the High Court and of the Zillah Court ought to be reversed, and that in lieu thereof a decree ought to be made dismissing the respondent's suit with costs, and their Lordships will direct that the appellants have the costs of this appeal.

The 15th January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

*Settlement in Oudh—Proprietary right—Disputes between Grandsons—
Ratio decidendi—Onus probandi.*

On Appeal from the Judicial Commissioner of Oudh.

Hyder Hossain

versus

Mahomed Hossain and others.

In a dispute between two grandsons as to proprietary right in a village which had been registered in the name of a member of the elder branch of the family, the Privy Council held that the *ratio decidendi*, according to which the legal presumption was in favor of one grandson claiming against another, and the *onus probandi* placed on the one claiming to be sole possessor, was more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits.

This is one of the appeals that have lately been brought from judgments or orders of the Revenue officers engaged in making the settlement of the land revenue for the province of Oudh. The present case has been before several of the Revenue authorities who have passed conflicting decisions upon it.

In October 1864, the respondents claimed to be entitled, as proprietors, to one moiety of a village named Belowlie with its appurtenant hamlets, and to be treated accordingly in the settlement then in progress. This claim was originally advanced by distinct plaints or petitions in respect of different hamlets, but these were consolidated into one suit by an order of the Extra Assistant Commissioner Mahomed Hossain Khan, dated 23rd February 1866; and the subject-matter of the litigation may be treated as the village Belowlie.

The title asserted by the respondents was, that the village had originally belonged to one Sheikh Aleemoolah, their great grandfather; that he had a daughter Khyreeyutoonissa, who left two sons, viz., Lootf Hossain, the father of the original appellant, and Enayut Hossain, the father of the respondents, who, as his representatives, were the proprietors of an undivided moiety of the village.

The case of the appellant was that, on the death of the common ancestor, Aleemoolah, the entire interest in the village had somehow become vested in his widow; that she, about the end of the last century, transferred it by deed of gift to Lootf Hossain, who thenceforward held it as sole proprietor up to the time of his death, when it passed to his son, the appellant; and that during all that period the respondents and their father had no proprietary interest in it, being at most dependents of the other branch of the family.

It was admitted, or hardly disputed on the part of the respondents, that, after Aleemoolah's death, his widow first, and after her death, Lootf Hossain, and after him the appellant, had been registered as the persons responsible for the revenue assessed from time to time on the village; and, so far, as the ostensible

proprietors of it. But it was insisted that this was merely an arrangement for fiscal purposes, and that notwithstanding the registration in the name of one member of the family on behalf of the others, both branches continued jointly to possess the village, and to enjoy the revenues of it.

It is to be observed that a suit so framed, though tried by the Revenue authorities, and in the course of proceedings for effecting a settlement of the public revenue, does not in the province of Oudh merely determine who is to be Lumberdar, or the persons entitled to engage for the payment of revenue, leaving the party excluded a remedy in the Civil Courts. Under the provisions of Act XVI of 1865, which, though passed after the commencement of this particular suit, seems to have a retroactive effect, such a suit involves a final adjudication on the question of proprietary right.

The following was the course of the litigation now brought under review of their Lordships:—

The issues originally settled in the suit were,

1st. Did the plaintiffs (the respondents) ever receive the profits of village or not?

2ndly. Did the plaintiffs live in common with the defendant, or separately?

3rdly. Did the defendant give the plaintiffs Rs. 881 for their sister's marriage in 1264 F. or not?

4thly. Did Mussamut Hyat Bebee make over this village with others to the defendant's father Lootf Hossain, and cause the engagement to be executed in his name, in virtue of which he remained in sole possession without the partnership of Enayut Hossain, and after his father's death, did the defendant himself remain in uninterrupted possession, or not?

On the 1st February 1866, Mahomed Hossain the Extra Assistant Commissioner decided the case in favor of the respondents.

On the 19th June 1866, this decision was reversed by the settlement officer, Major Chamier, on the ground that it was partly based upon the result of enquiries made out of Court, and the case was remanded for trial on the following issues:—

1. Whether up to 1263 F. (1856) commensality existed between plaintiff and defendant, and did plaintiff participate in the profits?

2. If so, did the plaintiffs enjoy the said portion of profits by right or by favor?

3. Whether estoppel is created by plaintiffs having enjoyed Seer?

On the 7th May 1866, Mahomed Hossain having tried these issues again decided the case in favor of the respondents.

There was a second appeal to the settlement officer, who, on the 19th June 1866, reversed the decision of this native officer and dismissed the respondent's claim.

This order was confirmed on appeal by the Commissioner of the Lucknow Division (Major Barrow) on the 21st September 1866.

The cause in the ordinary course of things would next have gone before the Financial Commissioner, but Major Barrow having been immediately raised to that office, it was transferred to the Judicial Commissioner, Sir George Couper, who, on the 16th September 1868, proceeding mainly on a recent decision of the late Financial Commissioner, Mr. Davies, reversed the orders of Major Chamier and Major Barrow, and affirmed the decision of the Court of first instance in favor of the respondents.

This ruling was afterwards reviewed by Mr. Tucker, who succeeded Sir George Couper as Judicial Commissioner, and was confirmed by him on the 2nd December 1868.

These conflicting judgments, and the argument addressed to their Lordships on behalf of the appellant, clearly show that the question between the parties is

not merely one of fact, but one involving the *ratio decidendi* in cases of the like nature.

The judgments of Major Chamier and Major Barrow proceed upon certain former rulings of the Revenue Courts in Oudh. These are not before their Lordships, but their effect seems to be that the principle of the settlement was to be based on the maintenance of the proprietary right as it existed prior to and at the time of the annexation of the province to British India in 1856; that if, under the Kings of Oudh, one member of the family had been registered as the sole owner of the estate, and the person responsible for the revenue assessed upon it, it lay upon those who claimed to be jointly interested in it to show not merely that they had received some indefinite and casual sums out of the profits, or even certain Seer lands by way of maintenance, but that the ostensible owner of the estate had accounted to them for the aliquot share of its profits receivable by the owners of the share claimed. These two officers seem accordingly to have come to the conclusion that, inasmuch as the proof of joint interest given by the respondents in the Court of first instance, to whatever it amounted, fell short of this, their claim ought to be dismissed, and the ostensible title of the appellant allowed to prevail.

The decision, however, of Mr. Davies, on which the Judicial Commissioners proceeded, is admitted on all hands to have qualified the former rulings. It is printed at p. 39 of the Record.

In that case it appeared that the party claiming a joint interest against the party who was the ostensible proprietor, had held 71 beegahs Seer land, and had also received sums averaging Rs. 86. And Mr. Davies's judgment, after stating the question to be whether the respondent had, by the adverse possession of the appellant, been excluded from his inheritance under the Mahomedan law, proceeds thus:—"Under the Mahomedan law grandsons are entitled to equal shares. Under the custom of the country one shareholder represents the family before the Government, and manages the estate. It is by no means a general practice to give each sharer an account of his share of the profits at the close of the year. No safe inference against a shareholder can be made from the omission. It was very frequently the case for acknowledged sharers to take only a sufficient sum for their own expenses; but this involved no relinquishment of their rights, nor did any cause of action arise until some quarrel took place between the parties." And from these propositions he inferred, first, that there was a legal presumption in favor of a grandson claiming against another grandson, and that the *onus* of proof should properly be placed on the one claiming to be sole possessor contrary to law and custom; and, secondly, that in the case before him the appellant had cut the ground from under his feet by paying to the respondent, in addition to Seer, a sum of money of fluctuating amount.

If their Lordships are called upon by the present appeal to overrule the decision of Mr. Davies, and to restore the rule supposed to be established by the earlier cases, they must decline to do so. That decision, after full discussion, was followed in this present case both by Sir George Couper and by Mr. Tucker; the principle which it lays down, having been thus sanctioned, has probably governed other settlement cases since decided; and it appears to their Lordships to be far more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. In so far as it depends upon the custom of Mahomedan families holding lands within the former kingdom of Oudh, it receives some corroboration from the findings of the Mahomedan officer (presumably conversant with such customs) who tried this case, in the first instance before the date of Mr. Davies's judgment.

It remains to be considered whether the principle of that judgment has been correctly applied to the present case.

It was argued for the appellant that he had not been allowed an opportunity of proving the alleged deed of gift to his father. There was nothing, however, to prevent him from proving this deed, if he had the means of doing so, on either of the two trials before the native officer. He chose, however, then to rest his case on the order, or copy of the order of the record, which, at most, proves no more than that with the consent of the family at the time the village, which had been entered in the Revenue Register in the name of the widow of Aleemoolah, was transferred into that of Looft Hossain on the suggestion that he had been appointed by her as her successor. Their Lordships apprehend that such an arrangement was not uncommon; nor, if proved, would it under the ruling of Mr. Davies, or even according to the stricter rule of their earlier cases, be conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. The decisions differ only as to the degree of proof required, and as to the party on whom the burden of proof lies.

It is no doubt true that, before Major Chamier, the appellant's pleader proposed to give further evidence in support of his client's title under the alleged gift; and that that officer, who had decided the other issues in favor of the appellant, refused to admit it, stating, "I consider that the fresh plea of gift should not be entertained at this late stage of the case." But their Lordships are far from thinking that this refusal would have been improper had the decision of the Settlement Officer on the merits been the other way. And however that may be, it appears to them that no substantial injury has been done to the appellant by it. For it is clear that the real issue between the parties is, whether, notwithstanding the title registered on the Revenue records, both branches of the family continued as a joint family to possess and enjoy the village. If that were made out, very little credit would be due to an ancient deed of gift, by whatever proof supported, since it would be inconsistent with the proved possession and enjoyment of the estate.

Have then joint possession and enjoyment been established in the decree which satisfies the ruling in Mr. Davies's case? Their Lordships are not insensible to the looseness of much of the evidence taken before the native officer. But they are of opinion that there was before him legal evidence which (if believed) would warrant his findings, at least to the extent that the Seer land was enjoyed by the respondents of right and not by favor, and that their *status* was not that of dependents but of co-proprietors, although the sums drawn by them from the profits may have fluctuated in amount, and not have been the subject of a regular accounting. This would satisfy the ruling of Mr. Davies, though it might not satisfy the requirements of the earlier cases on which Major Chamier and Major Barrow proceeded.

Their Lordships, in considering this appeal, have felt that in cases of this nature, wherein the procedure is somewhat loose, and the merits depend much upon local custom and local enquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation Provinces to act on the principle of not disturbing the judgment under appeal unless they are satisfied that it is substantially wrong.

Here, after full consideration of the arguments for the appellant, they have been unable to satisfy themselves that there is substantial error, either in the finding of the facts or in the principle of law that has been applied to them, and, therefore, they have come to the conclusion that, without calling on the other side, they ought to advise Her Majesty to affirm the Decree or Order of the Judicial Commissioner of Oudh and dismiss this appeal with costs.

The 20th January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Purchase of immoveable property—Resulting trust—Suit to set aside purchase after eleven years and after death of all parties who knew the transaction.

*On Appeal from the High Court at Calcutta.**

Ameeroonnissa Khanum and others

versus

Ashrufoonnissa.

Suit brought to recover possession of a *talook* upon the alleged ground that the moneys with which the purchase was made were not the moneys of the person in whose name the property was bought, but of a lady with whom he was living as her husband, and that there was a resulting trust in her favor. The Privy Council considered that the very principle of a resulting trust was that the property had been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged; but that if it was the intention of the person to whom the money belonged that there should be no such trust, no such implied trust could arise by implication, and the presumption would then be met by the facts. Considering also that the suit was brought to set aside a purchase which had been made eleven years before and had remained unimpeached from the time when it was first made until the institution of this suit, and that the suit was brought after the death of all the parties who knew the transaction and could have explained it, their Lordships were of opinion that every Court would be bound to look with very great jealousy at the evidence which was brought forward to support such a case.

This is an appeal from a judgment and decree of a Division Bench of the High Court of Calcutta which affirmed the decree of the Principal Sudder Ameen of Bhaugulpore, dismissing the suit of the appellants. The suit was brought to recover possession of the *talook* Nisf Ambey, which had been purchased by Velayet Hossein in his own name as long ago as the year 1848. The suit was not commenced till the 16th February 1849, which is nearly eleven years after the purchase.

The suit is brought upon the alleged ground that the moneys with which the purchase was made were not the moneys of Velayet Hossein himself, but of a lady with whom he was living as her husband, Belkissoonnissa Begum. It was admitted by Sir Roundell Palmer that it was not a *benamee* transaction, that Belkissoonnissa Begum had not desired that the estate should be bought in her name, and that there was no intention on her part to purchase an estate at all for herself; but Sir Roundell Palmer put the case on the ground that the money was her money, that it belonged to an *Imambarah*, of which she was the owner, as a sort of lay owner, and that there was a resulting trust in favor of the Begum, in consequence of the money with which the estate was purchased having been so provided.

Now it is plain that if the money did not come from the source indicated, or if the purchase was made in the name of Velayet Hossein, with the consent of the Begum that it should be so purchased for him, there is then no resulting trust. The very principle of a resulting trust is, that the property has been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts.

* From the judgment of Steer and L. S. Jackson, *J.J.*, dated 3rd October 1863. *Sevestre's Rep.* for 1863, p. 521.

The facts of the case are extremely simple. It seems that Belkissoonnissa Begum was a lady of good family and considerable fortune, and that one of the properties which she had was the *Imambarah*. She was, when young, betrothed to her cousin Ali Reza, but it seems either that she never co-habited with him, or that at all events she lived in his house but for a short time, and then they separated. The cause of the separation appears to have been that Ali Reza refused to pay her dower, and the mother of Belkissoonnissa then withdrew her from his house. That being her position, in the year 1842 she formed relations with Velayet Hossein, and it appears that she lived with him as her husband until her death in January 1849. It is plain that during the period of seven years which elapsed whilst they were so living together, Velayet Hossein, although he might not have been possessed of property at the time when these relations commenced, had probably during that period gifts from her, or he may have been allowed to receive the income of her property, and to appropriate a part of it to his own use. It appears that in the year 1848 the lady was in failing health, and in that year this purchase was made. It appears to have been a purchase made at a revenue sale, and the purchase was made in the name of Velayet Hossein. All the instruments of title were made out in his name, and he was registered as the owner of the estate. This happened ten months before the death of the Begum.

Now an instrument has been put in and relied on by both sides, a *mookhtar-namah*, dated 15th April 1848, in which Velayet Hossein appoints four persons as his mookhtars to purchase and pay for his estate, and one of those persons is Mudun Gopal who was the dewan of the Begum with whom he was living.

It is said that there is evidence that the earnest money and the consideration money were provided by the proceeds of jewels and other valuables which belonged to the *Imambarah*, and their Lordships cannot fail to see that the case, as originally put, was that Velayet Hossein was the Shajada of the *Imambarah*, and that he had used the money which he held as Shajada, in trust for the *Imambarah*, to make this purchase. The first two issues were framed to raise those questions, but the Principal Sudder Ameen has found, and he seems in that to have been well grounded upon the evidence, that there was no existing *Imambarah* in the sense of any place of worship which might be said to have its property belonging to it as distinct from the ownership of the Begum; that it was a sort of lay *Imambarah*, and that although he may have called himself Shajada, as he does in this document, it really was more a title of honor which he had assumed, or a nominal appointment of Shajada, than any real *status* which he had or anything which put him in the position of a trustee for an *Imambarah* as distinguished from any property which his wife had. The property of the *Imambarah* belonged to the Begum, as her other property would do, and, as was admitted by the learned Counsel for the appellant, she might have disposed of it as she thought fit.

Now, first of all, did the High Court come to a wrong conclusion in saying that it was not proved to their satisfaction that the money which paid for this estate was the proceeds of the property of the Begum? There is a good deal in the evidence to show that the jewels belonging to the Begum were brought to bankers and others and sold, but a great deal of the evidence is hearsay, and the Court may have come to this conclusion, "Although there is some evidence which if entirely believed would establish that the money did come from that source, yet, taking all the circumstances of the case into consideration, we cannot act upon it; we cannot say with sufficient certainty that that evidence is true." One circumstance upon which they strongly rely is that this suit was brought after the deaths of all the parties who knew the transaction and who could have explained it. The Begum was dead; Velayet was dead; the Dewan was dead. Those three persons knew exactly what the transaction was; and, certainly, when the suit is brought to set aside a purchase which was made eleven years before, which has remained unimpeached from the time when it was made until the institution of this suit,

every Court would be bound to look with very great jealousy at the evidence which is brought forward in order to support such a case.

But assuming that the High Court are not well founded in the conclusion to which they came, that no part of the money was proved to have come from the proceeds of the sale of the jewels belonging to the Begum, still their Lordships think that there was evidence to support the conclusion of fact at which the Principal Sudder Ameen arrived, and therefore that it is unnecessary to decide the question which the High Court took upon themselves to determine. What the Principal Sudder Ameen thought of the case was this, that some of the money might have come from the Begum, but he said, in effect, "Assume that it did so come; there is to my mind very strong evidence from the facts of the case that that was a gift on the part of the Begum, and that she intended to do something for the benefit of the man who had been living with her for seven years." Her husband, Ali Reza, had in fact been the cause of her separation from him by his refusal to pay her dower. She had formed relation with Velayet Hossein as a second husband, although it was not a marriage which was warranted by law; still he lived with her as her husband, and apparently upon very good terms. It was therefore extremely natural, if she found that she was in bad health, that she should have been desirous to make some provision for his benefit. It is also, their Lordships think, extremely probable that he had money of his own, for several of the witnesses speak to his having had money of his own at various periods after his marriage, though he may not have been a man in good circumstances before. The evidence upon which the conclusion is founded that she gave him some of the money, and that he bought this estate in his own name with her consent, is found in her acquiescence during her lifetime, and their Lordships also think it is founded in the acquiescence of Ali Reza after her death. Ali Reza was certainly not sleeping upon his rights. He was living near these parties. He instituted a suit to set aside a deed of gift which was set up by Velayet Hossein, but he took no steps during his lifetime to impeach the purchase; there is the strongest inference to be drawn from his acquiescence in it. What could have been the ground of his acquiescence? The ground of his acquiescence must have been that he knew that the purchase which was made by Velayet Hossein was not made for his wife, but was made, with her consent, for Velayet Hossein himself. One witness for the appellant, named Enayet Hossein, gives evidence which fortifies the view taken by the Principal Sudder Ameen. He says of Velayet Hossein, "He had not means formerly, but when he got married at Karagolah he became rich," and then he says, "The possession of Sha Walayet Hossein since his purchase continued without opposition, and after the sale the Bebee of the Sha died at Bhaugulpore. I cannot say after how long she died. She used to live with her husband and she did not claim the talook." There is thus strong evidence of her acquiescence, as well as of all the persons most interested in the transaction. The purchase was made by her own agent, who was appointed for that purpose by Velayet Hossein, and she appears to have been perfectly satisfied afterwards. It seems, also, to their Lordships that the whole history of the parties, and the probabilities of the case, strongly confirm the view originally taken by the Principal Sudder Ameen.

It was contended that this view of the case was not raised by the issues.

Their Lordships would be disposed to decide the appeal upon the substantial merits, unless they had reason to suppose the parties had been misled by the form of the proceedings; and although it may be true that the above view is not expressly stated, they think it in effect involved in the first two issues, which were founded on the hypothesis of the misappropriation of the property of the *Imambarah* by Velayet Hossein as Shajada, and the same view is open upon the general question raised in the third issue.

On these grounds, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court of Judicature, and to dismiss this appeal with costs.

The 22nd January 1872.

Present:

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Mortgage—Agreement—Construction—Interest—Reg. XV of 1793 s. 7.

*On Appeal from the High Court at Calcutta.**

Radhabenode Misser

versus

Kripa Moyee Debia.

This case turned upon the construction of an agreement by which (according to appellant's contention) the mortgagee was entitled to the payment of the principal and interest on the debt, but the payments of interest carried no interest themselves. The Privy Council, according to their construction of the agreement, were of opinion that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he might have received over and above the interest due to him upon the debt; and held that s. 7 Reg. XV of 1793 did not apply to transactions of this kind.

In this case the question admits of being very shortly stated. It was this, whether the ordinary rules applicable to mortgages expressed in the passage in Mr. Macpherson's book on mortgages, referred to by the High Court, do or do not apply to the present case? It was contended that they did not apply to the present case because their application is expressly excluded by an agreement between the parties; and if their Lordships had come to this conclusion, they would undoubtedly have given effect to that agreement.

The construction of the agreement which is contended for on the part of the appellant is this, that the mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payments of interest which properly would accrue, at all events annually, carry no interest themselves, which no doubt is the ordinary rule. On the other hand it is said that the mortgagor is entitled to call the mortgagee to account for the whole of the annual proceeds of the property less a few expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that while on the one hand the mortgagor can charge the mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the mortgagee on the other hand can only charge the mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that whereas in this case it appears very clear that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest, nevertheless, after a long period of time, the mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance on the part of the mortgagee. Of course the parties might have so agreed if they pleased, but their Lordships would be loth to put such a construction upon the agreement unless they were compelled to do so by very plain words.

On looking at this agreement, more especially at the 6th and 10th paragraphs which have been often referred to, and to the precise terms of which it is not necessary to refer again, their Lordships on the whole think that these paragraphs and the agreement generally, which is drawn by no means clearly, are not inconsistent with the supposition that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee

* From the judgment of Bayley and Roberts, J.J., dated 6th October 1863. Sevestre's Rep. for 1863, p. 545.

was only to account to the mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion that that interpretation is not inconsistent with the contract according to the best construction they can give to it, it follows that the rule stated by Macpherson in general terms is not excluded by the terms of this contract.

Their Lordships think it right also to say that even assuming the construction which has been contended for on the part of the appellant, certainly an unusual one in documents of this kind, their Lordships are not prepared to say that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion that s. 7 Reg. XV of 1793 does not apply to transactions of this kind.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

The 25th January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

*Defamation of character—Malicious prosecution—Onus probandi—Evidence—
Reasonable and probable cause.*

*On Appeal from the High Court at Calcutta.**

Baboo Gunnesh Dutt Singh

versus

Mugneeram Chowdry and others.

Although a suit cannot be maintained for damages for defamation of character when it is substantially a suit for damages against witnesses in respect of evidence given by them upon oath in a judicial proceeding, yet it may be supported when, though called a suit for defamation of character, it is substantially a suit for a malicious prosecution. In the latter case the burden is on the plaintiff to prove (1) that the defendants were the prosecutors of the criminal proceeding against him, (2) that they were actuated by malice, and (3) that their proceeding was without any reasonable or probable cause; and the Privy Council agreed with the High Court in thinking that there was no evidence on the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

The material facts in this case may be very shortly stated.

It would appear that an affray took place between the partisans of the Chowdrys who were the defendants in the suit below, and of Baboo Gunnesh Dutt Singh who was the plaintiff in the suit below. The cause of the affray and the circumstances attending it are involved in some obscurity, but their Lordships think it sufficiently appears that it originated in some attempt on the part of the

* From the judgment of Bayley and S. N. Pundit, *J.J.*, dated 7th March 1866. 5 W. R., 134.

partisans of the Chowdry to assert some real or pretended right which was resisted by the partisans of Baboo Gunnesh Dutt Singh, and that in the course of that affray one of the Chowdry was killed and some were wounded. It would appear that some of the Chowdry who were defendants in the suit below preferred a charge against Gunnesh Dutt Singh of having been accessory to this murder by inciting his partisans to violence, and Gunnesh Dutt Singh was brought before the Magistrate, who, however, upon hearing the case, dismissed it as against him for want of proof, and declined to commit him for trial. Thereupon Gunnesh Dutt Singh brought the present action.

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court that, if it had been strictly speaking such an action, it could not have been maintained, for they agree with that Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this,—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the plaintiff in the Court below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution; and that being so, if we apply the principles of English law to the case, the burden of proof lying upon the plaintiff would be this,—he would have to prove in the first place that the defendants were the prosecutors of the criminal proceeding against him; next that they were actuated by malice; and, further, that their proceeding was without any reasonable or probable cause.

It appears to their Lordships that the issues of fact as stated do in substance raise the same questions which would be raised in an action for malicious prosecution in this country. We find the first issue of fact to be stated thus: "Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative, then whether or not the charge of complicity in the wilful murder of Kirtee Chowdry, deceased, preferred against plaintiff by the defendants of the first party, simply originated from motives of humiliating the plaintiff, and was therefore entirely groundless." The other issues of fact appear to their Lordships to substantially state the same questions which would come before a Judge and jury in an action for malicious prosecution in this country.

With respect to the proof of those issues, it appears to their Lordships that the plaintiff did substantially prove that the defendants, or at all events two of them, were the prosecutors on this occasion, although some little doubt is expressed upon that subject by the High Court. It appears to their Lordships also that some evidence was given by the plaintiff of malice on the part of the defendants. That evidence was not of a very clear or conclusive kind, but their Lordships are disposed to say that the case of the plaintiff on this issue was on the whole sufficiently made out.

We now come to the third issue, namely, whether or not the plaintiff has given any proof of the want of reasonable and probable cause, or, as it is put in the statement of the points in the Court below, that the proceeding was altogether groundless. Their Lordships are of opinion that it rested upon the plaintiff to prove this, or at the least to give *prima facie* evidence of it calling for an answer.

Their Lordships agree with this statement which they find in the judgment of the High Court: "We find on the record of the case that the plaintiff has

given no other proof of his innocence and of the falsehood of the statements of these four appellants except a copy of the order of the Magistrate by which that officer released the plaintiff for want of proof." The plaintiff, it is true, gave in evidence certain depositions of the defendants; but those depositions taken by themselves were evidence of his guilt, not of his innocence.

Then what evidence does he give to rebut them? He puts in the decision of the Magistrate, which was neither more nor less than this (although it is a good deal amplified by the Sudder Ameen in the Court below), that the case is not proved against him in the opinion of the Magistrate.

Their Lordships are of opinion that this decision was no evidence whatever against the defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution, on the bare proof (without more) of the dismissal of the charge might very injuriously affect the administration of the criminal law. It was in the power of the plaintiff himself to go into the witness-box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence.

Undoubtedly in this country, where a man sues for defamation of character, whether in the form of an action for a malicious prosecution or of libel or slander, it is expected that he who of all men is best able to give evidence of his own innocence should be put into the witness-box; and it is very rarely indeed that a plaintiff in any such suit obtains substantial damages, if he does not give evidence or a good reason for not giving it.

Not only does the plaintiff not give evidence himself, but although he calls witnesses for the purpose of showing malice on the part of the defendants, he calls none for the purpose of establishing his own innocence, or of disproving the charge against him.

Under the circumstances their Lordships concur with the judgment of the High Court, which appears to be substantially based upon the ground that in their opinion no proof had been given—not even *prima facie* proof, certainly not such as the plaintiff if he had been an entirely innocent man would have had it in his power to give—of the groundlessness of the charges preferred against him; in other words, that there was no evidence on the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

Their Lordships do not think it necessary to follow the High Court in some observations which they have made as to the effect of the evidence upon the plaintiff's character; a subject on which they give no opinion; but on the ground already stated, namely, that they substantially agree with the finding of the High Court that no sufficient evidence was given on the part of the plaintiff of this being a malicious and a groundless prosecution, their Lordships will humbly advise Her Majesty that the decision of the High Court should be affirmed, and this appeal dismissed.

The 26th January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Practice—Boundary questions—Evidence—Copies—Reports of Deputy Collectors
—Local Investigations.*

*On Appeal from the High Court at Calcutta.**

Ram Gopal Roy and others

versus

Gordon Stuart and Company and others.

The Privy Council will never interfere with the finding of an Indian Court upon a question of boundary, unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make it the ground for an order reversing or varying the decree.

Although the admissibility in India of copies in evidence must not be dealt with by the strict rules prevailing at a *nisi prius* trial in England, yet their Lordships were of opinion that, when a copy has been in any way received and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question, and the weight and value which he will attach to it. There is a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered and the whole cause of action depends on the proof of the original instrument; strict proof may properly be required in the latter case.

Dealing with the present document, their Lordships were not prepared to say that the High Court had miscarried in concluding it to be genuine; but the High Court did not rest upon that document wholly but proceeded upon the whole of the evidence in the case, which appeared to their Lordships amply sufficient to support the finding of the Court.

Unless there be very good grounds for dissenting and differing from the reports made by Deputy Collectors upon local investigations, the Courts even in India, and *a fortiori* the Courts in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them.

The property in question in this suit is a large tract of jungle land lying to the north of the Great Trunk Road in Zillah Beerbhoom. There have been several claimants to portions of this land, besides the present appellants and the present respondents, and some of them were originally parties to this suit. Therefore, in order to see how the appellants and respondents stand to each other, it may be desirable shortly to consider the proceedings which led to the suit.

There was a dispute as early as 1828 between the Chatterjees, whose title is now vested in the principal respondents the Bengal Coal Company, and one Ram Narain Mitter, through whom the appellants derive their title concerning the right to this land, but at that time the dispute appears to have been limited to some 1,600 beegahs of land. The Government authorities attached this land, and their possession seems afterwards to have extended itself in some way or another to the whole of that which was claimed in this suit, being 5,600 beegahs. When the trunk road was made in 1841 there was another dispute between the parties as to who were entitled to compensation for the small portion of jungle which was taken on each side of the road; and, so far as any recognition of title went, the appellants seem to have been preferred on that occasion. They received some small sum which was awarded for compensation under an *ikrar* binding them, in case the opposite party or any other party should prove a title to it and come against the Government for it, to repay it.

Then came the proceedings which immediately led to this litigation, proceedings which were connected with the Government survey in 1857. There was then the ordinary dispute between the Chatterjees or the Bengal Coal Company as then representing the Chatterjees on the one side, and the Roys, the appellants, on the other, and the several other parties who claimed parts of the forests as annexed to their undisputed mouzahs, and also the Government claiming to hold, by some title or another, or by virtue of that occupation which had begun in 1828, a large portion of the land. Mr. Deputy Collector Ross appears then to have gone upon the land, to have made local enquiries, and on the 18th June

* From the judgment of Steer and Levinge, *J.J.*, dated 26th August 1863. *Sevestre's Rep.* for 1863, p. 104.

1857 to have made an award giving the land or the greater portion of the land to the Bengal Coal Company as representing the Chatterjees. The opposite party appealed to the Collector, who, acting upon his view that the principal document produced by the Chatterjees or the Bengal Coal Company was spurious, and that it did not correspond with an earlier document which was admitted to be the foundation of the Chatterjees' title, set aside that decision of Mr. Ross. There was an appeal from his decision to the Commissioner, and an appeal from the Commissioner to the Sudder Board of Revenue, but the result was that those authorities upheld the Collector's order. Another Deputy Collector was directed to make a further apportionment and award of the land among the parties, and the result was that this last officer, on the 16th July 1858, awarded 625 beegahs of the waste land in dispute to the appellants, and the remaining 4,975 beegahs to the Government.

The result of these Revenue proceedings was to put the parties to whom those lands were awarded actually or constructively in possession, but to leave to the opposite party the power of impeaching the Revenue awards, and of recovering possession of the lands by a regular suit if instituted within three years of the date of the award, and accordingly this suit was so brought for that purpose.

The Government appear to have now dropped out of the litigation. The Zillah Judge, who was the Judge of first instance, dismissed the respondent's suit wholly on the ground that they had failed to prove their title, and he also held that the suit as against the Government would have been barred by the Statute of Limitation, inasmuch as they had been in possession of this land since the time they took possession of it in 1828, certainly for more than twelve years. There was an appeal from that decision to the High Court, and on that occasion it seems to have been almost admitted before the High Court that the Government had not really any title to the land. The High Court, moreover, held that the decision as to the Statute of Limitation was erroneous, inasmuch as the possession of Government had been founded on the attachment of 1828, which was in the nature of taking possession in trust and for the benefit of the party who should succeed in establishing a title to the land. Government appears to have acquiesced in that view, and certainly has not appealed from the decree which gave the land which had been awarded to them by the Revenue authorities to the Bengal Coal Company, the plaintiffs in this suit, and the respondents on this appeal. The other parties who were also made parties to the suit, and who claimed portions of the land which were the subject of the award of the Revenue authorities, seem also now to have abandoned their respective claims, and the litigation is therefore reduced to a question between the appellants and the respondents the Bengal Coal Company. Nor can the appellants, if they were to succeed on this appeal, do more than obtain the dismissal of the respondents' suit, and thus obtain an affirmance of their right to hold the 625 beegahs of land. They cannot in this suit assert a title to the larger portion of the land, which the respondents have recovered from Government.

It is obvious from what I have already stated that the question is simply one of boundary. The appellants claim title under Government, which held *khas* a large portion of forest land situate in this district and apparently never included in the decennial settlement. Out of this land, no doubt, that estate which is admittedly in the possession of and belongs to the appellants has been carved. On the other hand, the Chatterjees derive title from a *mokurruree* grant from the Rajah of Burdwan, and it must be held that the land so granted to them was part of the settled estate of the Rajah of Burdwan. It has appeared to their Lordships, in the course of this discussion, that a more easy, at least a more satisfactory, mode of deciding this dispute might have been found in the ascertainment (if that be possible) of the real boundaries between the settled mehals of the Rajah of Burdwan, and the forest lands which remain after the perpetual settlement in the

hands of the Government, because it is clear that, on the one hand, the Chatterjees claim nothing except what they got from the Rajah of Burdwan, and, on the other hand, that the appellants claim nothing except what they derived from the Government. That, however, has not been the course which the parties have thought fit to take. They have, however, adduced a good deal of the evidence generally given in boundary cases; the issue being—what are the boundaries of the estate of Gopeenathpore, which is the *mokurruree* of the Chatterjees, and has now passed to the Bengal Coal Company, and what the true boundary of the estate of Gopeenathpore, which is in the undoubted possession of the appellants?

It has frequently been said at this board, that of all the questions which are brought here from India, there is no question of fact which is so improper to be brought for final decision by this tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a forest or tract of waste land, must depend so much upon local investigation and local enquiry, and on that sort of knowledge which only officers in India, who are conversant with such disputes, can acquire. Accordingly their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an order reversing or varying the decree. This case, no doubt, has been argued very much on that assumption. The long argument of Mr. Leith has turned mainly upon the miscarriage, or rather the alleged miscarriage, of the High Court in dealing with a particular document, viz., the copy of the confirmatory *sunnud*, which has been so much impeached.

I will at once go to the consideration of that document. With reference to the general question of the admissibility of copies, and the mode in which the Courts in India deal with them, their Lordships are desirous that I should make some observations. It has been repeatedly ruled here that these questions are not to be dealt with by the strict rules that would prevail at a *nisi prius* trial in England, where the question is whether the document ought to be submitted at all to the jury. The way in which evidence is brought in in India almost precludes that. On the other hand, their Lordships are undoubtedly of opinion that when a copy has been in any way received, and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it. There is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit, as in the case cited by Mr. Leith from 3rd Moore's Indian Appeals, is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument. In the latter case strict proof may properly be required.

Dealing with the present document, their Lordships are not prepared to say that the High Court has miscarried, in so far as it has come to a conclusion that this document is genuine. It is a very ancient document. It cannot for one moment be contended in the High Court that it was fabricated for the purpose of this suit. No doubt what we have actually on the record is a copy of a copy, but it is a certified copy of a document which is shown, though a copy, to have been produced in the earlier suits. The degree of credit which it has acquired in those suits, and the effect which has been given to it in those suits, may be more open

to question, and there is no doubt great weight in many of the observations of Mr. Leith, that those decisions did not positively affirm the genuineness of the document or proceed wholly on the document so as in effect to involve the decision of its genuineness. On the other hand, it is to be observed that it was produced in one of those suits against the Rajah of Burdwan, that it was not impeached then as other than a genuine document, and it is impossible to say that it did not, by being then produced, acquire some degree of credit.

The effect of the document against Mr. Leith's clients is of course another question. If the document is treated as a genuine instrument, it does not at all follow that of itself it would prove the title of the respondents against the appellants, because it is a mere statement by the Rajah of Burdwan that those are the boundaries of what he professes to grant, and one can conceive cases in which, if there had been a conflict between the Rajah of Burdwan and the Government as to the boundaries of his zemindary, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that his zemindary extended so far; it is at most a proof of an early assertion on the part of the Rajah of Burdwan that the land which he purported to grant in *mokurruree* to the Chatterjees did extend so far. Their Lordships conceive that the reason why this has been treated as the turning-point of the case is that the supposed spuriousness of the document and its assumed inconsistency with the earlier documents were the grounds upon which Mr. Lawford, the Collector, reversed the finding of Mr. Ross, the Deputy Collector, a decision which led to the final adjudication of the Revenue authorities, which is impeached by this suit. In their Lordships' opinion this decision of Mr. Lawford cannot be supported. For the reasons already given their Lordships think that the document is not spurious. Nor can it be properly said to be inconsistent with the earlier document. It contains something which the earlier document did not contain, but it contains nothing which is inconsistent with the earlier document. It gives boundaries which the other did not give, but it does not give boundaries which differ in any degree from any which the earlier document gave either expressly or by implication.

It is, however, to be observed that the decision of the High Court does not rest upon that document wholly, or indeed further than this, that if the document be genuine, it gets rid of that reversal of Mr. Ross's order, and throws the parties back into the position in which Mr. Ross's award would have left them. The judgment of the High Court proceeds upon the whole of the evidence in the cause, which appears to their Lordships to be amply sufficient to support the finding of the Court. There is, first, Mr. Ross's own finding, the result of his local investigation on the spot. It is confirmed to a certain degree by the other local investigation which takes place by the Ameen, and their Lordships cannot but remark that, unless there be very good grounds for dissenting and differing from those reports made upon local investigations, the Courts even in India, and *a fortiori* the Courts in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them. Supposing then that the *onus* of proof in this case was much heavier on the plaintiff than it really was, there was ample ground for saying that he had proved enough to throw the defendants upon proof of their title; and looking at the petition which limits the amount of their holding to the 1,800 odd beegahs, and to the other circumstances remarked upon by the High Court, their Lordships find it impossible to come to the conclusion that the High Court was not amply warranted in the finding to which it came and in reversing the decision of the Zillah Judge, which appears to their Lordships to rest upon very unsatisfactory grounds, and to treat the case as if the whole question turned upon the *sunnud*.

Their Lordships, therefore, must humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 22nd January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Mortgage—Agreement—Construction—Interest—Reg. XV of 1793 s. 7.

*On Appeal from the High Court at Calcutta.**

Radhabenode Misser

versus

Kripa Moyee Debia.

This case turned upon the construction of an agreement by which (according to appellant's contention) the mortgagee was entitled to the payment of the principal and interest on the debt, but the payments of interest carried no interest themselves. The Privy Council, according to their construction of the agreement, were of opinion that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he might have received over and above the interest due to him upon the debt; and held that s. 7 Reg. XV of 1793 did not apply to transactions of this kind.

In this case the question admits of being very shortly stated. It was this, whether the ordinary rules applicable to mortgages expressed in the passage in Mr. Macpherson's book on mortgages, referred to by the High Court, do or do not apply to the present case? It was contended that they did not apply to the present case because their application is expressly excluded by an agreement between the parties; and if their Lordships had come to this conclusion, they would undoubtedly have given effect to that agreement.

The construction of the agreement which is contended for on the part of the appellant is this, that the mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payments of interest which properly would accrue, at all events annually, carry no interest themselves, which no doubt is the ordinary rule. On the other hand it is said that the mortgagor is entitled to call the mortgagee to account for the whole of the annual proceeds of the property less a few expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that while on the one hand the mortgagor can charge the mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the mortgagee on the other hand can only charge the mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that whereas in this case it appears very clear that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest, nevertheless, after a long period of time, the mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance on the part of the mortgagee. Of course the parties might have so agreed if they pleased, but their Lordships would be loth to put such a construction upon the agreement unless they were compelled to do so by very plain words.

On looking at this agreement, more especially at the 6th and 10th paragraphs which have been often referred to, and to the precise terms of which it is not necessary to refer again, their Lordships on the whole think that these paragraphs and the agreement generally, which is drawn by no means clearly, are not inconsistent with the supposition that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee

* From the judgment of Bayley and Roberts, J.J., dated 6th October 1863. Sevestre's Rep. for 1863, p. 545.

was only to account to the mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion that that interpretation is not inconsistent with the contract according to the best construction they can give to it, it follows that the rule stated by Macpherson in general terms is not excluded by the terms of this contract.

Their Lordships think it right also to say that even assuming the construction which has been contended for on the part of the appellant, certainly an unusual one in documents of this kind, their Lordships are not prepared to say that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion that s. 7 Reg. XV of 1793 does not apply to transactions of this kind.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

The 25th January 1872.

Present:

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

*Defamation of character—Malicious prosecution—Onus probandi—Evidence—
Reasonable and probable cause.*

*On Appeal from the High Court at Calcutta.**

Baboo Gunnesh Dutt Singh

versus

Mugneeram Chowdry and others.

Although a suit cannot be maintained for damages for defamation of character when it is substantially a suit for damages against witnesses in respect of evidence given by them upon oath in a judicial proceeding, yet it may be supported when, though called a suit for defamation of character, it is substantially a suit for a malicious prosecution. In the latter case the burden is on the plaintiff to prove (1) that the defendants were the prosecutors of the criminal proceeding against him, (2) that they were actuated by malice, and (3) that their proceeding was without any reasonable or probable cause; and the Privy Council agreed with the High Court in thinking that there was no evidence on the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

The material facts in this case may be very shortly stated.

It would appear that an affray took place between the partisans of the Chowdrys who were the defendants in the suit below, and of Baboo Gunnesh Dutt Singh who was the plaintiff in the suit below. The cause of the affray and the circumstances attending it are involved in some obscurity, but their Lordships think it sufficiently appears that it originated in some attempt on the part of the

* From the judgment of Bayley and S. N. Pundit, *J.J.*, dated 7th March 1866. 5 W. R., 134.

partisans of the Chowdry to assert some real or pretended right which was resisted by the partisans of Baboo Gunnessh Dutt Singh, and that in the course of that affray one of the Chowdry was killed and some were wounded. It would appear that some of the Chowdry who were defendants in the suit below preferred a charge against Gunnessh Dutt Singh of having been accessory to this murder by inciting his partisans to violence, and Gunnessh Dutt Singh was brought before the Magistrate, who, however, upon hearing the case, dismissed it as against him for want of proof, and declined to commit him for trial. Thereupon Gunnessh Dutt Singh brought the present action.

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court that, if it had been strictly speaking such an action, it could not have been maintained, for they agree with that Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this,—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the plaintiff in the Court below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution; and that being so, if we apply the principles of English law to the case, the burden of proof lying upon the plaintiff would be this,—he would have to prove in the first place that the defendants were the prosecutors of the criminal proceeding against him; next that they were actuated by malice; and, further, that their proceeding was without any reasonable or probable cause.

It appears to their Lordships that the issues of fact as stated do in substance raise the same questions which would be raised in an action for malicious prosecution in this country. We find the first issue of fact to be stated thus: "Is there any proof of the existence of any enmity between the litigant parties previous to the commencement of the criminal prosecution? If it be in the affirmative, then whether or not the charge of complicity in the wilful murder of Kirtee Chowdry, deceased, preferred against plaintiff by the defendants of the first party, simply originated from motives of humiliating the plaintiff, and was therefore entirely groundless." The other issues of fact appear to their Lordships to substantially state the same questions which would come before a Judge and jury in an action for malicious prosecution in this country.

With respect to the proof of those issues, it appears to their Lordships that the plaintiff did substantially prove that the defendants, or at all events two of them, were the prosecutors on this occasion, although some little doubt is expressed upon that subject by the High Court. It appears to their Lordships also that some evidence was given by the plaintiff of malice on the part of the defendants. That evidence was not of a very clear or conclusive kind, but their Lordships are disposed to say that the case of the plaintiff on this issue was on the whole sufficiently made out.

We now come to the third issue, namely, whether or not the plaintiff has given any proof of the want of reasonable and probable cause, or, as it is put in the statement of the points in the Court below, that the proceeding was altogether groundless. Their Lordships are of opinion that it rested upon the plaintiff to prove this, or at the least to give *prima facie* evidence of it calling for an answer.

Their Lordships agree with this statement which they find in the judgment of the High Court: "We find on the record of the case that the plaintiff has

given no other proof of his innocence and of the falsehood of the statements of these four appellants except a copy of the order of the Magistrate by which that officer released the plaintiff for want of proof." The plaintiff, it is true, gave in evidence certain depositions of the defendants; but those depositions taken by themselves were evidence of his guilt, not of his innocence.

Then what evidence does he give to rebut them? He puts in the decision of the Magistrate, which was neither more nor less than this (although it is a good deal amplified by the Sudder Ameen in the Court below), that the case is not proved against him in the opinion of the Magistrate.

Their Lordships are of opinion that this decision was no evidence whatever against the defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution, on the bare proof (without more) of the dismissal of the charge might very injuriously affect the administration of the criminal law. It was in the power of the plaintiff himself to go into the witness-box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence.

Undoubtedly in this country, where a man sues for defamation of character, whether in the form of an action for a malicious prosecution or of libel or slander, it is expected that he who of all men is best able to give evidence of his own innocence should be put into the witness-box; and it is very rarely indeed that a plaintiff in any such suit obtains substantial damages, if he does not give evidence or a good reason for not giving it.

Not only does the plaintiff not give evidence himself, but although he calls witnesses for the purpose of showing malice on the part of the defendants, he calls none for the purpose of establishing his own innocence, or of disproving the charge against him.

Under the circumstances their Lordships concur with the judgment of the High Court, which appears to be substantially based upon the ground that in their opinion no proof had been given—not even *prima facie* proof, certainly not such as the plaintiff if he had been an entirely innocent man would have had it in his power to give—of the groundlessness of the charges preferred against him; in other words, that there was no evidence on the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

Their Lordships do not think it necessary to follow the High Court in some observations which they have made as to the effect of the evidence upon the plaintiff's character; a subject on which they give no opinion; but on the ground already stated, namely, that they substantially agree with the finding of the High Court that no sufficient evidence was given on the part of the plaintiff of this being a malicious and a groundless prosecution, their Lordships will humbly advise Her Majesty that the decision of the High Court should be affirmed, and this appeal dismissed.

The 26th January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Practice—Boundary questions—Evidence—Copies—Reports of Deputy Collectors
—Local Investigations.*

*On Appeal from the High Court at Calcutta.**

Ram Gopal Roy and others

versus

Gordon Stuart and Company and others.

The Privy Council will never interfere with the finding of an Indian Court upon a question of boundary, unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make it the ground for an order reversing or varying the decree.

Although the admissibility in India of copies in evidence must not be dealt with by the strict rules prevailing at a *nisi prius* trial in England, yet their Lordships were of opinion that, when a copy has been in any way received and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question, and the weight and value which he will attach to it. There is a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered and the whole cause of action depends on the proof of the original instrument; strict proof may properly be required in the latter case.

Dealing with the present document, their Lordships were not prepared to say that the High Court had miscarried in concluding it to be genuine; but the High Court did not rest upon that document wholly but proceeded upon the whole of the evidence in the case, which appeared to their Lordships amply sufficient to support the finding of the Court.

Unless there be very good grounds for dissenting and differing from the reports made by Deputy Collectors upon local investigations, the Courts even in India, and *a fortiori* the Courts in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them.

The property in question in this suit is a large tract of jungle land lying to the north of the Great Trunk Road in Zillah Beerbhoom. There have been several claimants to portions of this land, besides the present appellants and the present respondents, and some of them were originally parties to this suit. Therefore, in order to see how the appellants and respondents stand to each other, it may be desirable shortly to consider the proceedings which led to the suit.

There was a dispute as early as 1828 between the Chatterjees, whose title is now vested in the principal respondents the Bengal Coal Company, and one Ram Narain Mitter, through whom the appellants derive their title concerning the right to this land, but at that time the dispute appears to have been limited to some 1,600 beegahs of land. The Government authorities attached this land, and their possession seems afterwards to have extended itself in some way or another to the whole of that which was claimed in this suit, being 5,600 beegahs. When the trunk road was made in 1841 there was another dispute between the parties as to who were entitled to compensation for the small portion of jungle which was taken on each side of the road; and, so far as any recognition of title went, the appellants seem to have been preferred on that occasion. They received some small sum which was awarded for compensation under an *ikrar* binding them, in case the opposite party or any other party should prove a title to it and come against the Government for it, to repay it.

Then came the proceedings which immediately led to this litigation, proceedings which were connected with the Government survey in 1857. There was then the ordinary dispute between the Chatterjees or the Bengal Coal Company as then representing the Chatterjees on the one side, and the Roys, the appellants, on the other, and the several other parties who claimed parts of the forests as annexed to their undisputed mouzahs, and also the Government claiming to hold, by some title or another, or by virtue of that occupation which had begun in 1828, a large portion of the land. Mr. Deputy Collector Ross appears then to have gone upon the land, to have made local enquiries, and on the 18th June

* From the judgment of Steer and Levinge, *J.J.*, dated 26th August 1863. *Sevestre's Rep.* for 1863, p. 104.

1857 to have made an award giving the land or the greater portion of the land to the Bengal Coal Company as representing the Chatterjees. The opposite party appealed to the Collector, who, acting upon his view that the principal document produced by the Chatterjees or the Bengal Coal Company was spurious, and that it did not correspond with an earlier document which was admitted to be the foundation of the Chatterjees' title, set aside that decision of Mr. Ross. There was an appeal from his decision to the Commissioner, and an appeal from the Commissioner to the Sudder Board of Revenue, but the result was that those authorities upheld the Collector's order. Another Deputy Collector was directed to make a further apportionment and award of the land among the parties, and the result was that this last officer, on the 16th July 1858, awarded 625 beegahs of the waste land in dispute to the appellants, and the remaining 4,975 beegahs to the Government.

The result of these Revenue proceedings was to put the parties to whom those lands were awarded actually or constructively in possession, but to leave to the opposite party the power of impeaching the Revenue awards, and of recovering possession of the lands by a regular suit if instituted within three years of the date of the award, and accordingly this suit was so brought for that purpose.

The Government appear to have now dropped out of the litigation. The Zillah Judge, who was the Judge of first instance, dismissed the respondent's suit wholly on the ground that they had failed to prove their title, and he also held that the suit as against the Government would have been barred by the Statute of Limitation, inasmuch as they had been in possession of this land since the time they took possession of it in 1828, certainly for more than twelve years. There was an appeal from that decision to the High Court, and on that occasion it seems to have been almost admitted before the High Court that the Government had not really any title to the land. The High Court, moreover, held that the decision as to the Statute of Limitation was erroneous, inasmuch as the possession of Government had been founded on the attachment of 1828, which was in the nature of taking possession in trust and for the benefit of the party who should succeed in establishing a title to the land. Government appears to have acquiesced in that view, and certainly has not appealed from the decree which gave the land which had been awarded to them by the Revenue authorities to the Bengal Coal Company, the plaintiffs in this suit, and the respondents on this appeal. The other parties who were also made parties to the suit, and who claimed portions of the land which were the subject of the award of the Revenue authorities, seem also now to have abandoned their respective claims, and the litigation is therefore reduced to a question between the appellants and the respondents the Bengal Coal Company. Nor can the appellants, if they were to succeed on this appeal, do more than obtain the dismissal of the respondents' suit, and thus obtain an affirmance of their right to hold the 625 beegahs of land. They cannot in this suit assert a title to the larger portion of the land, which the respondents have recovered from Government.

It is obvious from what I have already stated that the question is simply one of boundary. The appellants claim title under Government, which held *khas* a large portion of forest land situate in this district and apparently never included in the decennial settlement. Out of this land, no doubt, that estate which is admittedly in the possession of and belongs to the appellants has been carved. On the other hand, the Chatterjees derive title from a *mokurruree* grant from the Rajah of Burdwan, and it must be held that the land so granted to them was part of the settled estate of the Rajah of Burdwan. It has appeared to their Lordships, in the course of this discussion, that a more easy, at least a more satisfactory, mode of deciding this dispute might have been found in the ascertainment (if that be possible) of the real boundaries between the settled mehals of the Rajah of Burdwan, and the forest lands which remain after the perpetual settlement in the

hands of the Government, because it is clear that, on the one hand, the Chatterjees claim nothing except what they got from the Rajah of Burdwan, and, on the other hand, that the appellants claim nothing except what they derived from the Government. That, however, has not been the course which the parties have thought fit to take. They have, however, adduced a good deal of the evidence generally given in boundary cases; the issue being—what are the boundaries of the estate of Gopeenathpore, which is the *mokurruree* of the Chatterjees, and has now passed to the Bengal Coal Company, and what the true boundary of the estate of Gopeenathpore, which is in the undoubted possession of the appellants?

It has frequently been said at this board, that of all the questions which are brought here from India, there is no question of fact which is so improper to be brought for final decision by this tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a forest or tract of waste land, must depend so much upon local investigation and local enquiry, and on that sort of knowledge which only officers in India, who are conversant with such disputes, can acquire. Accordingly their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an order reversing or varying the decree. This case, no doubt, has been argued very much on that assumption. The long argument of Mr. Leith has turned mainly upon the miscarriage, or rather the alleged miscarriage, of the High Court in dealing with a particular document, viz., the copy of the confirmatory *sunnud*, which has been so much impeached.

I will at once go to the consideration of that document. With reference to the general question of the admissibility of copies, and the mode in which the Courts in India deal with them, their Lordships are desirous that I should make some observations. It has been repeatedly ruled here that these questions are not to be dealt with by the strict rules that would prevail at a *nisi prius* trial in England, where the question is whether the document ought to be submitted at all to the jury. The way in which evidence is brought in in India almost precludes that. On the other hand, their Lordships are undoubtedly of opinion that when a copy has been in any way received, and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it. There is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit, as in the case cited by Mr. Leith from 3rd Moore's Indian Appeals, is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument. In the latter case strict proof may properly be required.

Dealing with the present document, their Lordships are not prepared to say that the High Court has miscarried, in so far as it has come to a conclusion that this document is genuine. It is a very ancient document. It cannot for one moment be contended in the High Court that it was fabricated for the purpose of this suit. No doubt what we have actually on the record is a copy of a copy, but it is a certified copy of a document which is shown, though a copy, to have been produced in the earlier suits. The degree of credit which it has acquired in those suits, and the effect which has been given to it in those suits, may be more open

to question, and there is no doubt great weight in many of the observations of Mr. Leith, that those decisions did not positively affirm the genuineness of the document or proceed wholly on the document so as in effect to involve the decision of its genuineness. On the other hand, it is to be observed that it was produced in one of those suits against the Rajah of Burdwan, that it was not impeached then as other than a genuine document, and it is impossible to say that it did not, by being then produced, acquire some degree of credit.

The effect of the document against Mr. Leith's clients is of course another question. If the document is treated as a genuine instrument, it does not at all follow that of itself it would prove the title of the respondents against the appellants, because it is a mere statement by the Rajah of Burdwan that those are the boundaries of what he professes to grant, and one can conceive cases in which, if there had been a conflict between the Rajah of Burdwan and the Government as to the boundaries of his zemindary, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that his zemindary extended so far; it is at most a proof of an early assertion on the part of the Rajah of Burdwan that the land which he purported to grant in *mokurruree* to the Chatterjees did extend so far. Their Lordships conceive that the reason why this has been treated as the turning-point of the case is that the supposed spuriousness of the document and its assumed inconsistency with the earlier documents were the grounds upon which Mr. Lawford, the Collector, reversed the finding of Mr. Ross, the Deputy Collector, a decision which led to the final adjudication of the Revenue authorities, which is impeached by this suit. In their Lordships' opinion this decision of Mr. Lawford cannot be supported. For the reasons already given their Lordships think that the document is not spurious. Nor can it be properly said to be inconsistent with the earlier document. It contains something which the earlier document did not contain, but it contains nothing which is inconsistent with the earlier document. It gives boundaries which the other did not give, but it does not give boundaries which differ in any degree from any which the earlier document gave either expressly or by implication.

It is, however, to be observed that the decision of the High Court does not rest upon that document wholly, or indeed further than this, that if the document be genuine, it gets rid of that reversal of Mr. Ross's order, and throws the parties back into the position in which Mr. Ross's award would have left them. The judgment of the High Court proceeds upon the whole of the evidence in the cause, which appears to their Lordships to be amply sufficient to support the finding of the Court. There is, first, Mr. Ross's own finding, the result of his local investigation on the spot. It is confirmed to a certain degree by the other local investigation which takes place by the Ameen, and their Lordships cannot but remark that, unless there be very good grounds for dissenting and differing from those reports made upon local investigations, the Courts even in India, and *a fortiori* the Courts in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them. Supposing then that the *onus* of proof in this case was much heavier on the plaintiff than it really was, there was ample ground for saying that he had proved enough to throw the defendants upon proof of their title; and looking at the petition which limits the amount of their holding to the 1,800 odd beegahs, and to the other circumstances remarked upon by the High Court, their Lordships find it impossible to come to the conclusion that the High Court was not amply warranted in the finding to which it came and in reversing the decision of the Zillah Judge, which appears to their Lordships to rest upon very unsatisfactory grounds, and to treat the case as if the whole question turned upon the *sunnud*.

Their Lordships, therefore, must humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 26th January 1872.

Present :

Sir James W. Colville, Sir Joseph Napier, Sir Montague Smith, and
Sir Lawrence Peel.

*Mortgage—Foreclosure—Possession—Sale for arrears of rent (against heirs
of Mortgagor).*

*On Appeal from the High Court at Calcutta.**

A. J. Forbes

versus

Baboo Luchmeeput Singh Doogur and others.

After appellant (mortgagee) had upon foreclosure of mortgage become absolute owner of certain talooks and obtained a decree for possession and been put into symbolical possession by the Zillah Court, the zemindar brought a summary suit for rent in the Collector's Court against the heirs of the mortgagor, who allowed judgment to go by default, and an *ex parte* decree was made against them. In execution of that decree, the talooks were sold to the zemindar's *mookhtar* at a grossly inadequate price. Both the zemindar and his *mookhtar* had the fullest notice of the appellant's title and claim to possession before the decree for sale. HELD by the Privy Council (affirming in effect the authority of the Full Bench decision in 7 W. R. 260), that under the Regulations in force at the time, and under the circumstances of this case, such a sale against the real owner was clearly invalid, and that no authority had been shown to satisfy their Lordships that, by any known law or usage, zemindars had the power to sell tenures of this kind for arrears of rent as a right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

This is an appeal from a decree of the High Court of Calcutta on review, in effect dismissing a suit brought in the Zillah Court of Purneah in 1856 by the appellant, as mortgagee after foreclosure, to recover possession of certain talooks in Pergunnah Havalee, and to set aside a judicial sale of them made at the instance of Baboo Pertab Singh, the zemindar, under a claim for arrears of rent.

The main question in the appeal is, whether the sale of the talooks made to Sheikh Jowhur Ali, the respondent who alone appeared at the hearing, under a decree in a suit instituted by the zemindar against the heirs of Shah Ali Reza, the mortgagor, for arrears of rent, treating them as defaulting tenants, is a valid sale as against the appellant, the mortgagee, who was not a party to that suit.

Ali Reza, a Mahomedan, held the property by an hereditary tenure created by sunnuds granted prior to 1793 to the ancestors of Ali Reza. These sunnuds are not set out in the present record; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the appellant and the representatives of Ali Reza. Their Lordships thought it right to ascertain with accuracy the contents of these sunnuds, inasmuch as the High Court based their judgment in a great degree on the assumption that the tenure was made saleable for arrears of rent by special terms contained in them.

It appears from the sunnuds, thus verified, that this assumption is unfounded; and it was admitted by the learned Counsel for the respondent that, if they were the same as those set out in the former record, this was so. By the sunnuds the mouzahs are given by way of *istamar* to Hossein Reza and his descendants on a fixed and absolute jumma of Rs. 2,291.

On the 13th March 1850, the appellant advanced to Ali Reza Rs. 39,500; and to secure this advance, the latter made, in ordinary form, a conditional sale of the talooks to him, to be absolute if the money was not repaid on 13th March 1851.

* From the judgment of Bayley and Shumboonath Pundit, J.J., 7 W. R. 409.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits.

The mortgage-debt not having been paid, the appellant took proceedings to foreclose under Reg. XVII of 1806; and the foreclosure was completed in due course in August 1852.

Thereupon, on the 28th January 1853 the appellant commenced a suit against Ali Reza to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The Zillah Judge on the 18th December 1854 (a day material to be borne in mind), made a decree in favor of the appellant for the possession of the talooks. On appeal to the Sudder Dewanny Adawlut, the suit was remanded, when the then Zillah Judge dismissed it, and the Sudder Court affirmed his decision; but both these judgments were reversed by Her Majesty on appeal, and the Order in Council declared that the appellant was entitled to the possession of the mortgaged premises as absolute owner. The case is reported in 10 Moore's Indian Appeals, 340.*

The Order in Council bears date on the 3rd February 1866.

Shortly after the decree of the Zillah Judge of the 18th December 1854, in the appellant's suit for possession, viz., on the 6th January 1855, the zemindar Pertab Singh brought a summary suit in the Collector's Court against the heirs of Ali Reza for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th February 1855, an *ex parte* decree was made against them for the amount of the arrears claimed, viz., Rs. 712. On the 19th March 1855, the zemindar prayed that the decree might be put into execution and the talooks sold, and they were sold accordingly on the 26th April 1855, to the respondent Jowhur Ali for Rs. 1,000. This is the sale which it is sought to set aside in the present suit.

It is plain that, when this summary suit against the heirs of Ali Reza was commenced, they had no title or right whatever in the talooks. The appellant had become absolute owner, and, moreover, he had obtained the decree of the Zillah Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th March 1856, the appellant commenced the present suit to set aside the sale and for possession against the zemindar, the purchaser, Jowhur Ali, and the heirs of Ali Reza.

His right to recover was at first opposed in the Courts below, on the ground that by the judgments given in India in the first of the above mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the Zillah and High Courts. On the reversal of these judgments by the Queen in 1866, the appellant, in order to obtain the fruits of the long litigation at last decided in his favor, obtained a re-hearing of his case on review, and the High Court then pronounced the judgment against him, now under appeal.

The contention of the appellant is that the zemindar could only sell the interest of the heirs of Ali Reza (if any), and not the tenure and estate which had passed to him before the decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive, and on objections founded on various alleged irregularities.

In the view taken by their Lordships, it will only be necessary to consider the first point, viz., the right of the zemindar to sell, under the decree in the summary suit against the heirs of Ali Reza, the tenure then vested in the appellant.

The respondent contends that the sale was, by law, valid. He relies on the facts that some rent was in arrear, that Ali Reza's name was on the register,

* 5 W. R. P. C. 47; 1 Sath. P. C. R. 621.

and his heirs in possession, and that the appellant did not tender the amount of the arrears.

But, on the other hand, it appears that if the heirs of Ali Reza were in possession, which is somewhat uncertain on the facts, their names were not put on the zemindar's register, and it also appears that, shortly after the commencement of the summary suit of the zemindar, and before the decree for sale, the officers of the Zillah Court, in pursuance of the decree of the 18th December 1854, gave the appellant symbolical possession by planting bamboos, which the zemindar's agents soon afterwards pulled up, and that the appellant's agent tendered the rent for December 1854 at the catcherry of the zemindar, and that such tender was there refused, with the answer that Sezawals had been appointed, and that until they were removed, no rent would be received. It also appears that the appellant endeavoured to get his name placed on the register of the zemindar, and that before the sale he applied to the Zillah Judge for a *perwannah*, directing the zemindar to place his name on the register, who refused the order. The appellant did not then apply to the zemindar, and it may be inferred that he did not do so because the above proceedings of the zemindar, who had then obtained the decree against the heirs of Ali Reza, had shown that such an application was useless.

It is apparent from these facts that the zemindar had the fullest notice of the title of the appellant and of his claim to possession before the decree for sale, and that having that notice, he proceeded, without notice to him, to obtain a decree for sale *ex parte* against the heirs of Ali Reza. There can also be no doubt that the purchaser, Jowhur Ali (who was, in fact, the *mookhtar* of the zemindar, and purchased at a grossly inadequate price), had in the same way notice of the appellant's title and his proceedings. It requires very plain positive law to support such a sale against the real owner under a decree thus obtained.

The High Court, in the judgment under appeal, assume that the sunnuds, in their terms, gave the zemindar power to sell the tenure itself free from incumbrances; but in the event of that assumption being unfounded, the learned Counsel for the respondent contended that the zemindar had that power either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, zemindars had the power to sell tenures of this kind for arrears of rent, as a right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long minute commentary was made, during the argument upon the Regulations bearing on the subject from 1793 downward, with the view, on the part of the respondents, of showing that they authorised a sale of the tenure itself free of previous titles and incumbrances created by the defaulting tenant and his predecessors.

Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the full Bench of the High Court (the Chief Justice, Sir Barnes Peacock, presiding), in which the Regulations are fully collated and examined (*Mahabooddeen v. Futtah Ali* and another, 7 Weekly Reporter, 260). This, which may be regarded as the leading decision in India, has been followed by the Courts there (*Tirthanund Thakoor v. Paresmon Jha*, 13 Weekly Reporter, 449; *Banerjee v. Debee* and others, 15 *ib.*, 237). It is true that the Courts in these decisions had to construe Act X of 1859, and not Reg. VII of 1799, which had then been repealed; but powers of sale analogous to those found in the Regulation of 1799, are provided in s. 105 Act X of 1859, with this difference—that the language of the latter Act is more favorable to the contention of the respondent than that of the Regulation

of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear that the power to sell the tenure itself free from encumbrances was not given by that Regulation.

The Regulations principally relied on by the respondent are Reg. VII of 1799 s. 15 cl. 7, and Reg. VIII of 1819. The part of the Regulation of 1799 relied on declares that "if the defaulter be a dependent talookdar, or the holder of any other tenure which by the title deeds or established usage of the country is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut, in satisfaction of the arrears of rent."

The language is not well adapted to meet the case of encumbered tenures, but the words, "if the defaulter be the holder of any tenure, it may be sold," may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold, and it does not seem to be a forced construction that the decisions above referred to have put on the statute, in holding that if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to be sold for his debt, and that if he has an encumbered tenure, then only the interest which he has in it is subject to the power of sale.

The older Regulations of 1793, 1795, and 1797 were referred to for the purpose of showing the general object to have been to give the zemindars the same powers to recover rents from their dependent talookdars, as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the Preamble of Reg. XXXV of 1795 (which relates to distresses, viz., that justice required that proprietors should have the means of levying their rents and revenues with equal punctuality as the Government), is not found in Reg. VII of 1799; and would not justify a construction of that Regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for.

Reg. VIII of 1819 s. 11 no doubt gives an express power to sell the tenure free of all encumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.

The preamble of the Act shows the existence of such tenures, and the Regulation treats them as a distinct class.

It has been already pointed out that the sunnuds in this case do not contain this special power, and that the High Court was in error in so assuming.

The present case is stronger in favor of the appellant than that cited from 7 Weekly Reporter. In this case, before the zemindar took proceedings against the heirs of Ali Reza, the title of the appellant has passed beyond the stage of being an encumbrance only on the tenure. He had become the absolute owner of the tenure itself, and the heirs of Ali Reza, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the holders of any tenure, to use the words of Reg. VII of 1799, and were certainly not "proprietors," in the words of Reg. VIII of 1819.

The judgment below was also grounded on the fact that the heirs were in actual possession, and that the name of Ali Reza, their ancestor, was on the register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the zemindar to be wrongful. With this knowledge the zemindar could not properly treat the heirs as holders of tenure, so as to affect the rights of the appellant, of whose title and efforts to obtain possession he had notice.

It is true the appellant did not tender the rent which was the subject of the

suit against the heirs; but, on the other hand, when he tendered the rent due from the date of his decree, at the cutcherry, the prior rent was not demanded of him, and, on the contrary, he was told the zemindar's Sezawals were in possession, and no rent would be received. These facts, coupled with the other proceedings of the zemindar's agents, show that a further tender was useless, and therefore unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships in effect affirm the authority of the decision of the Full Bench in the case referred to from the 7th Weekly Reporter. It may be inferred from their judgment that the High Court in this case would have followed that authority, if the terms of the sunnuds had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that zemindars may, by law, possess to enforce payment of their rents. What other powers and remedies the zemindar Pertab Singh had, and might have exercised, it is not necessary, nor is it now of any general importance to determine, for the remedies for arrears of rent are at present mainly provided by Act X of 1859 and subsequent Acts. The only question their Lordships are called upon to decide is as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the appellant is entitled to the mesne profits from the time of the sale to Jowhur Ali, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to Pertab Singh and his heirs should be deducted and allowed. The appellant also claims to be entitled to a decree for mesne profits against the heirs of Pertab Singh, on the grounds (1) that the zemindar was acting in collusion with Jowhur Ali; and (2) that he persisted in the sale of the talooks, when he knew that the heirs of Ali Reza, who alone were defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion; but considering that the zemindar proceeded to obtain a sale of the tenure, notwithstanding he had notice of the appellant's title, and of the order made by the Zillah Court for giving him possession, and that such sale has been the means of keeping the appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the appellant, they are of opinion that the decree for mesne profits should be against the heirs of Pertab Singh, as well as against Jowhur Ali, but that execution should not be had against such heirs in respect of them until after failure to obtain satisfaction from Jowhur Ali.

Their Lordships will therefore humbly recommend to Her Majesty that the decree appealed from be reversed, and that it be declared that the sale to Jowhur Ali was invalid, and should be set aside, that the appellant is entitled to possession, and to be registered as the holder of the talooks, and that he has been so entitled since the said decree of the Zillah Court of Purneah of the 18th December 1854: and that it should also be declared that the appellant is entitled to mesne profits from the time and in manner above mentioned; and further, that the respondents should pay the costs of the litigation in India, and if any costs have been paid in India they should be refunded, and their Lordships will direct that the appellant should have the costs of this appeal.

The 31st January 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

Attachment—Alienation—Act VIII of 1859 ss. 235 and 240.

*On Appeal from a Full Bench judgment of the High Court (Original Jurisdiction) at Calcutta.**

Anund Lall Doss

versus

Jullodhur Shaw and another.

The Privy Council affirmed the judgment of the majority of the Full Bench, by which it was held that a private alienation of property, during the continuance of an attachment, was null and void only as respects the attaching creditor and those who claimed under or through the attachment.

The facts under which this question arises may be thus shortly stated. *A* obtains an execution against his debtor, in the form of an attachment against the debtor's real property. The debtor, with the consent of *A*, makes a private sale of the property, and out of the proceeds satisfies the debt, but no application is made to the Court for the confirmation of the sale or for the removal of the attachment, and the attachment still remains, at all events formally, in force. Subsequently *B*, another creditor, obtains an attachment upon another judgment. He proceeds to a judicial sale, treating the former sale as void; and the question is whether the purchaser under the second sale has a good title and is entitled to say that the prior sale was to all intents and purposes void as against him?

Their Lordships adopt the view taken by the late Mr. Justice Norman in the first instance, and by the majority of the Court above, including the Chief Justice, upon appeal. The question turns mainly upon the interpretation of two Sections of Act VIII of 1859, under the head, "Execution of decrees for money by attachment of property;" and in construing these Sections, it should be borne in mind that we are not dealing with provisions prescribing the mode of administering property amongst creditors generally, but with provisions prescribing the right of particular creditors who have obtained judgments and execution.

Now the Sections alluded to are in these terms:—S. 235, "Where the property shall consist of lands, houses, or other immoveable property, the attachment shall be made by written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise." S. 240 says,—"After any attachment shall have been made by actual seizure or by written order as aforesaid, and in case of an attachment by written order after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise, and any payment of the debt or debts or dividends or shares to the defendant during the continuance of the attachment shall be null and void."

The question is whether those words, "any private alienation of the property attached, whether by sale, gift, or otherwise, shall be null and void," are to be taken in the widest possible sense as null and void against all the world, including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who expresses his opinion that "the object was to make the sale null and

* 11 W. R., Origl. Jurisdiction, 1.

void so far as it might be necessary to secure the execution of the decree ; it relates only to alienation which would affect the creditor who obtained the attachment." That appears to their Lordships to be the true meaning of the Section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bond fide* purchaser by the vendor could be set aside by the vendor himself ; the words must therefore necessarily be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions.

Reference has been made to s. 271, which is to this effect : " If after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale any surplus remain, such surplus shall be distributed rateably amongst any other persons who prior to the order for such distribution may have taken out execution of decrees against the same defendant and not obtained satisfaction thereof." This Section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not under the circumstances a private sale was valid.

Their Lordships understand that the Courts in India have generally proceeded upon the view taken by the Chief Justice and the majority of the Court, and would be unwilling to interfere with an established course of practice unless they came to a very clear opinion that it was wrong.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed, and this appeal dismissed, with costs.

The 3rd February 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Manager of Lunatic's Estate—Security by—Sale in Execution of Decree—Code of
Civil Procedure—Attachment without Sale—Lands situate in several Zillahs
—Concurrent Execution—Onus Probandi—Non-transmission of Decree—
Omnia præsumuntur rite esse acta.*

*On Appeal from the High Court at Calcutta.**

Saroda Prosad Mullick (Manager of the person and estate of
Sreenath Sannyal a Lunatic),

versus

Luchmeeput Sing Doogur and others.

Appellant, a lunatic's wife, as manager of his estate obtained a decree in execution of which certain lands belonging to the judgment-debtor were sold and purchased by the manager ; but before allowing actual possession to be given to her, she was required to give security for the proceeds of the sale. Some time elapsed before she found the security, and meanwhile the lands were attached and sold in execution of the respondent's decree, and purchased by him, and possession given to him. HELD that the appellant's omission to give security (which was a proceeding not affecting the judgment-debtor and entirely collateral to the suit between the judgment-creditor and him, could not in any way affect her title by the previous sale, and that the Judge was in error in granting the order for a second sale under the respondent's attachment, and confirming the purchase by him when the

* From the judgment of Kemp and E. Jackson, J.J., dated 26th March 1868,—9 W. R. 388.

sale of the same lands had already taken place under the appellant's attachment, and the purchase by her under that sale had been confirmed and had not been set aside.

Under the Code of Civil Procedure, property may be attached without view to immediate sale. The process of attachment and the order for sale may be distinct and separate, and there may be a complete execution of a decree under an attachment without any order for sale.

Where lands are situate in other zillahs, the Code contemplates the issuing of separate orders, subsequent to the attachment, for the sale or other disposition of them. The Code, instead of preventing the transmission of a decree with certificate to several Courts concurrently for execution, allows of it and of its being done most beneficially for the creditor, and without injustice to the debtor. At the same time the Privy Council considered that in any case it would be a right exercise of the discretion of the Court not to act on the power and to refuse to send a decree for concurrent execution into several places, or at least to impose terms on decree-holders that they should not proceed to sale under all the attachments at once.

Assuming that, if no copy of the decree was sent, the attachment made in this case would be invalid, and without determining that point the Privy Council held that the *onus* lay on the respondent to prove non-transmission; and as the Judge had acted on the certificate by the attachment and sale of the lands, the maxim *omnia presumuntur rite esse acta* must prevail until the contrary were shown.

In this case Mooktakashee Dabee, the manager of the estate of her husband—a lunatic—(of which the appellant is now manager) obtained a decree in the Zillah Court of East Burdwan against Jodoonath Sannyal, for upwards of 2 lacs of rupees.

A small sum only having been realized in that zillah, proceedings were taken to obtain execution of the decree on properties of the defendant Jodoonath Sannyal within the jurisdiction of the Zillah Courts of Moorshedabad, Hooghly, and Dinagepore. It is with reference to what was done in Dinagepore that the question arises.

In March 1864 a certificate and other papers were sent by the Judge of East Burdwan to the Judge of Dinagepore, the terms of which will be hereafter adverted to. Some time afterwards, but the precise date is not given, the Judge of Dinagepore attached the lands of the defendant in his zillah, which form the subject of the suit. On the 24th June 1865, another certificate was sent from the Judge of Burdwan, and on the 4th September the lands of the defendant were sold under the decree to Mooktakashee Dabee, the decree-holder, and by an order of the Judge of Dinagepore, of the 4th December 1865, the sale was confirmed, and a writ of possession directed.

It appears that the Judge of Dinagepore, in pursuance of the order of the Judge of Burdwan, required Mooktakashee Dabee to give security for the proceeds of the sale before he would allow actual possession to be given to her. Several months elapsed before she found the security, and meanwhile the present defendants, by orders of the Zillah Judge of Dinagepore, obtained attachment and sale of the same lands under a judgment obtained by them against the same debtor, Jodoonath Sannyal; and on the 6th January 1866, the lands were sold in execution of the decree, and purchased by themselves, and possession afterwards given to them.

Mooktakashee then brought this suit against the present defendants (the respondents), asserting her title under the first judgment sale. It is conceded that her title must prevail, unless the sale under her execution can be invalidated.

The ground on which the Zillah Judge directed the giving of possession under the second sale to the respondents was that, Mooktakashee having failed to give security, the sale to her became null. It is plain that this ground is utterly untenable. The security was ordered for the protection of the lunatic plaintiff against misappropriation by his manager. It was not a proceeding affecting the judgment-debtor, and was entirely collateral to the course of the suit between the judgment-creditor and judgment-debtor. The omission to give this security could not in any way affect the title which had vested in the plaintiff by the previous sale. This decision of the Zillah Judge had the effect of causing the omission by the lunatic's manager to do an act intended to secure the fruits of

his judgment to him, to operate so as to deprive him altogether of them, and hand them over to the second judgment-creditor. It is much to be lamented that such a misconception should have taken place.

Their Lordships also consider that the Zillah Judge was in error in granting the order for the second sale under the respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under Mooktakashee's attachment, and the purchase by her under that sale had been confirmed and had not been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure. The title had vested in Mooktakashee by the sale under her attachment, and until it was set aside there was nothing upon which the second sale could operate. This course inevitably created a conflict between the two decree-holders who became purchasers at the judicial sales under their respective attachments, and led to the erroneous order of the 19th June 1866 which ordered the possession to be given to the respondent. Such a course also is in any case clearly contrary to the interests of debtors as well as creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price.

In the present appeal, however, it was contended at their Lordships' Bar, by Sir Roundell Palmer, that the proceedings in the Court of Dinagepore, which resulted in the sale of the plaintiff, were without jurisdiction and that the sale under them was invalid on the ground of "a radical vice" in the proceedings when the matter was first transmitted by the East Burdwan Judge to Dinagepore in this—that the lands of the judgment-debtor were ordered to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and therefore that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code.

It is plain, however, on reference to the Code, that property may be attached without view to immediate sale. The group of Clauses, ss. 232 to 245, under the heading "Of the execution of decrees for money by attachment of property," prescribe the manner of attaching the various kinds of property, and dealing with them when attached. S. 243 shows how debts and immoveable property are dealt with, and provides modes of satisfying the decree by them, without sale. Another group of sections, 248 to 272, "Of sales in execution of decrees," provide the procedure in case it becomes necessary to sell.

It is obvious from these Sections that, in the case of lands, the process of attachment and the order for sale may be distinct and separate, and that there may be a complete execution of a decree under an attachment without any order for sale.

Then procedure is provided for the execution of decrees out of the jurisdiction of the Court in which they are made. S. 284 and following clauses empower the Judge on application, "unless there be any sufficient reason to the contrary," to transmit a copy of the decree with a certificate that satisfaction of it has not been obtained in his jurisdiction, and a copy of any order for execution of such decree that may have been passed, "to any Court to which the applicant may wish the decree to be executed." The Court to which they are sent is to file them, and s. 287 enacts that the copy of any decree, or of any order of execution, when filed in the Court to which it has been transmitted for execution, shall for such purpose have the same effect as a decree or order for execution made by such Court.

The certificate or order of the Judge of Burdwan, of 19th March 1864, sent to the Judge of Dinagepore, contains, in substance, a recital or statement of the decree of the East Burdwan Court, the amount recovered by execution, the balance due, and that the decree-holder had given a list of properties in Zillahs Moorshedabad, Hooghly, and Dinagepore, and then declares that "a certificate, &c., are sent" to Moorshedabad, under ss. 284 and 285, requesting that properties

in that district may be attached and brought to sale, and that certificates, &c., be sent under s. 235 for attachment, with a view to prevent alienations of properties, in Zillahs Hooghly and Dinagapore. It ends thus: "Afterwards, when proceedings for attachment and sale of the properties in Moorshedabad shall have been completed, the proper order will be passed on the decree-holder's application."

The objection was, in effect, that this order treated the attachment directed to be made in Dinagapore as an injunction or sequestration only. Their Lordships, however, think that this was not so, but that it was meant that the attachment should be a proceeding in execution of the decree. The proceeding was, on the face of it, declared to be a direction to attach under s. 235; and that Section only authorizes the attachment as a step in execution. No doubt, every attachment involves an injunction, which is indeed one of its necessary effects. But when an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect. Their Lordships, therefore, consider that what the Court intended to do was to transmit the proceedings to the three Zillahs for execution, with a direction that the first process of execution, viz., by attachment, should take place in all, but that further proceedings under the attachments should not be taken in Hooghly and Dinagapore until the result of the completed execution in Moorshedabad was known.

It has been already pointed out that the procedure of the Code contemplates, in the case of lands, the issuing of separate orders, subsequent to the attachment, for the sale or other disposition of them.

A more important point involved in the case is whether the transmission could be made to the three Zillah Courts concurrently, for the purpose of execution. On consideration of the Code their Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow of it, and of its being done most beneficially for the creditor, and without injustice to the debtor. If it were not so, the debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the debtor, for the issuing of the execution in more Zillahs than one is made subject to the control of the Judge, who may refuse to do so, "where he saw there was any sufficient reason to the contrary" (s. 286). Again, after the attachments have been granted, if there should be any ground of complaint the debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them.

It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a decree for concurrent execution into several places; and when it did act on it, it would be in many cases proper to impose terms on decree-holders, that they should not proceed to sale under all the attachments at once.

This is really what was meant to be done here, although it was not done in a very good and satisfactory form.

The case is thus reduced to the objection, that a copy of the decree was not transmitted to Dinagapore.

The High Court rest their first judgment on the ground that no copy of the decree or of the certificate, that satisfaction had not been obtained, was sent. The latter document clearly was sent. In the judgment on review, Mr. Justice Jackson came to the conclusion that both were transmitted; Mr. Justice Kemp alone retained his former view.

Assuming that, if no copy of the decree was sent, the attachment made at Dinagapore would be without valid authority, which their Lordships do not find it necessary to determine, it lies on the defendant to prove that it was not transmitted. The Judge at Dinagapore acted on the certificate by attaching the lands, and afterwards sold under that attachment. The maxim, therefore, *Omnia præ-*

sumuntur rite esse acta, must prevail until the contrary is shown. It certainly is not shown by the document of 19th March 1864, for it is there stated that "certificates, &c.," were sent; nor by the Memorandum of the attachment which refers to the *roobakaree* "and other papers" having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said that it must be inferred from the order which preceded the document of the 19th March, that it was not intended to send the copy of the decree to Dinagapore. This, perhaps, may be inferred from that document taken alone; but it would not be safe to act on such an inference to annul the attachment and sale, especially when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th March; or, at all events, before the attachment was made.

On the whole, their Lordships consider that the appeal should be allowed; and will humbly advise Her Majesty that the decree of the High Court should be reversed, that the decree of the Principal Sudder Ameen should be executed, and that the appellant should have the costs of the litigation in India and of this appeal.

The 3rd February 1872.

Present :

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Limitation—Act XIV of 1859—High Courts when not Courts established by
Royal Charter within meaning of that Act—Ss. 19 and 20—Decrees of
High Court on Appeal—Execution—Final Decree—Decrees of Privy
Council—Appeal to England—Proceeding to keep Decree alive.*

*On Appeal from the High Court at Calcutta.**

Kristo Kinker Ghose Roy and another

versus

Burrodakant Singh Roy and another.

Considering the date and history of the Limitation Act XIV of 1859, the Privy Council were of opinion that the High Court in their decision (16 W. R., Full Bench, p. 1) were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term, were not, when exercising their appellate jurisdiction from the Mofussil Courts, such Courts within the meaning of that Act.

Their Lordships also agreed in the same Full Bench ruling that the execution of decrees of the High Court made on appeal from the District Courts was subject to the three years' limitation prescribed by s. 20.

The consideration of the question as to the date from which the three years should be calculated was not necessary for the determination of this appeal; but the Privy Council inclined to the view that the execution ought to proceed on a decree of which the mandatory part expressly declared the right sought to be enforced; and as the question was not one of practical importance, their Lordships would not express dissent from the Full Bench ruling above referred to—in which it was held that, when the decree of the Lower Court was reversed, modified, or affirmed, the decree passed by the Appellate Court was the final decree in the suit—farther than by saying that there might be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal without confirming a decree erroneous or questionable yet not open to examination on special appeal; and their Lordships suggested the expediency in all cases expressly to embody in a decree of affirmance so much of the decree below as it is necessary to affirm.

Quære.—Whether the so-called "*decrees* of the Privy Council" are not subject to any law of

* From the judgment of L. S. Jackson and C. P. Hobhouse, *J.J.*, dated 27th November 1867, 8 W. R. 470.

limitation; or whether they are not merely Orders of H. M. in Council made on the recommendation of a Committee of the Privy Council, and do no more than prescribe what shall be the final decree in the cause, leaving them to be executed by the ordinary process of the Courts in India.

The presentation of a petition of appeal to England, which is a proceeding taken to destroy the decree appealed from, cannot of itself be treated as a proceeding to keep it in force; though if the appeal to England be allowed, the respondent to it supporting the decree appealed from is entitled to sue out execution at any time within three years after the final dismissal of the appeal.

This was an appeal from a decision of the High Court of Calcutta confirming a decision of the Judge of Moorshedabad.

The facts of the case appear in the judgment.

For the appellants *Mr. Bell* and *Mr. John Cutler*.

For the respondents *Sir R. Palmer* and *Mr. Doyme*.

Mr. Bell, after stating the facts, contended that the decree in the suit became, on being affirmed, the decree of a Court established by Royal Charter (*Chowdry Wahid Ali v. Mullick Enayet Ali*, 14 W. R., 288; *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee*, 7 W. R., 521; and *Bupura Krishna v. Madhariah Ramrav*, 5 Bom. H. C. R., 215); and therefore, the twelve years' rule applied. If, however, the three years' rule applied, then there had been a proceeding to keep the decree in force within the meaning of s. 20 of the Limitation Act, (*Rajah of Burdwan v. Bulram Singh*, 14 W. R., Privy Council, 21; and *Ramruttun Bannerjee v. Maharajah Ameeroomolk*, 6 W. R., 95).

Mr. John Cutler, after stating that there was no dispute as to the material facts, contended that, if the case fell within the three years' rule, either the petition of 8th April 1865, or the order of the High Court of the 4th August 1865, or the striking off the appeal on the 9th May 1866, was "a proceeding to keep the decree in force" (*Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee*, 7 W. R., 521), or that the net effect of the proceedings in the suit between the 8th April 1865 and the 9th May 1866, was to keep the decree in force until the latter date, so that the time ran from that date. He argued that "a proceeding to keep the decree in force" should be construed "a proceeding having the quality of keeping the decree in force"; and that when an appeal was preferred, then during every day of the time and every hour of the day that the appeal was pending, there was a proceeding to keep the decree in force (*Rajah of Burdwan v. Bulram Singh*, 14 W. R., Privy Council, 21), and that this was so whatever might be the result of the appeal (*per Holloway, J.*, in *Arunachella Haidayan v. Veludayan*, 5 Mad. H. C. R., 215). But he contended that the decree was the decree of the High Court, and therefore that of a Court established by Royal Charter to which the twelve years' rule applies. Where a decree is passed by an Appellate Court, that decree is the final decree in the suit, be it one affirming, modifying, or revising the decree of the Court below. There cannot be two final decrees in the same suit (*Chowdry Wahid Ali v. Mullick Enayet Ali*, 14 W. R., 288; *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee*, 7 W. R., 521; *Bapurah Krishna v. Madhariah Ramrar*, 5 Bom. H. C. R., 215).

Sir R. Palmer contended that there were two distinct decrees, the one that of the High Court for costs, the other that of the Zillah Court, and that the High Court by affirming the decree of the Zillah Court did not incorporate it into its own; that the decrees of the High Court on the appellate side were not decrees of Courts established by Royal Charter within the meaning of s. 19, because that Section only applies to existing Courts established by Royal Charter, and the High Court was not at that time in existence. He then contended that, if the three years' limitation applied, there had not been "a proceeding to keep the decree in force." He commented upon the cases cited on behalf of the appellant and cited *Arunachella Haduyan v. Veludayan*, 5 Mad. H. C. R., 215, as being directly contrary to *Bipro Doss Gossain v. Chunder Seekur Bhuttacharjee*, 7 W. R., 521. In the present case there was no *litis contestatio* between the parties after the decree of the High Court, no judicial proceeding and no act by the decree-holder.

Mr. Doyne contended that there had been no "proceeding to keep the decree in force" and that s. 20 applied to decrees passed by the High Courts on appeal from the Mofussil.

Mr. Bell replied.

Sir James Colville delivered the following judgment :—

This appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The appellants, on the 25th March 1862, obtained a judgment against the respondents for the sum of Rs. 9,500 with interest from the date of the plaint, and costs of suit on a claim founded on an agreement to pay to the appellant *Kristokinker* an allowance of Rs. 900 per annum by way of maintenance.

The respondent, *Rajah Burrodakant*, appealed against this decree to the High Court of Calcutta, but by the decree of that Court made on the 8th June 1863, it was ordered and decreed that the decree of the Lower Court should be, and the same was thereby affirmed; and that the defendant, appellant, should pay to the plaintiffs, respondents, the sum of Rs. 350, being the costs of the appeal with interest thereon at the rate of 12 per cent. per annum, from the date of the decree to the date of realization.

A petition of appeal to Her Majesty in Council against the decree was then presented by the *Rajah*. He tendered security for costs, and the usual reference was made to ascertain its sufficiency. But the security was never perfected. On the 8th April 1865, he presented a petition to the Court, suggesting that negotiations for a compromise between him and the appellants were pending, and praying that proceedings in regard to the appeal to England might be stayed for two months. On the same day the appellant filed a petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th August 1865, made an order "postponing the case for two months, as there were hopes of the parties coming to an amicable settlement." The two months expired on the 6th October, and nothing came of the negotiations, and, on the 9th May 1866, the High Court struck the appeal off the file in default of prosecution.

On the 22nd April 1867, the appellants made their first application to the Zillah Court for execution against the respondent. Their application was in the tabular form prescribed by s. 212 of the Code of Procedure which requires the date of the decree of which execution is sought to be mentioned with other particulars. The only decree so specified was the decree of the 25th March 1862. But the fact of its affirmance on appeal was stated in the next column, and the amount sought to be levied included the Rs. 350 decreed by the High Court as the costs of the appeal. On the 27th April 1867, the Zillah Judge rejected the application for execution on the ground that it was barred by s. 20 Act XIV of 1859; no step having been taken since the 8th June 1863 to keep the decree in force within the meaning of that section.

The appellants appealed from that decision to the High Court, which, on the 27th November 1867, ruled that, in so far as the appellants sought to realize the amount decreed to them by the original decree, their application for execution fell within the three years' limitation of s. 20; but that, inasmuch as their claim for the costs of the appeal being Rs. 350 rested on the decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under s. 19 of the Limitation Act, to sue out execution for that amount at any time within twelve years from the date of that decree; and the case was sent back to the Zillah Court with instructions to deal with it accordingly. The appellants have brought this appeal against so much of this order as held that their right to execution for any part of their demand was barred, but there has been no cross-appeal against that part of the order which was in their favor.

The argument on this appeal has raised the following questions :—

First.—Is the execution of a decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by s. 20 or by s. 19 of Act XIV of 1859; or, in other words, is it subject to the three years' or to the twelve years' rule of limitation?

Secondly.—What is the effect of a decree of the High Court affirming a decree of a Zillah Court? Is it to be taken to incorporate the latter in itself, so that for the purpose of execution the decree to be executed is to be taken to be a decree of the High Court?

Thirdly.—If, on any ground, the decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of s. 20 been done within three years of the date of the application for execution?

Upon the two first and general questions there have been conflicting decisions by the High Courts in India.

The order under appeal appears to have been the earliest which decided that decrees of the High Court were within s. 19. It has been followed at least in one case in Bengal decided as lately as the 6th September 1870 (14th Weekly Reporter, p. 288); and it has been recognized as sound law by the High Court of Bombay in the case reported in 5 Bombay High Court Reports, 214. But in two cases decided by the High Court of Madras, on the 4th March 1870, it was ruled by Chief Justice Scotland and Mr. Justice Bittleston (apparently without any dissent on that point on the part of the other Judges composing the Full Bench of the Court) that a decree of the High Court made on appeal from a Mofussil Court is not a decree of a Court established by Royal Charter, within the meaning of s. 19 of the Limitation Act, and is a decree subject to the provisions of s. 20 of that Act. It may be observed that, neither in these Madras cases, nor in that decided at Bombay, was the determination of this question essential to the decision of the Court upon the particular appeal before it; since in none of them had the period of three years' limitation, if calculated from the date of the decree of the Appellate Court, expired. This ruling, however, of Chief Justice Scotland appears to have led to a reconsideration of the question by the High Court of Bengal.

Their Lordships find that in a case, not cited at the Bar during the argument, which is to be found among the Full Bench Rulings of the High Court of Bengal in the 16th volume of Sutherland's Weekly Reporter, under date the 12th June 1871, a Division Bench of the High Court referred for the determination of the Full Bench two questions, in the following terms:—1st, whether a decree of the District Court affirmed on appeal by the High Court becomes a decree of the last-mentioned Court: and secondly, whether execution of that decree of affirmance passed by the High Court is to be governed by the provisions of s. 19 of the Statute of Limitation Act XIV of 1859, or s. 20 of that enactment, i.e., whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Mr. Justice Norman (then acting as Chief Justice), Messrs. Loch, Bayley, Macpherson, and Dwarkanath Mitter, unanimously decided the first of these questions in the affirmative; and ruled on the second that when under s. 361 of the Code of Procedure a decree of the High Court on its appellate side is transmitted to the District Court which passed the first decree in the suit for execution, it will have the effect of a decree of such Court, and must be executed within the period limited by s. 20 Act XIV of 1859.

The preponderance, therefore, of authority in India is now in favor of the proposition that the execution of decrees of the High Court made on appeal from the District Courts is subject to the three years' rule of limitation.

Their Lordships are of opinion that this conclusion is correct.

The object of Act XIV of 1859 was to carry out a recommendation made many years before by the Law Commissioners for India, by passing one general law of limitation applicable to all Courts in India. It is hardly necessary to

remark that the Legislature, in framing the Act, had then to deal with two distinct judicial systems—the one consisting of what had been the Courts of the East India Company, and may here be called the Mofussil Courts ; the other, the Courts established in the Presidency Towns and elsewhere by Royal Charter, and administering to all within their jurisdiction, subject to certain statutory exceptions and modifications, the law of England. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency Towns ; whilst the law of limitation which governed the latter consisted of the Statute of James, together with such other portions of the Statute Law of England applicable to the subject (if any) as had been introduced into India, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in England. It is not surprising that, in framing a law designed to be common to both systems of Judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons which approved themselves to the minds of those who were conversant with the administration of justice in the Mofussil to subject the execution of the decrees of the Mofussil Courts, whether of appellate or of original jurisdiction, to the three years' limitation ; whilst, on the other hand, being pressed by the weight and value which the Law of England gives to a judgment or decree of a superior Court, it determined not to reduce the period for enforcing the decrees of the Supreme Courts to less than twelve years. Hence the distinction made by ss. 19 and 20 of the Act, in which the term " Courts established by Royal Charter " was obviously used not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not it is needless to enquire) certain existing Courts, viz., the Supreme Courts in the three Presidency Towns, and the Recorders' Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions which might thereafter be established. The same term, it may be observed, is to be found in the preamble of Act VIII of 1859 (the Code of Procedure), which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of Judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24th and 25th Vict. cap. 104, and the 28th Vict. cap. 15. It will be convenient to speak only of the High Court of Bengal. The general scheme of the amalgamation was to constitute one general Court, of which the Judges sitting in various divisional Courts were to exercise the functions both of the Supreme Court and the Appellate Mofussil Courts (the Sudder Dewanny Adawlut and the Sudder Nizamut Adawlut), all of which were abolished.

The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court to be exercised by it as a Court of Original Jurisdiction ; and the powers and jurisdiction of the Appellate Mofussil Courts were transferred to it, to be exercised by it as an Appellate Court. But the law to be administered by it as a Court of Original Jurisdiction was substantially that previously administered by the Supreme Court ; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act VIII of 1859) was indeed made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV of 1859.

So far, therefore, there can be no ground for inferring that there was any intention on the part either of Parliament or of the Crown to alter the period

within which a decree made on appeal from a Mofussil Court could be executed. The decree like the decree of the former Sudder Court was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned Judges who decided the case now under appeal, has admitted that his construction involved consequences "absurd" in themselves, and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, that the High Court of Madras, and the High Court of Bengal in its decision of the 12th June 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term, were not, when exercising their appellate jurisdiction from the Mofussil Courts, such Courts *within the meaning of Act XIV of 1859*.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases. But if those words be held to import the Court issuing the process of execution, *i.e.*, the Zillah Court, the difficulty would equally have applied to the decree of the former Sudder Court, which, not being the decree of a Court established by Royal Charter, would have been subject to no rule of limitation. It seems necessary to construe the words "such Court" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, therefore, though it is to be regretted that the Indian Legislature did not upon the amalgamation of the Courts provide more precisely for the application of the Limitation Act, and possibly of other Statutes, to the new Court, their Lordships are of opinion that the first question ought to be determined in accordance with the rulings of the High Court of Madras, and the Full Bench of the High Court of Bengal. The sound and convenient rule is undoubtedly that the Court which has to execute the decree of the High Court, should be governed by the rules which govern the execution of its own decrees, and their Lordships do not feel constrained by the words of the Statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal; since it is admitted that the period of three years, if calculated from the date of the decree of the High Court, had expired before the application for execution was made.

Nor, indeed, is the general question, upon which there have also been conflicting decisions in India, of much practical importance; since it is admitted that the date from which the three years are to be calculated is the date of the decree of the Appellate Court; whether that decree is to be treated as the decree to be executed; or the appeal of which it is the termination is to be deemed "a proceeding taken to keep the original decree in force." That an appeal prosecuted to a decree would be such a proceeding is shown both by the judgment of the Full Bench delivered by Chief Justice Peacock, in the 7th Weekly Reporter, p. 521; and also by the judgment of this Board, delivered by Lord Cairns, in the case of Maharajah Dheraj Mahtab Chand, on the 14th July 1870 (14 Weekly Reporter, Privy Council, p. 21).

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make, for all purposes, the decree of the Appellate Court the sole decree to be executed. And this ruling appears to have been followed in the case in the 14th Weekly Reporter, p. 288, in which it was ruled that, in order to make the decree of the Appellate Court, the final decree in the suit for all the

purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in the decision of the 12th June 1871, already referred to, has ruled that, whether the decree of the Lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit; and, in the words of Mr. Justice Mitter, "as such the only decree which is capable of being enforced by execution." And that is in accordance with the Madras decision already cited. Chief Justice Scotland's words are "whether that decree be in affirmance, or reversal, or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution."

The function of an Appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the decree of the Appellate Court may be regarded either as a direction to the Lower Court to make and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the Appellate Court or by the Lower Court. In the latter case a further question arises, viz., whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the Appellate Court as the sole decree capable of execution; or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoyed by the one, and not expressly enjoyed by the other.

In this country the nature and effect of a decree on appeal would seem to vary according to the nature of the decree under appeal, the constitution of the Appellate Tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that Code, whatever decree is executed, is to be executed by the Lower Court in which the record remains, or to which it is to be returned.

But ss. 360, 361, and 362, which prescribe the form of the decree of the Appellate Court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain decree.

If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz., that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering however that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying that there may be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree.

From a passage in the judgment of Mr. Justice Mitter, already referred to, it appears to have been decided in India, that what are there termed "the decrees

of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships; and if it ever arises, must be determined on its own merits.

The ground of the decision seems to have been, that the order of Her Majesty in Council being an act done by virtue of her prerogative, it was not competent to the Indian Legislature to limit the time within which that order could be enforced. Their Lordships desire to say that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the question ever be brought here, it will have to be considered whether the Order in Council, which is not, properly speaking, the decree of a Court, but an order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final decree in the cause, leaving it to be executed by the ordinary process of the Courts in India. It may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the Prerogative has no concern.

The result of what has been said is, that the determination of this appeal must depend on the third question, viz., whether any proceeding sufficient to keep the decree in force within the meaning of s. 20, was had between the 8th June 1863 and the 22nd April 1867, date of the application for execution. It has been argued that the presentation of the petition of appeal to England was such a proceeding, and that the period of limitation was to be calculated from the 9th May 1866, when that petition was finally dismissed.

It was further argued that the filing by the appellants of the petition consenting to the respondent's application for further time to prosecute his appeal was such a proceeding, and that the time was to be calculated from the date of that petition (the 8th April 1864), or from the 4th October 1865, when the two months granted expired. Their Lordships are of opinion that there is no ground for the first contention; that the respondent's petition of appeal being a proceeding taken in order to destroy the decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Mr. Justice Holloway in the Madras case. It is, however, admitted, that had the appeal to England been allowed, the present appellants, being respondents to it, and, as such, supporting the decrees, would have been entitled to sue out execution at any time within three years at least after the final dismissal of that appeal.

The appeal, it is true, never was allowed, but during the period between the date of the presentation of the petition and that of its dismissal, the allowance of the appeal depended on the respondent's compliance with the rules which regulate the admission and allowance of appeals to England; and the appellants had a right to intervene and see that there was a compliance with these rules, particularly with such of them as relate to security, and in the event of non-compliance, to insist on the dismissal of the petition. In their Lordships' opinion there is in this case sufficient evidence that the appellants did so intervene. The petition, by which they consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings, their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion that there was at that time such a *contestatio* between the parties touching the allowance of the appeal to England as suffices to bring this case within the principle laid down by Lord Cairns in the case of Maharajah Dheraj Mahtab Chand, already referred to, and to relieve their Lordships from the necessity of depriving the appellants of the fruits of what appear to be just decrees by the application of the Statute of Limitations.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed; that the orders of the Zillah Judge and of the High Court ought to be reversed; and that the appellants ought to be declared entitled to sue out execution of the decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

The 24th-February 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Transactions with Purdah women—Proof of execution of Deed.

On Appeal from the High Court at Agra.

Azeezoonnissa and Ehsan Beebee

versus

Baqur Khan.

The Privy Council dissented from the conclusion come to by the High Court that any *prima facie* case had been made out by the plaintiff (respondent); and considered that the suit, being one brought against purdah women upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them, and that their Lordships, if they affirmed the judgment of the High Court, would be going against the whole course of cases that have been decided in India and by the Privy Council in respect of transactions to which purdah women are parties.

This appeal arises out of a suit brought by the present respondent against the appellants for the recovery of the possession of a village named Burehta, under a title which was originally a mortgage title, but which may be taken to have been made absolute by foreclosure.

The suit was resisted by the appellants, the then defendants, on the ground that they never executed the mortgage deed in question. That is the substantial issue in the case, that it was executed neither by them nor by any person duly authorised to execute it on their behalf. The Zillah Judge who tried the case in the first instance found that the plaintiff had wholly failed to make out his case, and dismissed the suit. The plaintiff then appealed to the High Court in Agra, and the learned Judges who heard that appeal reversed the decision of the Zillah Judge and found in favor of the plaintiff; and it is against that decree that the present appeal is brought.

What was the foundation of the judgment of the High Court? The learned Judges begin by saying:—"We do not mean to find that the plaintiff's case is free from doubt; but the admitted facts, and some reasonable presumptions, lead us to conclude that the plaintiff had at least proved a sufficient *prima facie* case, and that the defendants, not having adduced such evidence in answer to it as they might fairly be expected to do, there should be a decree against them." Therefore, the judgment assumes that the plaintiff had made out a *prima facie* case, and that the defendants had failed to make a sufficient answer to that case.

It is, then, desirable in the first instance to consider what was the *prima facie* case, which, in the opinion of the learned Judges, had been proved. The case of the plaintiff was that, on the 22nd January 1857, in consideration of an advance made by him to the defendants they had executed to him a bond hypothecating another village named Nundsene; that finding he had not got the security

which he intended to have, namely, a mortgage by conditional sale, he applied to them for further security, and that after some dispute it was agreed that the instrument upon which he sued should be given to him in substitution for the other, which was in fact, though not actually cancelled, treated as being superseded and made of no effect by the second transaction.

It appeared by the evidence, and it was not contested at the Bar, that both these instruments were executed by Mahomed Alee, the husband of the appellant, Ehsan Bebee, and each document appears to have been registered on the day on which it was executed, not at Cawnpore, the place where the defendants resided, and where the transaction of advance, if any advance was made, is alleged to have taken place, but in Futtehpoore, the district in which the village of Burehta is situated.

So far, no doubt, the plaintiff proved his case. But he failed to show that either at the time of the registration, or at any subsequent time, any *mookhtar-namah* authorising the execution of those deeds by Mahomed Alee, as agent of the appellants, was produced or verified, or proved in any way. No mention of such an instrument is made in the endorsement of registration upon either mortgage, all that therein appears being that Mahomed Alee was identified, and that upon such identification the deeds were registered.

Again, what is the account which the plaintiff gives of the advance and of the transaction? He alleges that this Mahomed Alee was not only the manager on behalf of his wife and her sister—of their property—but that he had some employment under a person described as the Rajah of Rusbharree; that in that capacity he wanted to obtain a loan of Rs. 16,000, to be applied in paying off a mortgage upon Mouzah Rusbharree belonging to the Rajah; that he, the plaintiff, agreed to advance Rs. 8,000, part of this money, on the security of the appellant's villages, and that the remaining Rs. 8,000 were to be advanced by one Rae Chund, a banker in Cawnpore: and that in some way or other the appellants were to have a counter security upon Mouzah Rusbharree. There is no evidence whatever that any such transaction ever really took place, except the deposition of the plaintiff himself. None of the subscribing witnesses to the execution of the first bond, which was the only occasion on which money is alleged to have passed, were called. Two persons were called by the plaintiff, who alleged that they were creditors of the ladies. They gave a wholly different account of the transaction, representing that the ladies were about to change their residence, and to leave Cawnpore, that they owed to one of these persons Rs. 1,000, and to the other Rs. 451, and that these debts were paid out of the Rs. 8,000 advanced. Neither of them professed to have seen the ladies; and neither of them spoke to the execution of the first bond in his presence. They left it uncertain where the first bond was executed; their testimony pointing to its execution at Futtehpoore, and not at Cawnpore where the ladies were living.

Then only one of the subscribing witnesses to the second instrument was called, and he too did not profess to have been present at its execution, or to have seen any power of attorney under which it was executed; nor does his evidence fix the place of its execution, or show under what authority it was executed.

Their Lordships, therefore, considering that these ladies are purdah women, are of opinion that the High Court was in error in considering that a *prima facie* case had been made out at all. The witnesses differ from the plaintiff as to the nature of the transaction, they are not consistent as to the execution of the instruments, and not one of them pretends to prove the authority under which they purported to be executed. That authority was either a written authority, or, if such a thing would suffice, it was a verbal authority. No written authority is produced or proved. If there was a verbal authority, it lay upon the plaintiff to prove that verbal authority, and not upon the defendants to show that Mahomed Alee acted without their authority.

If, then, there has been any error in not calling Mahomed Alee, that is a fault of which the plaintiff and not the defendants should suffer the consequences, because it was clearly the plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the purdah women, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that Mahomed Alee is dead. He, therefore, cannot be heard to say that the defendants are in fault for not calling Mahomed Alee, even supposing that it lay upon them and not upon him to call that person.

Their Lordships have not omitted to consider some documentary evidence relied upon by the plaint, viz., the petitions put in by Mahomed Alee in 1858 and afterwards in 1860. In 1858 Mahomed Alee seems to have either truly or untruly alleged that these instruments, though executed by him, never were really delivered to the plaintiff; that they remained with him until the advance should be actually made, and that during the disturbances consequent upon the mutiny at Cawnpore his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the plaintiff. He put in a counter petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action, and dismissed the criminal charge. That statement of Mahomed Alee was either true or false. If it were true, there is an end of the plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding with the defendants, except the mere statement of Mahomed Alee. The High Court seems to have assumed that, because Mahomed Alee said he presented that petition on behalf of the defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with Mahomed Alee in an attempt upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the plaintiff. But there is really no more proof of Mahomed Alee's having acted as their agent in that case than there is of his agency in the original transaction; and, therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted. The same observation applies, perhaps even more strongly, to the petition put in by Mahomed Alee in 1860, as an intervenor in the foreclosure proceedings.

Therefore, taking the whole evidence produced by the plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *prima facie* case had been made out; and they considered that the suit, being one brought against purdah women, upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the whole course of cases that have been decided in India and at this Board in respect of transactions to which purdah women are parties.

It has perhaps by anticipation been stated that, even had a *prima facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the defendants because they had failed to call Mahomed Alee (if Mahomed Alee is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given, by the mouth of Amjud Alee, evidence far more satisfactory than any statement of so untrustworthy a person as Mahomed Alee, that that person was not their general manager or their manager at all, and that there is no reason to suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the plaintiff, or of the

fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the Zillah Judge was correct, and they will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and in lieu thereof to direct that the appeal to that Court be dismissed, and the judgment of the Zillah Judge affirmed with costs, and that the respondent should also pay the costs of this appeal.

The 2nd March 1872.

Present:

The Rt. Hon. Sir James W. Colvile, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Benamée purchase—Act VIII of 1859 ss. 260, 259, and 261 to 266.

*On Appeal from the High Court at Calcutta.**

Mussamut Bahuns Koonwur

versus

Lalla Buhoree Lall and another.

Benamée purchases in India, not having been declared by law to be illegal, must be recognized and have effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. There is nothing in s. 260 Act VIII of 1859, either taken by itself, or taken in connection with ss. 259 and 261 to 266, from which an inference can be drawn of an intention to prohibit *benamée* transactions.

The facts which raise the question for decision in this appeal may be very shortly stated.

Brijlal Opadhia was mortgagee in possession of Talooka Doodhur. Whilst he was so in possession, the interest of the mortgagor was offered for sale under a decree obtained against him by a creditor. Buhoree Lall became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser.

Brijlal Opadhia remained in possession until his death, and after it this suit was brought by Buhoree Lall against his heirs (the present appellants) for the redemption of the talook and possession of it; alleging that the mortgage-debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.

The defence was that the purchase was made by Buhoree, in his own name, as a *benamée* purchaser for Brijlal Opadhia, and with his money; and that the attempt by Buhoree to set up title in himself was a fraud.

It has been decided by the Courts in India that this defence is true in fact, and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain Clauses of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in India. The Principal Sudder Ameen decided in favor of the defendants (the appellants). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the

* From Full Bench judgment reported in 11 W. R., F. B., 16.

If, then, there has been any error in not calling Mahomed Alee, that is a fault of which the plaintiff and not the defendants should suffer the consequences, because it was clearly the plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the purdah women, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that Mahomed Alee is dead. He, therefore, cannot be heard to say that the defendants are in fault for not calling Mahomed Alee, even supposing that it lay upon them and not upon him to call that person.

Their Lordships have not omitted to consider some documentary evidence relied upon by the plaintiff, viz., the petitions put in by Mahomed Alee in 1858 and afterwards in 1860. In 1858 Mahomed Alee seems to have either truly or untruly alleged that these instruments, though executed by him, never were really delivered to the plaintiff; that they remained with him until the advance should be actually made, and that during the disturbances consequent upon the mutiny at Cawnpore his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the plaintiff. He put in a counter petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action, and dismissed the criminal charge. That statement of Mahomed Alee was either true or false. If it were true, there is an end of the plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding with the defendants, except the mere statement of Mahomed Alee. The High Court seems to have assumed that, because Mahomed Alee said he presented that petition on behalf of the defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with Mahomed Alee in an attempt upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the plaintiff. But there is really no more proof of Mahomed Alee's having acted as their agent in that case than there is of his agency in the original transaction; and, therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted. The same observation applies, perhaps even more strongly, to the petition put in by Mahomed Alee in 1860, as an intervenor in the foreclosure proceedings.

Therefore, taking the whole evidence produced by the plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *prima facie* case had been made out; and they considered that the suit, being one brought against purdah women, upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the whole course of cases that have been decided in India and at this Board in respect of transactions to which purdah women are parties.

It has perhaps by anticipation been stated that, even had a *prima facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the defendants because they had failed to call Mahomed Alee (if Mahomed Alee is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given, by the mouth of Amjud Alee, evidence far more satisfactory than any statement of so untrustworthy a person as Mahomed Alee, that that person was not their general manager or their manager at all, and that there is no reason to suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the plaintiff, or of the

fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the Zillah Judge was correct, and they will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and in lieu thereof to direct that the appeal to that Court be dismissed, and the judgment of the Zillah Judge affirmed with costs, and that the respondent should also pay the costs of this appeal.

The 2nd March 1872.

Present:

The Rt. Hon. Sir James W. Colville, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Benamée purchase—Act VIII of 1859 ss. 260, 259, and 261 to 266.

*On Appeal from the High Court at Calcutta.**

Mussamut Bahuns Koonwur

versus

Lalla Buhoree Lall and another.

Benamée purchases in India, not having been declared by law to be illegal, must be recognized and have effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. There is nothing in a. 260 Act VIII of 1859, either taken by itself, or taken in connection with ss. 259 and 261 to 266, from which an inference can be drawn of an intention to prohibit *benamée* transactions.

The facts which raise the question for decision in this appeal may be very shortly stated.

Brijlal Opadhia was mortgagee in possession of Talooka Doodhur. Whilst he was so in possession, the interest of the mortgagor was offered for sale under a decree obtained against him by a creditor. Buhoree Lall became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser.

Brijlal Opadhia remained in possession until his death, and after it this suit was brought by Buhoree Lall against his heirs (the present appellants) for the redemption of the talook and possession of it; alleging that the mortgage-debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.

The defence was that the purchase was made by Buhoree, in his own name, as a *benamée* purchaser for Brijlal Opadhia, and with his money; and that the attempt by Buhoree to set up title in himself was a fraud.

It has been decided by the Courts in India that this defence is true in fact, and it was admitted that it must be so treated in dealing with the question to be decided in the present appeal, which is, whether, having reference to certain Clauses of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in India. The Principal Sudder Ameen decided in favor of the defendants (the appellants). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the

* From Full Bench judgment reported in 11 W. R., F. B., 16.

point by a short memorandum to the Full Bench, who gave judgment for the respondents; Mr. Justice Jackson dissenting from the decision.

It must be observed at the outset that the suit to be dealt with is one in which the plaintiffs (the present respondents) seek to establish a right against the defendants (the appellants), and that they invoke the aid of the Courts to give effect against equity and good conscience to a claim founded upon fraud.

It must be conceded that it is only by force of positive statutory law that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent plaintiffs against the defrauded defendants. But it is said that this obligation is found in the Code of Civil Procedure.

It is well known that *benamee* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights.

The preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the Clauses on which the plaintiffs rely.

The only express enactment on the subject occurs in s. 260. That Clause, after directing that the certificate shall state the name of the person who is declared at the sale to be the actual purchaser, says this:—"And any suit brought *against* the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs."

This enactment is clear and definite; there is nothing from which it can be inferred that more is meant than is expressed. It is confined to a suit brought against the certified purchaser, and to a specific direction as to what shall be done with that suit, viz., that it shall be dismissed with costs.

The present suit, which is the converse of that pointed at in the Clause, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end.

It has, however, been contended, in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this Clause, taken in connection with s. 259, and the Sections relating to the manner of giving possession, a general intention, having for its object to prevent any enquiry between the purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question whether the purchase was *benamee* or not, and that effect should be given to that general intention.

Their Lordships consider it would not be safe to make such an inference, except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an enquiry into the truth in *any* suit between the parties; when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships that effect can reasonably be given to the provisions of the Code without making such implication.

S. 259, requiring the Court to grant a certificate to the person declared to be the purchaser at the sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the debtor's right and interest, does no more than create statutory evidence of the transfer, in place of the old mode of transfer by bill of sale. Their Lordships consider that no inference fairly arises from this Clause, that it was intended to interfere with *benamee* transactions; for the

language is adapted to meet the case of ordinary purchasers, and the same language might well have been used if *benamee* transactions had been wholly unknown.

The same observations apply to ss. 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit *benamee* transactions.

It is evident from this analysis of the Sections of the Code, that the inference sought to be made against *benamee* transactions rests entirely on s. 260, and that if this Clause were absent from the Code, there is absolutely nothing in the other Sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of s. 260, a suit brought against a purchaser on the ground that the purchase was *benamee* must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a *benameedar*.

If this really were so, it would result from the attempt to deal with the subject of *benamee* in a partial manner; and even in that case their Lordships would consider it fitting that the Legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing statute. But it will probably be found that the suggested inconsistencies will not be great, and even if the respondents' view were adopted, they would not be wholly avoided.

The object which the framers of the Code probably had in view, was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property, and to empower the Court selling under a decree to give effect to its own sale, without contention on the ground of *benamee* purchase, by placing the ostensible purchaser in possession of what it had sold, and of ensuring respect to that possession by enacting that any suit brought against him on the ground of *benamee* shall be dismissed.

In the cases where actual possession can be given of the thing sold by the Court, no difficulty can arise; for there the certified purchaser, having both the certificate and possession, can hold the property by virtue of cl. 260, against any suit brought against him; and if that possession should be interfered with, either by force or fraud, on the part of any person, even a *benamee* claimant, it no doubt ought, without enquiry as to the *benamee* claim, to be restored.

It has been suggested that difficulties may arise in the case of possession given, under s. 264, of lands in the occupancy of ryots to a certified purchaser, who had bought *benamee* for the judgment-debtor, to whom the ryots may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the purchaser might be precluded from suing the ryots for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction; for, as regards the ryots, the certified purchaser when put into possession becomes their landlord, both by title and possession, and it may well be that they should not be allowed to set up the *benamee* right of another against the person to whom they had thus become tenants.

So, in the case where debts due to the judgment-debtor have been sold and delivered to the certified purchaser, the debtors may well be prevented from setting up the *benamee* title of a third person in actions brought by the holder of the certificate of sale, for they are by s. 265 prohibited from paying to any one except the certified purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified purchaser, who is really a *benameedar*, having been put into complete possession by the Court of the thing purchased at the judicial sale, attempts to bring a new suit against the real purchaser, not to complete the title or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the purchaser has full possession of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him ; but when he seeks, as mortgagor, in a suit altogether new, to redeem against the mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up.

But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that, where the real owner has been permitted to have or retain possession by the ostensible purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of *benameedar* judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed ; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from the *benameedar* to the real owner. The title must depend upon the purchase having been made *benamee*, and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so.

The authorities, therefore, which have held that, in the cases just referred to, the real owner may set up his *benamee* right against the *benameedar*, necessarily involve the opinion that the Code has not made *benamee* purchases unlawful ; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports.

The High Court, in their judgment in this case, approve of the above authorities ; but they say they may be explained on the ground that the *benameedar* has, by consenting to the possession of the real owner, waived his right to the benefit given to him by the Code ; but the Code had certainly not for its object the desire to confer a benefit on fraudulent *benameedars*. Its provisions must have been framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider that, where the Legislature has stopped, the Courts must stop.

It was said that the certified purchaser in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have if no positive law intervened. The question is, whether such positive law does intervene in this case.

For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would in effect be to declare that to be unlawful which the Code itself has not declared to be so ; and they are consequently of opinion that there is no bar to preclude the enquiry in this suit into the real title.

Their Lordships find that a cross-appeal to Her Majesty against the decision of the Courts below on the question of fact is pending. Without prejudice to such cross-appeal, and to any order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this appeal, to reverse the decrees appealed from, and in lieu thereof, to order that the appeal to the High Court from the decree of the Principal Sudder Ameen be dismissed with costs. The appellant will have the costs of this appeal.

The 21st March 1872.

Present :

Sir James W. Colville, Lord Justice James, Sir Montague E. Smith,
and Sir Robert P. Collier.

Inheritance—Adoption—Decree—Execution—Representative of a deceased Person—Sale (under Act XI of 1859)—Decree (inter partes and in rem).

*On Appeal from the High Court at Calcutta.**

The General Manager of the Raj Durbungah, under the Court of Wards
versus
Maharajah Coomar Ramaput Singh.

Appellant brought a suit under Act X of 1859 for rent due by a deceased person against his widow as widow and guardian of her infant son, but obtained a decree against the widow only as sole heiress and representative, on the ground that the son having been adopted into another family was not the heir of his father. Difficulties having been interposed in the way of executing that decree, he brought a suit in the Civil Court and obtained a decree affirmed by the High Court, the result of which was to affirm that the son was the heir of his natural father. In execution of the Collector's decree, the estate of the deceased was sold under Act XI of 1859, the certificate of sale making a distinct reference to the Civil Court's decree. HELD that the estate of the deceased was sold in execution for his debts, and that the interest of his widow, the registered proprietor and ostensible owner of the estate, as well as of his son, if he had any interest, was bound by that decree; that the decree obtained by appellant in the Civil Courts was a mere decree *inter partes* and not a decree *in rem*; and that, as between appellant and respondent (who had obtained a decree in the Civil Court against the deceased in his lifetime, but now only sought to enforce it against the widow and the infant son, and to impeach the sale in execution of appellant's decree), the appellant was entitled to, and could not be deprived of, the benefit which had resulted to him from his greater diligence in enforcing his demand.

These proceedings certainly illustrate what was said by Mr. Doyne, and what has been often stated before, that the difficulties of a litigant in India begin when he has obtained a decree. When, however, the actual question which is at issue between the appellant and the respondent on this appeal is eliminated from the rest of the record, it does not appear to their Lordships to present any very great difficulty.

The appellant and the respondent had each, it must be assumed, a good claim against the estate of the deceased Gourpershad. The respondent had obtained a decree according to the practice then existing in the Civil Court in the lifetime of Gourpershad. The appellant, pursuing his remedy for rent under Act X of 1859 in the Collector's Court, had obtained a decree for the arrears of rent in respect of which he sued against the widow as the widow of the deceased and the guardian of her infant son. It was a suit brought against those who were supposed to be the representatives of the debtor, Gourpershad. In that suit the case set up by the defendants was that the infant was not the heir of his father, that he had been adopted into another family, and that consequently the widow was the sole heiress and representative. The decree was against the widow in that capacity. It declared that the son was not liable, and ended with a declaration, which clearly pointed to the realization of the demand out of the estates of the deceased Gourpershad, and showed that the decree was made against the person supposed to be the heir and representative of Gourpershad. Other difficulties being interposed in the way of executing that decree, the respondent thought it necessary to go to the Zillah Court in order to get rid of certain deeds as well as of the alleged *kritima* adoption of Hurspersad, the son, and he succeeded in obtaining a decree which was afterwards affirmed by the High Court, the result of which may be taken to be to affirm that Hurspersad was the heir of his natural father. The execution of the Collector's

* From the judgment of Kemp and Glover *J.J.*, dated 28th May 1869.

decree had in the meantime been suspended. When the decree of the Civil Court became final, an intimation was sent to the Collector that the stop-order which had been put upon the execution should be removed, and that the execution might go on. Execution of that decree was accordingly had under the conjoint provisions of Act X and Act XI of 1859, and perhaps it is owing to the operation of those statutes, and in particular to the fact that the execution took place under Act XI of 1859 by putting up the property for sale in the same way that an estate would be sold for arrears of revenue, and did not proceed under the ordinary Civil Code Act VIII of 1859, that some of the confusion and difficulties which have taken place in this case have arisen. However that may be, the estates in question were sold under the Collector's order, and purchased by the judgment-creditor. That took place in November 1867. In the meantime certain proceedings had taken place in the suit of the respondent. The respondent had originally applied for execution of his decree obtained in the lifetime of Gourpershad against the widow and the infant son. He was met by the same allegation that had been made in the appellant's suit, that Hursadsad had no interest in his father's estate, and a miscellaneous order was made, which held that Hursadsad was not liable for his father's debt, and treated the widow as the sole representative. Afterwards, the respondent attempted to get the benefit of the decree which had been obtained by the appellant, and to proceed against Hursadsad, and on that occasion the appellant intervened as an objector. The Judge disallowed the objection, but, at the same time, held that the former execution proceedings were invalid, and directed them to be struck off the file. The respondent then commenced other proceedings against Hursadsad, and although there was no formal discharge of the miscellaneous order, the Judge appears to have considered that as swept away with the former execution proceedings and no longer operative, and directed a sale in execution, which, if there were nothing else in the way of it, would probably have been regular against Hursadsad as the heir of his father. However, when the respondent was proceeding to carry out that order, the appellant came in and objected that the estates had already been sold under his decree, and had been purchased by him, and that in fact they could not be any longer sold as the estates of Hursadsad. That objection prevailed, and the result was that the respondent's only remedy was to bring the regular suit out of which this appeal has arisen.

From the above statement it is clear that, unless there be some fatal irregularity in the mode in which the decree of the appellant was obtained or drawn, or some fatal irregularity in the mode in which that decree has been prosecuted, the estates have been regularly sold, and that the suit of the respondent, seeking to set aside the order for sale and to get the benefit of his own execution as against Hursadsad as the heir of his father, must fail.

Their Lordships are of opinion that no case has been made upon which they can say that there has been that irregularity in the proceedings before the Collector and the sale which took place, which would justify them in setting aside the sale, and upon that point they must differ from the Judges of the High Court. The proceedings took place under Act XI of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this case, so far as the proceedings show, it appears that the widow was the registered proprietor. But the case does not rest there, because in the certificate of sale there is a distinct reference to the decree obtained by the appellant from the Zillah Court, and therefore the whole proceeding, if fairly looked at, amounts to this,—that the estate of Gourpershad was sold under that decree in execution for his debt; and that the interest of his widow the registered proprietor and ostensible owner of the estate, and also the interest of his son, if he had any interest, was bound by that decree. If that be so, the question arises whether the respondent, the plaintiff in the suit below, has any ground upon which he can come in and impeach the sale?

It appears to their Lordships that he can claim only what interest remained in Hurpersad, and that substantially the proceedings would be a bar to any claim on the part of Hurpersad. It is unnecessary to consider whether in any question between the respondent and Hurpersad, who in this suit came in and continued to dispute his heirship, the decree in the suit which had been obtained by the appellant would be any binding adjudication between the respondent and Hurpersad. It appears to their Lordships clearly to be a mere decree *inter partes* and that there is no ground for giving it the effect of a decree *in rem*, which is the effect which one passage in the judgment of the High Court appears to attribute to it. But without going into that, it seems sufficient to their Lordships for the determination of this appeal to say that there was in their judgment no substantial irregularity in the sale before the Collector, and that therefore, as between the appellant and respondent, the appellant is entitled to and cannot be deprived of the benefit which has resulted to him from his greater diligence in enforcing his demand.

Their Lordships also desire to add that they are unable to see any substantial distinction between this case and that reported p. 614, Marshall. They entirely agree in the principles expressed by Chief Justice Peacock in that case, and think that they govern the present case.

The result, therefore, must be that their Lordships will humbly recommend to Her Majesty that this appeal be allowed, the judgment of the High Court reversed, and the judgment of the Lower Court affirmed. The costs of the appeal will, of course, follow the result, and the appellant will be entitled to the costs of the appeal in the Court below.

The 21st March 1872.

Present:

Sir James W. Colville, Lord Justice James, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Possession—Purchaser from Heir—Grantees from Widows—Mokurruree,
Dur-Mokurruree, Putnee, and Dur-Putnee Rights.*

*On Appeal from the High Court at Calcutta.**

Sheroocomaree Debia

versus

Keshub Chunder Bosoo and others.

In a former suit appellant sought as purchaser from the *heir* to a former proprietor, to establish her *mokurruree* right to certain lands as against the grantees from the widows of such proprietor, upon the death of the last surviving widow. She obtained a decree establishing such right, and on proceeding to take out execution, was opposed by the respondents, who claimed the lands as being a *putnee* tenure which had been sold by auction for arrears of rent due by *B. S.* the former *putneedar*, and which had been purchased by *K. B.* and *H. B.* who had granted a *dur-putnee* of the same to the respondents in 1849. In 1841 there was a proceeding before the Magistrate as between the grantees of the *dur-mokurruree* right under the widows and *B. S.* the *putneedar*, the result of which investigation was that the Magistrate quieted the former in possession as *dur-mokurrureedars* under the widows, and ordered the *putneedar* to institute a suit in the Civil Court to enforce his claim, which suit was never brought.

The claim of the respondents was tried as a regular suit between the objectors (respondents) as plaintiffs, and the decree-holder (appellant) as defendant, and was decided in favor of the respondents in the lower Courts. On appeal to the Privy Council, their Lordships held that the proceeding in 1841 was conclusive of the present case, as showing that the actual possession then was in the grantees of the

* From the judgment of Kemp and Markby, *J.J.*, dated 21st January 1867.

widows ; that it was in the highest degree improbable that they, having established their possessory right against *B. S.*, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same *B. S.*'s right ; that the possession of the grantees was obtained and continued under the widow's title and was referable solely to the title which was now vested in the appellant ; and that the right of the appellant should in nowise be affected by the acquisition of the *putnee* title in 1849.

This is an appeal from the High Court of Judicature at Calcutta ; and also, by special leave, from two judgments and decrees of the Zillah Judge of West Burdwan. As the suit was not heard on the merits by the High Court, and as the whole case is open on the decisions of the Zillah Judge, it is only necessary for their Lordships to deal with the latter.

The case is shortly this :—

The appellant instituted her original suit under these circumstances. She alleged that the property in question was hers by purchase from the person who became entitled to it as heir of a former proprietor, on the death of the last survivor of the four widows left by such proprietor. The widows, she alleged, had made a grant to Modhoosoodun Bosoo and Bhoyrub Chunder Bosoo, which grant would, of course, determine on the death of the last surviving widow. Upon such death she instituted her suit against the said Modhoosoodun and Bhoyrub Chunder and others in assertion of her right as purchaser from the heir, and obtained a decree establishing such right as against the defendants in that suit, and took possession in the usual form by planting bamboos in execution of the decree. The litigation in this suit was very hostile. The heirship of the appellant's vendor was disputed strenuously, and it was only after appeal to the High Court that her right was finally established. The lands in question were alleged by the appellant to have been held by *mokurruree* tenure under the Rajah of Burdwan, but were included in a part of the Rajah's zemindary, which he had granted in *putnee*, and the result of that state of things would, of course, be that the *mokurrureedars* were entitled to the possession of the lands, paying the rents reserved by their grant to the *putneedar*, as middleman between them and the zemindar.

When the appellant came to take out execution of her decree, other members of the Bosoo family who had not previously intervened in the suit, objected to such execution, on the ground that they were the persons really in possession under a better title, which was thus alleged :—

Keshub Chunder Bosoo said "that lot Beesoonundunpore, &c., seven mouzahs in Pergunnah Bistoopore (being the *putnee* tenure above mentioned), having been sold at auction for the arrears of rent due by Beer Sing Baboo, Khetternauth Bosoo, and Hungseswur Bosoo purchased the same on the 15th May 1849. In the year 1256, Khetternauth Bosoo granted the *durputnee* of his half share to me, and Hungseswur Bosoo granted the *durputnee* of his half share to Ram Chunder Bosoo, and since that time we have been in *khas* possession of the same."

On this claim being so made, it was put in course of trial as a regular suit between the objectors (the first three respondents) as plaintiffs, and the decree-holder as defendant, as provided by law in that behalf.

The alleged purchase in 1849 is not disputed, nor is the fact of the actual possession of the property by the Bosoo family, or some of them, denied ; the appellant's case being that what was so purchased was the interest of the *putneedar*, and that the alleged possession was, in truth, a possession under the *mokurruree* title derived from the widows, as above stated, and, therefore, a possession not adverse to, but supporting, her (the appellant's) title.

The Court of first instance was of that opinion, and gave judgment as follows :—

"I consider the *mokurruree* rights of the decree-holder to be true. If the plaintiffs have a *putnee* right, they can obtain the rent from the female defendant."

The suit of the objectors was, therefore, dismissed with costs.

On appeal to the Zillah Judge, he at first thought that the suit had not been instituted with sufficient and proper allegations, and decided against the plaintiffs on that technical ground; but the High Court having remanded it to be tried on the merits, the Zillah Judge proceeded to try it, and gave judgment against the appellant, on the ground stated in page 96 of the "Record," the substance of which is "the long and undisputed possession of the plaintiffs gives rise to a strong presumption of their title being good; the *onus* of proving a strict legal title lies on the party seeking to disturb such possession. The defendant cannot disturb the possession of the plaintiff without proving possession within twelve years. Defendant has given no proof of possession within twelve years. On the contrary, her witnesses prove the plaintiff's possession. There is no proof, indeed, that defendant has ever collected the rents, or has ever paid rent to the putneedar. And she produces no title-deeds and no reliable proof that her vendor was ever in possession. It appears to me that the only ground on which the defendant stands is that the under-tenure subordinate to the putnee is called a *mokurruree* in various old papers, one if not more of which is a copy of a copy. This is quite insufficient to prove a title." And for these reasons the judgment of the Lower Court was reversed and the appeal decreed.

On special appeal, the High Court held that the case had not been really tried on the true merits, that is to say, under what title the *khas* or actual possession had been held, and remanded it for re-trial, and directed that such re-trial should be in the presence of the putneedars and the zemindars, so as to make a final decision.

Such re-trial was heard. The Zillah Judge adhered to his former decision. His judgment is contained in a few lines as follows:—

"There is no proof whatever that the possession of the dur-putneedars is the same as the alleged possession of the 'dur-putneedars' (the grantees of the widows). Defendant's witness acknowledges that a former suit for rent was instituted some seven or eight years ago, by Ram Chunder Bosoo, styling himself dur-putneedar. The putnee title is proved, and the putneedars acknowledge the dur-putnee. But there is no proof whatever of the existence of the *mokurruree*, and, for the reasons given in my judgment of the 9th August 1865, I believe that no *mokurruree* has ever existed as separate from the putnee, though the latter tenure may have been occasionally styled a *mokurruree*. Therefore, clearly, the dur-putneedar is entitled to his claim."

It appears to their Lordships that the Judge must have overlooked the most material evidence in the case. The title alleged by the dur-putneedars was a title acquired in 1849 to the putnee which had previously been Beer Sing's.

Now, in 1841, there was a proceeding before the Magistrate, in which the above-named Modhoosoodun and Bhyrub Chunder Bosoo were plaintiffs, and the same Beer Sing and one Christoprosaud, his Mookhtar, were defendants, in which the whole title and the respective rights of the parties, as they then stood, were gone into and investigated.

Modhoosoodun and Bhyrub Chunder then expressly alleged their title as grantees of the "dur-mokurruree" right under the widows, and their possession under such title, and then insisted, as the appellant now insists, that the putneedar's right was only to the reserved rent.

As the result of that investigation the Magistrate found in favor of the then plaintiffs that they were and had been in possession as *dur-mokurrureedar*s under the widows, and he accordingly, by his order, quieted them in such possession, and remitted the putneedar to institute a suit in the Civil Court to enforce his claim. No such suit was brought.

It appears to their Lordships that this proceeding, unless its effect can be altered by some other cogent evidence, is conclusive of the present case.

In the year 1841 the actual possession was clearly in the grantees of the widows; and any subsequent possession by other members of their families must be presumed and taken to be a possession by their permission and with their consent, unless the contrary is very clearly shown. If a widow or person claiming under a widow could destroy the title of the heir by allowing a friend or relative to have twelve years' possession of the estate, no heir would be safe.

In this case there is nothing to show that the possession was other than permissive, and on the other hand there is very strong evidence confirmatory of the presumption that it was permissive.

There is, moreover, considerable parol evidence that the possession was a joint family possession, and important documentary evidence to the same effect. Amongst these documents are a bond and a suit upon that bond showing that the purchase of the putnee, although made in two names only, viz., Khetternauth Bosoo and Hungseswur Bosoo, was really made on behalf of themselves and of Modhoosoodun, Ram Chunder, Bhyrub Chunder, and Keshub Chunder (Modhoosoodun and Bhyrub Chunder being the two *dur-mokurrureedars*). There are also on record a petition purporting to be a petition of Khetternauth's and filed as far back as 1858, claiming to be a co-sharer in the *dur-mokurruree* taken from the widows in the name of his brother Modhoosoodun; and a similar petition, of the same date, of one Eshan Chunder Bosoo, claiming in like manner to be a co-sharer in the *dur-mokurruree* taken in the name of his uncle, Bhyrub Chunder.

All the probabilities of the case lead to the same conclusion. It is in the highest degree improbable that Modhoosoodun and Bhyrub Chunder, having established their possessory right against Beer Sing, would, without a struggle, have allowed themselves to be turned out of possession by their relatives as purchasers of the same Beer Sing's right. And it is equally improbable that, if they were not in possession, but the possession was in their relatives (the putneedars), they would have litigated the original suit in the way in which it was litigated.

Their Lordships are clearly of opinion that the family or families of the Bosooos were in joint possession, that such possession was obtained and continued under the widow's title, and is to be referred solely to the title which is now vested in the appellant, and that the right of the appellant can in nowise be affected by the acquisition of the putnee title in 1849.

The Zillah Judge seems to have thought throughout that the mere production of the purchase of title acquired in 1849, and the possession by the purchaser subsequent to that year, were sufficient to establish his right. If he had rightly apprehended (as was clearly pointed out to him by the High Court) that such purchase and possession were perfectly consistent with the appellant's case, if that case were true—if he had considered the proceeding in 1841, and ascertained in whom the possession then was and under what title, and had enquired whether any change had been made in such possession between 1841 and 1849; or whether there had been any change in the possession consequent on the purchase in the latter year, and how that change, if any, had been effected—there would not have been what their Lordships cannot but consider a serious miscarriage of justice.

Their Lordships will humbly recommend to Her Majesty that, notwithstanding the decree of the High Court of Judicature at Fort William in Bengal of the 21st February 1867 on the special appeal, the judgments and decrees of the Zillah Judge of West Burdwan, dated respectively the 9th August 1855, and the 2nd August 1866, ought to be reversed, and that the decree of the Principal Sudder Ameen of West Burdwan of the 21st July 1864 ought to be affirmed with a declaration that the appellant is entitled to possession of the property claimed, and that the suit ought to be remanded to the High Court of Judicature,

with directions to cause the decree of the Principal Sudder Ameen, of the 21st July 1864, to be executed in due course of law, and to take an account of the mesne rents and profits of the property claimed, to be repaid to the appellant by the respondents, Keshub Chunder Bosoo, Redaynatt Bosoo, and Ahladinee Dossee; and their Lordships will further report to Her Majesty that the said respondents ought to pay to the appellant her costs of the proceedings before the Principal Sudder Ameen and before the Judge of the Zillah Court of West Burdwan, and that the costs (if any) paid by the appellant in the Zillah Court be repaid to her by the respondents.

And the respondents are also to pay to the appellant the costs of this appeal.

The 25th March 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Registration—Conveyances by purdah women—Evidence—Mutation of names.

*On Appeal from the High Court at Calcutta.**

Synd Fuzzul Hossein and others

versus

Amjud Ali Khan and others.

In cases of transactions by purdah women, mere registration does go far to corroborate the proof of their validity, unless a mutation of names takes place, which, if done under a mookhtarnamah, has not the same effect as against a purdah woman as it has against a person capable of transacting his own business and acting for himself.

When a transaction of this kind is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the secluded woman had the means of knowing what she was about.

Their Lordships have come to the conclusion that in this case it is their duty to advise Her Majesty not to disturb the judgment under appeal.

With respect to two of the transactions in question, the case falls within their Lordships' rule against disturbing, except on very special grounds, the concurrent judgments of two Courts on issues of fact. With respect to the two earlier transactions there are conflicting judgments, and it was therefore open to the appellants to go fully into their case and to satisfy their Lordships, if it could be done, that the decision of the Principal Sudder Ameen was that which ought to be upheld.

It must be conceded to Sir Roundell Palmer that the plaintiffs, by alleging in their pleadings that all the documents impeached, including the grant of the mokurruree, which both Courts have pronounced to be valid, were actually forgeries, have raised an issue which they have failed to establish. And if it were necessary or usual in these Indian cases to hold the parties very strictly to their original pleadings, the case would, no doubt, be fairly open to many of the observations which have been made upon it. It seems, however, to their Lordships that, in determining this appeal, they ought to look to the issues settled and tried in the cause. Now, the fourth of those issues appears to them to raise the question, whether it be true or not, according to the statement of the defendants, that the Ranee had executed all or any of the conveyances therein mentioned for the consideration alleged, in such a way as to make the execution of those conveyances her act and deed, and binding upon her; and to throw the burden of establishing the affirmative of that question upon the defendants. Upon the issue so settled

* From the judgment of Steer and Levinge, *J.J.*, dated the 16th September 1863.

the parties have gone to trial, and the Judges of both Courts, in dealing with the evidence given, appear to have addressed themselves to the consideration whether it was sufficient to establish that these transactions were *bond fide* transactions in the nature of conveyances executed for the consideration alleged, and so as to be binding upon the Ranee, a purdah woman.

Again, their Lordships, finding that both the Courts have, upon full consideration of the evidence, held that the two last conveyances were not binding on the Ranee, and that the defendants had failed as to them, have to enter upon the consideration of the rest of this case with the fact found that Moulvie Mahomed Hossein not only stood in a fiduciary relation to the Ranee, but had, in two instances at least, abused his trust, and obtained from her conveyances of a fraudulent character. That circumstance necessarily throws more or less suspicion upon the other transactions in question.

And when their Lordships consider the particular evidence relating to the execution of the other conveyances, which has been so fully and clearly opened to them by Sir Roundell Palmer, they are constrained to say that they see no grounds for coming to a different conclusion from that to which the High Court has come upon it. There are, no doubt, witnesses who speak to the execution and preparation of the instruments, so far as these can have been seen by persons outside the purdah. Some speak to admissions of the payment of the consideration on the part of the Ranee, made by her through the purdah, and swear that they knew and recognized her voice. Some, again, speak of having seen bags of money carried into the inner apartments by the hands of Chooah, a kitmutgar, and another menial servant, who was probably admitted behind the purdah named Bakshoo. It is possible that these persons may be dead, though the fact has not been proved. It is certain that neither has been produced, and that of neither has the absence been accounted for. The whole evidence seems to their Lordships to fall far short of that which is ordinarily given to prove a conveyance by a purdah woman. There is, generally, the evidence of some relation, or, failing a relation, of some female servant; certainly of some person who is admitted behind the purdah, who can speak to having seen the execution of the instrument by the person in question, and who professes to have identified the executing party to the witnesses on the other side of the screen or purdah. Again, it has been often laid down that, when a transaction of this kind is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the secluded woman had the means of knowing what she was about. Now, all these transactions are in favor of the person who naturally would have advised the Ranee. There is no proof that she had the benefit of any independent adviser. The only shred of evidence of that kind is that one of the subscribing witnesses to some of the documents is described as being at that time her dewan. The Ranee, it is true, seems to have had no near relation with whom she was upon intimate terms, or who lived in the house. Still, one would have thought that there must have been some female, some person actually admitted to live with her behind the screen, who could have given more satisfactory evidence than has been given, both as to the fact of the execution and as to the receipt of the consideration money by her.

Again, the evidence as to one of the transactions of the writer, which has been commented upon by the High Court, is certainly of a suspicious character. It is to the effect that he was directed to prepare the formal document by the Moulvie, who brought to him the draft already prepared with a blank paper signed by the Ranee. This passage in his evidence may admit of two constructions; but it certainly does admit of that which the High Court seems to have put upon it, viz., that the stamped paper on which the formal deed was to be written had already got the signature of the Ranee upon it. The transaction seems to have struck the witness himself as one of an unusual and suspicious character; for he says that he intimated to the Moulvie his doubts as to the propriety of the proceeding, and

did not write the kowala until his scruples were removed by a dye or female servant of the Ranee who came and confirmed the Moulvie's statement.

The principal grounds on which the Principal Sudder Ameen has relied upon in distinguishing the two earlier of the transactions in question from the two on which his decision is adverse to the defendants, are the proceedings which followed the supposed execution of the earlier documents—the registration and the subsequent mutation of names. It is, however, to be observed that in these cases of transactions by purdah women mere registration does go far to corroborate the proof of their validity, unless some such proceeding as that which will be presently mentioned takes place upon it. For the registration must necessarily take place under a mookhtarnamah executed by the party executing the principal conveyance; and there can be on the face of the one no higher proof of its execution than there is of the execution of the other. The same witnesses generally depose before the Registrar to the execution of both. But in some of the cases which have come before this Committee there has been proof (and it is unfortunate that the Registrars did not follow that course in the present case) that, when such documents executed by a purdah have been produced for registration, the Registrar has sent some officer as commissioner to the house of the lady, who, by examining her through the purdah, after satisfying himself of her identity, has obtained an acknowledgment of her signature.

Again, the mutation of names, though a more solemn proceeding, seems invariably to have taken place under a mookhtarnamah from the Ranee, and we have the distinct evidence of the pleader that this Mahomed Hossein was acting in all the Ranee's litigious proceedings, that he was in the habit of authorising persons to act for her, and therefore those proceedings have not the effect as against a purdah woman which they would have against a person capable of transacting his own business and acting for himself.

Their Lordships, therefore, looking to the position of the parties, and to the great necessity of protecting these secluded women from the undue effects of that influence which persons connected with them, as the Moulvie was with the Ranee, may acquire over them, find it impossible to say that upon the proof given to establish these transactions, the High Court was wrong in refusing to recognize the validity of any of them, except the grant of the mokurruree tenure; or that such a conclusion is inconsistent with a fair view of the whole of the evidence in the cause.

For these reasons their Lordships must humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal with costs.

The 26th March 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

*Presumption (from delay)—Long possession—Alluvial lands—
Re-formations—Accretions.*

*On Appeal from the late Sudder Dewanny Adawlut at Calcutta.**

Sham Chand Bysack

versus

Kishen Prosaud Surma.

* From the judgment of Trevor, Loch, and Steer, *J.J.*, dated 31st January 1861.

The presumption that usually arises against those who slumber on their rights is the stronger when applied to rights, the subject-matter of which (as in the case of *churs*) is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time.

In this case plaintiff sought to oust from possession persons who had enjoyed the property in question from 1835 to the present time; and as he was responsible for nearly twenty years of that delay, the Privy Council required to be satisfied by clear proof of the grounds which he alleged for disturbing a possession of such long continuance, and were of opinion that plaintiff had failed to prove his case, inasmuch as he had not proved the lands which had re-formed (if lands had re-formed in the bed of the river) to have been the same as those which belonged to his predecessors and had been diluviated, nor had he proved his title upon the ground of the *locus in quo* being an accretion to any lands of which he was possessed.

This was a dispute between two riparian proprietors, holding estates respectively on the opposite sides of an Indian river, concerning certain *churs* formed in the course of that river, each landed proprietor maintaining that he was entitled to those *churs*, as appertaining to his estate.

The case of the plaintiff was in substance this, that he was the owner of a talook called Meer Syud Mahomed, together with certain other persons of the surname of Chowdry; that his ancestors, by reason of their possession of this talook, were entitled to two *churs* in the channel formed by the junction of two rivers, the Booreegunga and the Dhuneesuree; that those *churs*, one named Goag, otherwise Kodalia, and the other Bhedur, were what is called diluviated, that is, covered by water, some fifty years or more ago. *Chur* Goag was said to be diluviated in a great measure, though not wholly (indeed it has never been quite diluviated), as long ago as the year 1814. The other *chur*, Bhedur, was diluviated somewhere about the year 1817 or 1818. The case of the plaintiff was that those *churs* had gradually re-appeared, chiefly owing to a change in the course of the river; in fact, that they have re-formed upon their original sites not many years after they were diluviated; and he gave evidence of measuring from time to time those *churs* as they re-appeared and exercising acts of ownership upon them. Among other acts of ownership, he gave evidence of a lease granted by the Chowdrees, who were co-shareholders with him in the estate of Meer Syud Mahomed, to a person of the name of Dowcett in 1829 for a term of five years, and that Dowcett cultivated indigo upon a portion of the *locus in quo*. It is to be observed, however, that there is evidence on the other side of Dowcett having taken the precaution of also obtaining a lease from the proprietor on the opposite bank.

According to the plaintiff's evidence, he was in as complete possession as the subject-matter admitted of, at all events up to the year 1832, when this litigation with the riparian proprietor on the other side of the river, who owned a talook of the name of Bucktbully, commenced.

It is not necessary to refer to the proceedings which took place before the Magistrates from 1832 to 1835, further than to state their result, which appears to have been this:—The plaintiff, or rather those under whom he now claims, were put into possession of *chur* Goag, or at all events, a portion of *chur* Goag, and they have remained in possession of that portion from that time to this. But in the year 1835 an order was made for putting the defendant's father, Gopal Pershad, in possession of *chur* Bhedur. Actual possession would appear to have been delivered in 1836, and Gopal Pershad and his son, the present defendant, have remained in possession of *chur* Bhedur from that day to this.

The plaintiff, having been dispossessed, as he alleges, in the year 1836, of this *chur* Bhedur, did not institute this suit for the purpose of recovering that possession until the year 1847. He does indeed make some attempt to explain this delay by stating that, in the interim, what is called a resumption suit was instituted in respect to these lands. As to the proceedings in that suit, it is not necessary for the present case to refer to more than this, that the proprietor of Mouzah Bucktbully, on the opposite side of the river, appears to have instituted a proceeding against the Government, with a view of obtaining possession of the lands in dispute, and some more upon payment of the Government revenue. As

to a portion he succeeded, that he now occupies, and in respect of that there is no dispute. As to the lands now in question he failed, and undoubtedly the Collector did find that the plaintiff was entitled to those lands. That decision, however, was subsequently set aside, on the ground that the Collector had no jurisdiction to make it, his jurisdiction being confined to determining the questions which arose between the owner of Buckbully and the Government, and not extending to deciding on the conflicting claims of landowners.

It appears also that, in the interim between 1836 and the institution of this suit, there was some family suit with respect to this property. Their Lordships, however, are of opinion that no sufficient explanation has been given for the very long delay on the part of the plaintiff in instituting this suit. If some presumption usually arises against those who slumber on their rights, it is the stronger when applied to rights of this description, the subject-matter of which is in a constant state of change, and the proof of which is rendered more than usually difficult by lapse of time. The hardship may be great of calling upon persons who have been long in undisturbed possession of such property for strict proof of their title after landmarks may have been washed away or witnesses may have died; indeed in this case it would appear that Gopal Pershad, the then owner, died before the institution of this suit, and possibly Gopal Pershad's evidence might have been of an important character, which his son could not supply.

But the delay in the institution of this suit is not the only delay with which the defendant (plaintiff?) is chargeable, for the judgment in this suit was given so long ago as 1861; the appeal was brought in 1862; and in 1863 the record was lodged. Some years afterwards, in the year 1868, the defendant (plaintiff?) filed a supplemental record, but he did not lodge a case until the year 1871, so that there has been a delay of nearly eight or nine years wholly unexplained in the prosecution of this appeal.

The case then stands thus: the defendant (plaintiff?) seeks to oust from possession persons who have enjoyed this property from the year 1835 to the present time, and for nearly twenty years of that delay he is responsible. Under these circumstances their Lordships certainly require to be satisfied by clear proof of the grounds which he alleges for disturbing a possession of such long continuance.

This suit began in the year 1848, and it lasted to the year 1861. It is not necessary to refer at length to its history. It may be enough to say that at an early stage, in the year 1848, a local investigation was held by an Ameen of the name of Monier, which appears to have resulted in favor of the plaintiff. Subsequently to that there was a hearing in 1850, before the Principal Sudder Ameen, who decided against the plaintiff, upon the ground of the Statute of Limitations. The case on appeal was sent back to be re-heard, in order that the grounds of that judgment might be more clearly stated. It was again heard in 1852, and again decided against the plaintiff on the plea of the Statute of Limitations, the Principal Sudder Ameen at the same time expressing a somewhat strong opinion against the plaintiff's case generally. Subsequently the case was again sent back to be re-heard upon the merits, and previous to its re-hearing upon the merits another local investigation was ordered before the Moonsiff of Naraingunge, which took place on the 30th January 1858, whereupon the report of the Moonsiff was against the plaintiff. The Principal Sudder Ameen, on the hearing of the cause, indeed, set aside the Moonsiff's report, which he considered unsatisfactory, and decided substantially all the issues in favor of the plaintiff. The case then came on for appeal before the High (Sudder?) Court, and it is against this judgment that the present appeal is lodged.

It has been contended that the High (Sudder?) Court mistook the law as applicable to this case, and that their decision is in contravention of two cases—one, *Mussamut Imam Banda v. Hurgobind Ghose*, reported in the 4th Moore's Indian Appeals, p. 403,* and another in the 12th Moore's Indian Appeals†—in

* 7 W. R. P. C. 67; 1 Cuth. P. C. R. 208.

† 11 W. R. P. C. 2; and p. 171 ante.

which their Lordships have laid down the principles applicable to cases of this description. If their Lordships could see clearly that the High (Sudder ?) Court had acted in contravention of the principles laid down in those cases, they would have thought it their duty to set aside the decision ; but it appears to their Lordships impossible to suppose that the High (Sudder ?) Court could not have been acquainted with the first of those cases, reported so long ago, as before observed, as the 4th of Moore's Indian Appeals ; and on looking at the judgment, although there are some expressions in it which may give some color to the contention of the appellant, it does not appear to their Lordships that the High (Sudder ?) Court have, in the reasons of their decision, acted in contravention of either of the above decisions. It appears to their Lordships that the judgment must be taken to have proceeded mainly upon the ground that the plaintiff had not succeeded in proving that the spot which he claimed was identical with that of the *chur* which he alleged to have been diluviated. Whether the second clause of s. 4 Reg. XI of 1825 applies, or whether the fifth paragraph of the same section applies, which is in general terms and to this effect, " That in all cases not previously provided for, and in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a river or sea, which are not specifically provided for by the rules of this Regulation, the Courts of Justice, in deciding upon such claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to such a case ; if not, by general principles of equity or justice ; " in either case it is equally essential for the maintenance of the plaintiff's case that he should establish the identity of the land which he has lost.

Their Lordships think that on the face of the judgment it appears that this consideration must have been present to the High (Sudder ?) Court, and they read their finding, " that there were not any marks by which the lands can be identified as having at any time formed part of the estate of the plaintiff," not as intimating (as it has been contended) that proof was necessary of the existence of some specific landmarks, but as a general finding on the part of the Court that the lands had not been identified ; and, if so, undoubtedly there was an end of the plaintiff's main case. But, further, it would appear from the judgment that the plaintiff, possibly feeling that, in the opinion of the Court, he had not established the identity of these lands as re-formed lands, contended that he was entitled to them as accretions to that land which was undoubtedly in his possession ; for in the judgment of the Court it is said : " But he," the plaintiff, " urges that being in possession of part of the *chur* as the Goag under a decree of a competent Court which has become final, the rest of the *chur* lands must be considered an increment to that village." The Court disposed of that argument by stating their opinion that if the lands in question had formed to the south of the portion which was in possession of the plaintiff, then there might have been good grounds for this contention, but not so as they were alleged to have formed to the north. They thus disposed of the question of accretion, which certainly seems to have been raised, and, to a certain extent, dwelt upon, by the plaintiff.

Under these circumstances, their Lordships, whatever might have been their view if this matter had come before them as a Court of first instance, see no sufficient grounds for disturbing the finding of the High (Sudder ?) Court, which was to the effect that the plaintiff has failed to prove his case, that he has not proved the lands which have re-formed, if lands have re-formed, in the bed of the river, to have been the same as those which belonged to his predecessors and had been diluviated ; and that he has failed also to prove his title upon the ground of the *locus in quo* being an accretion to any lands of which he is possessed.

On these grounds, their Lordships will humbly advise Her Majesty that this appeal be dismissed.

The 26th March 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Hindoo Law (Mithila)—Joint Family—Acquisition standing in name of individual members—Right of son's widow—Separate property—Partition—Succession—Maintenance—Cesser of Commensality—Punchayet.

*On Appeal from the High Court at Calcutta.**

Anundee Koonwur, Mankee Koonwur, and Poonpoon Koonwur
versus
Khedoo Lal.

This was a case in which the questions raised were, what was the *status* of the Hindoo family of which the appellants and the respondent were members, and whether certain acquisitions were to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stood and by whom they were ostensibly made. The Privy Council, in affirming the judgment of the High Court in so far as it held that the acquisitions of the family in the lifetime of the late head of the family were part of his estate, and in declaring other properties also to be part of his estate, observed, with reference to the doubt and difficulty they had felt in dealing with a record the value of which was by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts, that the case was one which a native Punchayet composed of persons conversant not only with native customs but with the circumstances of this family, knowing what questions to put to the parties and what accounts to call for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in India or England to try satisfactorily.

The wife of a Hindoo who predeceased his father without male issue, is entitled, as his widow and heiress, to succeed to his separate estate.

Even if the son survived his father, but died subsequently and before a partition, his share according to the Mithila law, would pass to his brothers to the exclusion of his widow, who would be entitled only to maintenance.

The cesser of commensality serves to remove and qualify the presumptions which the Hindoo law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate.

In this case three distinct appeals against a decree of the High Court of Bengal have been consolidated and heard as one appeal. The principal questions raised are, what was the *status* of the Hindoo family of which the appellants and the respondent were members; and whether certain acquisitions are to be regarded as part of the estate of the late head of the family, or as the separate property of the individual member in whose name they stand, and by whom they were ostensibly acquired.

The following is the history of the family in question: Choonee Lal, the father, who died in October 1854, had for many years carried on business as a cloth merchant at Sahibgunj, in Zillah Behar, within that part of India in which Hindoos are governed by the Mithila law. At the time of his death this business was carried on in his sole name; but he had previously, and up to the year 1851 or 1852, been in partnership first with one Radha Lal, and, after the death of that person, with his son, Sreekishen.

All parties are agreed that he had no ancestral estate, and that whatever property belonged to him was of his own acquisition. He had three sons, viz., Gopal Chund, the respondent Khedoo, and the appellant, Gunput. About 1839, and after his sons had reached man's estate, he married a second wife, who survived him.

Gopal Chund, the eldest son, became of unsettled, if not of unsound mind,

* From the judgment of E. Jackson and A. A. Roberts, *J.J.*, dated 22nd June 1863.

in or before the year 1848, when he left his home as a Byragee, or religious mendicant, and wandered away on pilgrimage to various holy places. His wife, the appellant Mussamut Mankee Koonwur, tendered some evidence in this suit to show that he had been seen alive as late as 1858, and may be still alive; but both the Indian Courts, discrediting that evidence, have come to the conclusion that he had not been heard of for twelve years before the date of the first decree, and proceeding on the presumption of Hindoo law have treated him as then dead. There is nothing, however, to show that he did not survive his father. He had no male issue, and is represented on the record by Mussamut Mankee Koonwur, who, if he be dead, would, as his widow and heiress, be entitled to succeed to his separate estate.

Gunput, the younger son, has died since his appeal from the decree of the High Court was allowed. He, too, had no male issue, and his appeal has been revived by his widow and heiress, Mussamut Anundee Koonwur. He left, however, a daughter, Mussamut Poonpoon Koonwur, who has an infant son, Lulloo Baboo; and she is an appellant against the decree in respect of the interest which she claims in part of the property in dispute. Khedoo Lal, the respondent, and the plaintiff in the suit, has at least two sons, Brij Bhookun Doss and Mahomed Lal, of whom mention is made in the suit, but who are not parties to it.

From this statement of the family, it follows that the property of which Choonee Lal died possessed, whatever it was, descended to his sons living at the time of his death in equal shares. If Gopal Chund were then dead, the estate would descend to Khedoo and Gunput in equal moieties. And even if Gopal is to be taken to have survived his father, but to have died subsequently, and before a partition, his share, according to the Mithila law, would pass to his brothers, to the exclusion of his widow, who would be entitled only to maintenance. This does not appear to be contested. The question in dispute is, which, if any, of the various acquisitions of the family, standing in the separate names of different members of it, are to be treated as part of the estate of Choonee Lal, and descendible to his heirs.

The suit was commenced by the respondent on the 1st November 1859. It was originally brought against Gunput and his daughter, Mussamut Poonpoon Koonwur, described as the mother and guardian of Lulloo Baboo; and the plaintiff treated the share and interest of Gopal as vested in his two brothers. The appellant, Mankee Koonwur, however, intervened as an objector in respect both of the share in his father's estate, to which Gopal, if alive, was entitled; and of that part of the property claimed, which she insisted was his separate estate, and by an order of the Principal Sudder Ameen, in whose Court the suit was brought, she was made a defendant.

The plaintiff claimed a moiety of all the property specified in the schedule annexed to it, and valued at upwards of two lacs of rupees, the respondent alleging that he had been dispossessed of it. Some objections have been taken to the frame of the suit on the ground that the respondent has not included amongst the subjects of it that property which is held by him and his sons in their respective names. But their Lordships are of opinion that, on a fair construction of the plaintiff in connection with the respondent's written statement, which will be afterwards referred to, it must be held that he does offer to account for the whole of what is so held as part of his father's estate.

The plaintiff, though it prays for delivery of possession, seems to be framed rather with a view to obtain a declaration of the partibility of the disputed subjects, than to carry out a partition by metes and bounds of the estate to be consummated by the delivery of actual possession.

The following are the issues settled in the suit :—

1. Whether, according to the statement of the plaintiff, the whole of the

property in dispute belongs to the paternal estate and is undivided? or whether, according to the averment of Gunput Lal and Mussamut Mankee Koonwur, defendants, part belongs to the paternal estate, and part has been acquired by Gunput Lal and Gopal Chund during the time of their separation and messing apart?

2. Whether the property mentioned in the written statement of Mussamut Poonpoon Koonwur belongs to her, or not?

3. Whether Gopal Chund, the husband of Mankee Koonwur, is lost, or whether he is residing towards the North-Western Provinces; and if he is lost, whether the claim of the plaintiff to a moiety is right or not?

4. Whether the estimate of the effects and goods and chattels in litigation, and the amount expended, is correct or not?

Before considering these issues and the evidence applicable to them, their Lordships think it desirable to pursue the history of the family.

It is admitted on both sides that, when his two elder sons came of age, Choonee Lal opened for each a separate cloth-shop, and established him in it. The precise dates at which these shops were opened are not quite certain. The respondent admits them to have been in existence before 1835, and the appellants insist that they were established before 1829. According to Mewa Lal, a witness for the respondent and the brother of his step-mother, they were established in 1829 and 1831. The respondent appears to have followed his father's example, and to have opened two other cloth-shops, one in the name of each of his sons. He insists, however, that all these shops and their profits were and are part of Choonee Lal's estate; whilst the appellants, of course, contend that each was and is the respective property of the person in whose name the business was carried on, Choonee Lal having no interest therein. Gunput, the third, remained for some time in the cloth-shop of Choonee Lal and Rhadha Lal, but, as he says, as a gomastah employed at a salary of Rs. 50 per mensem. Afterwards, and about the year 1844, a banking firm was opened in the names of Gunput Lal and Sreekishen Lal, which was carried on in their names until 1850, when Sreekishen retired, and the business was thenceforward, and until the death of Choonee Lal, carried on in the names of Choonee Lal and Gunput Lal. The question, what interest, if any, Choonee Lal had in this concern, is one of the material issues in the cause; the respondent contending that the beneficial interest in the half-share during the partnership with Sreekishen, and the whole interest after the dissolution, belonged to Choonee Lal; the appellants insisting that he never had any interest in that *kotee*, the half-share originally, and afterwards the whole, being the separate and self-acquired property of Gunput. Again, both parties are agreed that, at the time of the death of Choonee Lal, his three sons had ceased to live in commensality with him or with each other. But the time at which such separation took place is in dispute, the appellant contending that it was complete in 1829, and the respondent insisting each brother withdrew from the state of commensality with his father at a different time, viz., Gopal about 1839, the respondent about 1846, and Gunput as late as 1852.

The state of the landed property standing in the names of the different members of the family is as follows:—

The respondent, in his written statement, says that Mouzahs Budem and Hurchundpore and Rughoonathpore and Jhekutea in Pergunnah Kotumba, and two houses and a coach-house situate in Street No. 4 of Sahebgunj, were all acquired with the profits of the cloth-dealer's shop bearing his name, and were then "under his control." These, as was before stated, do not form part of the properties specified in his plaint; but they are covered by the general conclusion of his written statement, which is in these words:—"The conclusion is, that all the properties and effects, and moneys and common articles of this estate bearing the name of your petitioner's father, or of any of the brothers, or of any of the

sons, constitute the estate left by, and that acquired with the funds of, my father. Of the landed properties specified in the plaint, some are admitted to be part of Choonee Lal's estate. But as to the rest, Mouzah Tilhara and an upper-roomed house in Sahebgunj, in which the banking *kotee* has been carried on, are claimed by Mankee Koonwur as the separate and self-acquired property of her husband, Gopal Chund. Other parts (the particulars of which are stated) are alleged to be the separate and self-acquired property of Gunput; whilst the several properties specified in her written statement are claimed by Mussamut Koonwur as "her exclusive property, with which neither the respondent nor Gunput Lal has any concern."

Before considering the conflicting claims to these properties, it seems to their Lordships to be desirable to ascertain and determine, if it be possible, when the brothers first became separate in food from their father and each other; in other words, when that commensality, which is the normal condition of an undivided Hindoo family, ceased.

The finding of the High Court on this point is as follows:—

"We are of opinion that, from the admissions of the parties, and the dates of the purchases of the houses in which the different sons were established by their father, the three sons began to live separate from their father at different dates, concurrent with or subsequent to their father's second marriage in the year 1246 (A.D. 1839), in which year the eldest son, Gopal Chund, got a house to himself, while Khedoo Lal and Gunput Lal went into separate houses in the year 1253 (A.D. 1846) and 1259 (A.D. 1851) respectively. We think, too, that there was from those dates an undoubted separation in food between the father and each son as he left the paternal house." The appellants contend that, as early as 1829, the three brothers had all become separate in food from their father and from each other; and have argued at the Bar that the fact has been so found by the Principal Sudder Ameen.

The judgment of the Principal Sudder Ameen does not, as their Lordships read it, expressly fix the date of the separation; but its general effect is undoubtedly on this point more consistent with the case of the appellants than with that of the respondent. The evidence in the cause is conflicting and far from satisfactory. The finding of the High Court seems to proceed upon the several dates of the purchases of the houses in which the three brothers ultimately came to live; and to assume that each brother withdrew singly and at a different time from the state of commensality. This does not appear to their Lordships to be probable. On the other hand, the witnesses for the appellants, speaking with the usual inaccuracy of native witnesses as to time, are not agreed as to the date of the separation. Thanoo Chowdree puts it as late as 1834; Goureesunkur makes it as late as 1832. On the other hand, Gunga Ram Kandoo, though a witness produced by the respondent, supports, on this point, the case of the appellants. Mewa Lal says:—"I do not recollect the year, but when the family increased, Choonee Lal provided his sons with separate houses and paid their expenses." On the evidence, their Lordships are by no means satisfied that the separation took place so early as 1829.

On the other hand, they do not think that the date of each brother's separation can safely be determined by the date of the purchase of the house in which he ultimately lived. They are disposed to think that the separation took place on or shortly after the second marriage of Choonee Lal in 1839.

Another observation which arises upon the evidence in the cause, is that this cesser of commensality, whenever it took place, does not appear to have operated as a complete separation of the different members of the family, or to have prevented Choonee Lal from continuing to exercise many of the functions which would ordinarily belong to the head of an undivided Hindoo family. The whole family continued to reside in the same town. Some of the witnesses depose that

marriages and other family ceremonies continued to be performed in Choonee Lal's house, and at his expense, as they would have been had no separation taken place. And this testimony is confirmed in the case of the marriage of Poonpoo, the daughter of Gunput, by a passage in the correspondence which will be afterwards referred to. Again, it appears by the evidence that, after Gopal Chund went away, his separate establishment was broken up, and his wife and family returned to live under the same roof with Choonee Lal.

The cesser of commensality is only material to the determination of the issues in the cause, in so far as it removes or qualifies the presumptions which the Hindoo law might otherwise raise, that an acquisition made in the name of an individual son of the family, was made by the head of the family, and as part of the family estate. According to their Lordships' view of the evidence, it is not proved to have taken place at the date of some of the acquisitions which are in question in this suit ; and the effect to be given to it, in weighing the conflicting evidence concerning transactions of a date subsequent to that at which it took place, is necessarily diminished by such evidence as that which has been just referred to.

Their Lordships will, in the first instance, following herein the examples of the High Court, consider the evidence touching the earliest of the acquisitions in question—Mouzah Tilhara.

That property was purchased in the year 1835, at a revenue sale, in the name of Gopal Chund, for Rs. 4,400. Their Lordships, for the reasons above stated, are disposed to believe that, at that time, the cesser of commensality relied upon had not taken place. They will, however, consider the evidence relating to this property independently of any presumptions which might arise from the fact that the family was then joint in food. It may further be admitted that there is no documentary evidence corroborative of the assertion made by some of the respondent's witnesses, that the purchase-money was paid out of the funds of Choonee Lal ; and further that, if the shop carried on in the separate name of Gopal Chund was his own separate property, he may well at that date have been in a position to pay out of the accumulated profits of that shop a sum of Rs. 4,400. It happens, however, that we have evidence concerning the enjoyment of this estate, which is wanting as to the other properties in dispute.

It has been proved that this property, between the years 1841 and 1855-56, was under several successive leases demised to Nundcoomar (one of the respondent's witnesses, and the brother of Choonee Lal's second wife), sometimes jointly with other persons, sometimes alone. One of the leases, that granted to Nundcoomar on the 10th December 1849, is in the Record ; it of course purports to be granted in the name of Gopal Chund, and is signed by him. But it is also countersigned by Choonee Lal. It was, indeed, suggested at the Bar that the Choonee Lal whose name is so subscribed, being described as putwarree of Mouzah Sahebgunj, was not the father of Gopal, but some other person of the same name. Their Lordships, however, see no reason for adopting that conclusion. A circumstance of far more importance is that Nundcoomar has produced a long series of letters addressed to him as tenant of this property by Choonee Lal in his lifetime, and after his death by Gunput. The genuineness of these letters their Lordships have no reason to doubt. They are to be found in this Record. They cover a period from 1841 to 1856-57, when the tenancy of Nundcoomar terminated. Many of them therefore are anterior in date to 1848, when Gopal left his home, and were written at a time when there is no reason to suppose he was of unsound mind or incapable of managing his affairs. It is, however, impossible, in their Lordships' opinion, to read these letters without coming to the conclusion that they were such as the real owner of the estate would write to his tenant, and that they are inconsistent with the case made by the appellants, viz., that Kusba Tilhara was the separate property of Gopal Chund, and was only managed for him

and his family after his insanity had declared itself, first, by his father, and afterwards by his brother, Gunput. In the earlier years, rent and produce are acknowledged by Choonee Lal as received by him on his own account, without reference to Gopal Chund.

In No. 273, p. 187, which is dated in 1252 or 1845, he writes : "Pay Meer Gholam Rs. 6 for rent of shop occupied by Baboo Gopal Chund for three months, *and place it to my account, and it will be deducted from the rents.*"

In No. 279, p. 188, which is dated in 1845, he complains of the rent being in arrear, requires C. Rs. 800 to be sent immediately, and says, "Do not delay, as I am desirous of sending the revenue to Patna. Till the revenue is sent and receipt taken, my mind is not at ease, *because it affects my landed property.*" No. 255, p. 183, written in 1843, is the letter cited by the Judges of the High Court. It may be inferred from it both that Choonee Lal, as the head of the family, was about to celebrate the marriage of Poonpoon, the daughter of Gunput, and that he was requiring the tenant of Kusba Tilhara to send part of the produce of the estate to be used on that occasion.

In No. 303, p. 194, written in 1852, he reproaches Nundcoomar with being in arrear, and says, "You are well aware that I was in need of expenses this year; it would have been proper for you to have advanced Rs. 10 more by way of assistance; you might have taken credit in the following year;" and he threatens Nundcoomar with a proceeding in the nature of a distress. This is the language rather of the owner of the estate than of a trustee for the master and absent proprietor.

In like manner, after the death of Choonee Lal, Gunput writes in the character of proprietor, not in that of manager for the absent Gopal. He considers what repairs should be made; threatens his uncle when in arrears, and reproaches him with having ill-used the ryots and dependents. In No. 393, at p. 216, he, too, requires produce to be sent for the marriage of Baboo Laljee's daughter, with which Gopal would seem to have no concern. In No. 395, at the same page, he writes, "You requested me to write a letter to Patna that you should deposit the rents of Kusba Tilhara there, but I have no desire that money should be deposited there as a large sum of mine is deposited there; therefore I request you to send in cash the rent of Kusba Tilhara up to Phagun instalment in full and soon."

Again, No. 387, at p. 214, written in 1856, is a remarkable letter, for it not only gives various directions which imply ownership, but it contains the following passages, which seem to point to the joint interest of the respondent in this property: "Uncle, I have been laid up with fever, therefore I have sent Khedoo Lal brother for enquiry." And again, "Uncle, I have already written to you the full particulars; I have also explained to Khedoo Lal brother; please give Khedoo Lal your good opinion regarding any point he might ask, and act accordingly."

Their Lordships can find no trustworthy evidence that either Choonee Lal or Gunput, whilst thus acting and writing, accounted for the rents of this property to Gopal or to Gopal's family; and, finding the direct evidence on the part of the respondent thus corroborated, they concur in the conclusion of the Judges of the High Court, viz., that Kusba Tilhara was purchased by Choonee Lal on his own account, though in the name of his eldest son.

Their Lordships will next proceed to consider what is the effect of the evidence as to the banking *kotee* established in 1844, from which a considerable part of the family wealth seems to have been derived. The appellant Gunput has contended broadly that in this *kotee* Choonee Lal had no interest. It is, however, unquestionable that, after the dissolution of the partnership with Sreekishen the business was carried on in the joint names of Choonee Lal and Gunput Lal; and the Principal Sudder Ameen, though his decree in other respects was adverse to the respondent, gave effect to the ostensible title, and held that Choonee Lal had a half-share in this *kotee*. Gunput has represented that, after the establishment of

his brothers in separate shops, he remained in his father's original shop as a gomastah at Rs. 50 per mensem. It is very difficult to believe that, by his earnings in this capacity, or by means of any other separate employment, he accumulated money enough to pay, in 1835, Rs. 7,500 for the lease of Coorkihar ; to pay the price of the 8 annas of Gorabhurat purchased in his name in 1842 ; and, finally, to establish this *kotee*. It seems to be far more probable that this business, which was originally carried on in partnership with Sreekishen Lal, the partner of Choonee Lal in the cloth-shop, was, in fact, established and carried on by Choonee Lal, though in the name and with the aid of the personal services of his youngest son. At all events, it lay upon Gunput, in whose dominion the books of this concern were, to show far more clearly than he has done that his father had either no interest, or only a limited interest, in this concern. And upon the evidence as it stands, their Lordships can find no sufficient grounds for dissenting from the conclusion of the High Court that the banking-house was, at the time of his death, the sole property of Choonee Lal.

In their Lordships' opinions the fate of the appeals must be determined by the findings upon these two questions—the real ownership of Kusba Tilhara and the interest of Choonee Lal in the banking *kotee*. For, whilst the respondent has broadly contended that everything which stood in the name of any member of the family belonged to Choonee Lal, so the appellants have as broadly contended that nothing was Choonee's except that which stood in his own name, and that *benamee* transactions were unknown to the family. It is hardly possible upon the evidence to draw a definite line between these two cases. The difficulty of doing so is greatly increased by the finding as to the *kotee* ; since, unless he had the separate interest, which he says he had, in that *kotee*, it is difficult to see whence Gunput derived the funds by means of which many of the purchases in his own name were made. Their Lordships are not insensible to the difficulties of the other side. If the evidence as to the shops carried on in the separate names of Gopal and of the respondent and his sons had stood alone, their Lordships would have inclined to the opinion that they were separate property. It is, however, to be observed, as to these, that the respondent admits that the separate shops opened in his name or in the names of his sons, and all the investments made out of the profits of these shops, form part of the joint family estate ; and their Lordships, for the reasons above given, have found that Mouzah Tilhara, the principal and almost the only property alleged to have been purchased by Gopal out of the profits of his shop, was in fact purchased by Choonee Lal in the name of his son. The *ikra-namah*, again, though it does not touch directly any of the properties in dispute, affords a strong inference in favor of the theory of separate interests and separate transactions ; and it is difficult to explain why so elaborate a contrivance should have been adopted in order to shift property belonging to the father from the name of one son to that of another. The case is one which a native Panchayet, composed of persons conversant not only with native customs, but with the circumstances of this family, knowing what questions to put to the parties, and what accounts to call for, and capable of understanding such accounts when produced, would probably have been more competent than any Court of Justice in India or England to try satisfactorily. Their Lordships have, in this case, felt much doubt and difficulty in dealing with a record the value of which is by no means in proportion to its bulk, and with the conflicting judgments of two Indian Courts. But, upon the whole, and for the reasons above stated, they have come to the conclusion that it is their duty to advise Her Majesty not to disturb the carefully considered judgment of the High Court, so far, at least, as relates to the acquisitions of the family in the lifetime of Choonee Lal. As to those which have been made after his death, the 8 annas of Backergunj, purchased in Gunput's name, cannot be supposed to have been purchased otherwise than out of the family funds in Gunput's hands. There is more difficulty in respect of the lease of Koorkihar which has been re-

newed in the name of the appellant Poonpoo Koonwur. But their Lordships are of opinion that she has failed to show, as she might have shown, that this renewal was paid for by her own funds. They believe, on the evidence, that the money came from Gunput, and if it came from Gunput it must be presumed, like the purchase-money of Backergunj, to have come from the family funds. Therefore, on this point also, their Lordships think the judgment of the High Court should be affirmed.

On the argument of the appeal it was contended for the appellants, and admitted on behalf of the respondent, that the decree of the High Court would in any case require some qualifications. Their Lordships are also of that opinion; but, as at present advised, they are not sure that it will require any alterations except the introduction of a declaration that the separate shops carried on in the separate names of the respondent and of his two sons, and also the landed properties admitted by the respondent to have been purchased out of the profits of those shops, and to be under his control, are also part of the estate of Choonee Lal, deceased; and that, in estimating the half share of the respondent in that estate, he should give credit for those assets, and any other portion of the estate in his possession or control.

Having regard to the necessary alterations in the decree and to the nature of the suit, their Lordships think that each party should bear their own costs of the appeal.

The form of the decree, as altered, in pursuance of their Lordships' recommendation, will be as follows:—

It is ordered and decreed that the decree of the Lower Court be and the same is hereby reversed, and the suit of the plaintiff, Khedoo Lal, for a half share of all the property real and personal left by his father, Choonee Lal, deceased, decreed: And it is declared that the estates and landed property standing in the names of Gopal Chund and Gunput Lal, or of any other person or persons, *benamee*, or in trust for them or any of them, are the property of the said Choonee Lal deceased, and acquired with his funds; and it is further declared that the lease of Mouzah Koorkihar was renewed with the funds, not of Mussamut Poonpoo Koonwur, but of the family, which were then entrusted to the defendant the said Gunput Lal: And it is further declared that the banking house as well as the house property claimed were the sole property of the said Choonee Lal deceased: And it is further declared that the shops carried on in the separate names of the said plaintiff Khedoo Lal, and of each of his two sons, and Mouzahs Budun and Hurchundpore and Rughoonathpore and Jheketea in Kotumba, and the two houses and coach-house in Street No. 4 of Sahebgunj, which are all mentioned in the written statement of the plaintiff, Khedoo Lal, and any other property standing in the names of the plaintiff and of his two sons, or any of them or of any other person or persons, *benamee*, or in trust for them or any of them, were also the property of Choonee Lal, and part of his estate: And it is further declared that the said plaintiff is entitled to a half share of the estate of his father Choonee Lal deceased; but that in estimating such half share the plaintiff is to be charged with the value of such of the above-mentioned properties as are in the possession or control of him or of his said sons or any of them, and with the mesne profits thereof: And it is further declared that the said plaintiff is entitled to recover Rs. 17,575 and 13 annas, being a moiety of the sum of Rs. 35,151 and 10 annas, being part of such estate, and fixed by the said Lower Court as the mesne profits of the said banking house: And it is further declared that the said plaintiff is also entitled to a half share of all mesne profits obtained from the landed property left by the said Choonee Lal deceased since the date of his demise. And it is further declared that the defendant Mankee Koonwur, the wife of Gopal Chund, one of the sons of the said Choonee Lal deceased, who is said to be missing, is entitled to maintenance out of the said estate, which will be awarded by the said

Lower Court in execution, if required : And it is further ordered and decreed that the said defendant Anundee Koonwur as the widow and heiress, according to Hindoo law, of the said defendant Gunput Lal (now deceased), from and out of the estate and effects, if any, which may have come into her hands or into her possession, do pay the said plaintiff the sum of Rs. 3,012, being the amount of costs incurred by him in the High Court of Bengal, with interest thereon at the rate of 12 per cent. per annum from the date of the decree of the said High Court to the date of realization thereof : And it is further ordered and decreed that the said defendant Anundee Koonwur, as such widow and heiress in like manner, and from and out of the same estate and effects, do pay to the said plaintiff the costs incurred by him in the Lower Court, with interest thereon at the rate aforesaid, from the date of the decree of the said Lower Court to the time of realization.

The 26th March 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

*Mahomedan widow—Unpaid Dower—Alienation by son for life of mother
—Evidence—Bye-Mokasa—Priority (among creditors).*

*On Appeal from the High Court at Calcutta.**

Mussamut Humeeda and others

versus

Mussamut Budlun and the Government.

The Privy Council reversed so much of the decision of the High Court as ruled that the effect of the arrangement between the plaintiff and her son, by which the son relinquished his share in his late father's property, was not that the mother took an absolute interest in the property in satisfaction of her claim for unpaid dower, but that she should have only a life-interest, the son retaining the legal reversion in himself ; the Privy Council being of opinion that the creation of such a life-estate did not seem to be consistent with Mahomedan usage, and that there ought to be very clear proof (which had not been shown in this case) of a transaction so unusual and so improbable amongst Mahomedans.

A widow's claim for unpaid dower, when it does not, by virtue of a *Bye-Mokasa* executed by her husband, become a preferential charge on the estate, constitutes a debt payable *pari passu* with the demands of other creditors.

The origin of this suit was as follows :—

In the year 1857, one Ali Kureem, who was accused of participating in the rebellion, absconded, whereupon, on the 10th July 1857, an order was issued by the Magistrate of Patna under the directions of the Commissioners of Circuit directing the Collector of the district of Patna to report what real property Ali Kureem possessed in the district, with a view to its confiscation.

The Collector reported that the mouzahs, and shares of mouzahs, which form the subject-matter of his suit, together with some others, belonged to Ali Kureem, notwithstanding the intervention of his mother, Mussamut Beebee Budlun, claiming them as hers, which intervention the Collector designated as but an attempt to secure the property for an absconded party.

In pursuance of this report an order was made by the Judge of Patna adjudging the forfeiture to the Government, under s. 2 Act XXV of 1857, of all the property so claimed by Mussamut Beebee Budlun, whereupon the Government took possession of it, and sold it to several purchasers.

* From the judgment of Bayley and Roberts, *J.J.*, dated 25th November 1863, *Sevestre's Rep.* for 1863, p. 665.

On the 22nd March 1859, Mussamut Beebee Budlun instituted a suit against the Government and the purchasers of the property, claiming to be in possession of it under a valid title.

Her title to all the mouzahs, except two, was in substance this:—that, upon her marriage with Moulvie Mahomet Ali, the father of Ali Kureem, a dower of Rs. 100,000 and one gold mohur had been assigned to her, which, upon her husband's death in 1844, was unpaid; that, thereupon, Ali Kureem, being unable to pay it, relinquished his right as heir of his father to a fourteen anna share of the paternal property to her, in satisfaction or part satisfaction of her dower. The remaining two anna share she claimed as widow and heiress of her husband.

Her title to certain shares in the two excepted mouzahs (Purhownah and Punjkunnah) was of a different character. She alleged that she had bought them of her son in 1855 for Rs. 50,000, the payment of which she thus described.

She stated that, notwithstanding the relinquishment by Ali Kureem of his right of heirship, he appropriated to the purposes of his business (at some time which is not stated) Rs. 40,000 of the paternal property. That that sum of Rs. 40,000 was, in the first instance, secured on the two mouzahs in question, the rents of which were received by her in lieu of interest; but that, on a subsequent treaty for the absolute sale of the property to her for Rs. 50,000, the said sum was treated as part of the purchase-money, and that the remaining Rs. 10,000 were paid to him on the execution of the deed of sale on the 15th March 1855, whereupon these mouzahs which had been bought by Ali Kureem and stood in his name, were transferred to hers.

These allegations were, for the most part, put in issue by the defendants, whose case was that the plaintiff's dower was no more than Rs. 40,000, and it had been paid in the lifetime of her husband, that the asserted renunciation of heirship by Ali Kureem and sale of the two mouzahs were fictitious and colorable, that Ali Kureem was the real owner of the property, and had so acted on many occasions after the supposed relinquishment and sale.

All the issues were found in favor of the plaintiff by the Judge of Patna, who adjudged that the plaintiff was entitled to all the property absolutely.

The Government acquiesced in this judgment, but the other defendants appealed from it to the High Court of Calcutta. The High Court found that the plaintiff had a life-interest only in all the property. From this judgment both parties have appealed, the plaintiff on the ground that her interest was absolute and not for life only; the defendants, on the ground that she had no interest whatever.

It now becomes necessary to refer, with more particularity, to some portions of the judgment of the High Court, and of the evidence on which they are based.

With respect to the property claimed by the plaintiff as relinquished to her by her son in lieu of dower, the High Court thus expressed its opinion:—"We consider that the plaintiff has not established her plea of dower, nor does she hold her husband's estate in virtue of dower. She, as widow and one of the two heirs of her husband, inherited an eighth of his estate. The remainder devolved upon her son, Ali Kureem, who, for reasons best known to himself, permitted his mother, Budlun, to appear to occupy his share during his lifetime, but on the clear and recorded stipulation that, on her death, he would succeed to the whole estate."

Their Lordships concur in the finding of the High Court, that the plaintiff has not proved the amount of dower which she alleges, nor that she was in possession of her husband's property in right of dower independently of an agreement with her son. There appears to have been no "*Bye-mokasa*" whereby, in the lifetime of her husband, her dower was hypothecated so as to become a first charge upon his estate; consequently her claim in respect of dower would not have priority over the claims of other creditors.

Having regard, however, to the proof which was given, that, shortly after the death of Mahomed Ali in 1844, his widow was put into possession of his property by the recorded consent of her son, who admitted her right to dower, and his inability to pay it; that, as acknowledged heiress to her husband's whole estate, she received payment of debts due to it and incurred liability, enforced in one instance by an action, to pay debts owing from it; that at the time of these transactions no motive, such as that of defrauding creditors, was shown to account for Ali Kureem investing his mother with a fictitious ownership; and, further, that the whole value of the property was probably much less than that of the dower, taking it at Rs. 40,000, their Lordships see no sufficient reason to disbelieve the arrangement between the mother and the son, as it appears on the face of the documents put in by the plaintiff.

The question remains, whether the effect of that arrangement was to give the plaintiff the absolute interest, or an interest for life only.

The Judges of the High Court appear to have thought that a claim for unpaid dower, of whatever amount, was not the real consideration for the agreement between the mother and the son; but have found that, for some other consideration, not disclosed, it was agreed that the whole estate of Moulvie Mahomed Ali should be vested in his widow for her life, and on her death, should devolve on her son. They reject the transaction pleaded, and substitute one which is hardly consistent either with the pleadings or the proofs in the cause.

No document in the nature of an assignment, or an agreement defining the nature and expressing the terms of the arrangement between the mother and the son, has been produced or proved. The documentary proof of that arrangement consists chiefly of the proceedings, under which various portions of landed property of Mahomed Ali were, immediately after his death, and, with the recorded consent of his son, transferred into the sole name of his widow, and of the proceedings relating to a sum payable to his estate, and to a debt recoverable from it.

The position of the mother and son on the death of Mahomed Ali was this:—the former, as sharer, was entitled to two annas; the latter as “residuary” was entitled to the remaining fourteen annas of the estate, both rights being subject to the debts of the deceased including deferred or unpaid dower (if any).

There does not appear to their Lordships to be on the record the slightest proof of any agreement on the part of the mother, to convert her absolute interest in her two-anna share into a life interest; so as to give to her son a reversionary interest therein capable of being seised or sold under the forfeiture or otherwise.

Again, if the widow had a claim or unpaid dower (and their Lordships think that, on the admission of Ali Kureem in 1844, it must be taken that she had such a claim), and that claim had not, by virtue of a *bye-mokasa* executed by her husband, become a preferential charge on the estate, such a claim would constitute a debt payable *pari passu* with the demands of other creditors. In these circumstances it was competent to the son either to assign his share of his father's residuary estate to his mother by way of security for her dower (in which case she would take only a redeemable interest), or to relinquish it to her absolutely in satisfaction of her claim. In neither case would it have been essential in such a suit as this, which is for the recovery of the possession to which she was entitled and from which she has been ousted, to prove the amount of her dower; although the omission to do so may be urged as an argument to show that the transaction pleaded was not real but fictitious.

The case made is that the son relinquished his share in his father's possession in satisfaction of the claim for dower. Such relinquishment would be *prima facie* absolute; and, if it were absolute, the widow would take the whole property, subject to the claims of other creditors. The subsequent acts of the parties are consistent with this state of things. It does not follow that, because she paid a

small debt in full, she had not a valid claim for dower. The estate may have been sufficient for both; and, even if it were insufficient, she may have thought it better to satisfy than to litigate so small a demand.

Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. The only grounds on which it can be inferred that the plaintiff was to take only a life-interest, seem to be the expressions in the *foutenamah* and in the plaintiff's petition recited in the proceeding for the mutation of names in the case of Mouzah Muzdum-pore Doomree. The judgment in that case finds generally that she is in possession of the entire property left by Mahomed Ali, "in lieu of Den Mohr receivable by her," without any qualification as to the extent of her interest. Their Lordships conceive that the expressions in question may be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life; and that Ali Kureem, as her heir, would succeed to them after her death. They are, at all events, of opinion that these expressions, taken in connection with the rest of the evidence, are too weak to prove a transaction, so improbable amongst Mahomedans, as an alienation by the son for the life only of his mother (a transaction consistent with the case of neither party), and that the Zillah Judge came to the right conclusion when he found that the plaintiff took an absolute interest in the properties left by her husband.

It should be further observed, with reference to this part of the case, that the interest of Mahomed Alim in Mouzah Shacklepore Doomree was in the nature of a mortgage interest under a *zur-i-peshgee* lease; and that Ali Kureem, by a deed of July 29th 1844, the validity of which does not appear to be impugned, purchased the rights of the mortgagor in this property. It appears therefore to their Lordships that, at the date of the forfeiture, Ali Kureem was entitled to this property subject to the mortgage; and that his rights would pass to the purchaser under the forfeiture and consequent sale; and that there should be a declaration to that effect in the decree.

It remains to consider so much of the judgment as relates to the shares in Mouzahs Burhownah and Punjkunwah, alleged by the plaintiff to have been purchased by her of her son in 1855.

The High Court disbelieve this sale, relying on the improbability of the account of it and of the payment of the purchase-money, and also upon a petition presented by the plaintiff in 1852 in a proceeding of attachment against the property of Ali Kureem, wherein she claimed these Mouzahs on the ground that they had belonged to her late husband, who had purchased them "*benamee*" in the name of his son, and that they were transferred to her, together with the rest of her husband's property, under the before-mentioned arrangement with her son, a statement manifestly inconsistent with her contention in this suit.

So far their Lordships concur with the High Court, but are unable to concur with their finding which follows that the plaintiff possessed a life-interest in these Mouzahs—a finding which appears to their Lordships to be neither in accordance with the allegations nor with the proofs in this suit.

The High Court were undoubtedly justified in treating the fact of the plaintiff having, in her petition of 1852, told a story inconsistent with her present case, as throwing discredit on that case and affecting her credibility, but, in their Lordships' opinion, were not justified in treating her allegation in that petition of a "*benamee*" purchase by her husband as proof in her favor of that fact in this suit wherein she does not even allege it.

If the plaintiff is entitled to recover possession of the two Mouzahs in this suit, it must be on the sole ground which she has pleaded, viz., a purchase from

her son, and on her failing to prove this judgment must be pronounced as to so much of her claims for the defendant.

Their Lordships will therefore humbly report to Her Majesty as their opinion that both the appeal and the cross-appeal ought to be allowed, and that the decrees of the High Court of Judicature at Fort William in Bengal of the 25th November, 1863, and likewise the decree of the Zillah Court of Patna of the 8th March 1861, ought to be reversed, and that, in lieu of the said decrees, it should be ordered and declared by Her Majesty in the following terms :—

1. That it should be ordered and declared that the plaintiff was and is absolutely entitled to whatever interest belonged to her late husband in the several properties sued for, other than the $5\frac{1}{2}$ annas of the entire sixteen annas of Talooka Kusba Burhownah; and likewise, other than the one-third share of the entire sixteen annas of Mouzah Budara Punjkunwah, and that she is entitled to recover the possession of such properties with mesne profits from the date of dispossession, but subject, as to Mouzah Shackpore Doomree, to the right of redemption vested in Moulvie Ali Kureem, by virtue of the conveyance from Ameroonissa Begum of the 29th July 1844, which is hereby declared to have passed to and become vested in the defendant the purchaser of that property under the forfeiture and sale.

2. That it should be declared that the plaintiff having failed to establish her title to the shares of the two Mouzahs above excepted, her suit as to those properties ought to be dismissed.

3. That it be ordered that the costs of the litigation in India in both Courts ought to be apportioned between the plaintiff and defendants, according to the course of the Courts of India in cases where the plaintiff is only partially successful, and that each party pay their own costs of this appeal.

4. That the cause be remitted to the High Court to give effect to these orders and declarations, and carry the same into execution.

The 20th April 1872.

Present :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Hindoo Law of Succession—Impartible inheritance—First-born son—Priority (of birth or marriage)—Status of first wife—Evidence—Proof of custom—Admission of documents.

On Appeal from the High Court at Madras.

Ramalakshmi Ammal

versus

Sivananantha Perumal Sethurayer.

According to the principles of Hindoo law, when regarded apart from any special custom prevailing in a particular district or family, where there are sons by different wives, priority of birth and not of marriage, certainly as regards the sons by any wives after the first, must determine the succession of an impartible inheritance. Accordingly the son of a third wife, born before the son of the second wife, was held entitled to inherit.

Semble.—No just analogy can be established between the *status* of the first wife and that of any subsequent wife, the title of the first wife to special rank and privileges resting upon grounds peculiar to her and which can have no application to others.

It is of the essence of special usages modifying the ordinary law of succession, that they should be ancient and invariable, and that they should be established to be so by clear and unambiguous evidence.

With reference to the laxity prevailing in the Indian Courts in admitting documents, the Privy Council remarked that, whilst it might not be desirable in all cases to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed.

This is an appeal from the High Court of Madras in a suit raising the question of the right of succession to an impartible zemindary called Urcadu, in Tinnevely. The litigants are two sons by different wives of Kolalinga Sethurayer, the late zemindar.

Kolalinga Sethurayer, who was a Hindoo, married three wives. The first, Kanthunathi Ammal, had no child. His other wives were Ramalakshmi Ammal, the mother of Muttee Ramalinga Sethurayer (the appellant) and Vellaithai Perumal Ammal, the mother of Sivananantha Perumal Sethurayer (the respondent).

Although the mother, Ramalakshmi, is appellant as guardian of her son, it will be convenient to speak of him as the appellant, and of the other claimant as the respondent.

The marriages of the two mothers took place on the same day in June 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit.

The Courts in India have held that the marriage of the appellant's mother was first solemnized, and that she, therefore, in order of time, was the second wife, and the respondent's mother the third wife of the zemindar.

In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they therefore adopt it in dealing with the present appeal.

It appears that at the date of the marriages the appellant's mother was a child only ten years old, whilst the mother of the respondent was a girl of sixteen. The respondent, as might naturally be expected from the relative ages of the mothers, was born many years before the appellant, and he seeks to recover the zemindary in this suit as the first-born son of the zemindar. The appellant resists his claim on the ground that he, as the son by the earlier marriage, is the rightful heir. The question is thus raised whether the son of the second wife, although born after the son of the third wife, is entitled to inherit; in other words, whether the priority in birth of the sons, or the priority in the marriages of their mothers, both being of the same caste, is to prevail in determining the succession to an impartible zemindary in this district of Madras.

It appears from the pleadings and issues that the respondent, the first-born son, relies on the general Hindoo law of succession, and on the custom of the family which he affirms to be in accordance with it.

The appellant alleges that, by the custom of the district, he is entitled to the succession, and he also denies that the general Hindoo law is in favor of the respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court that the appellant has failed to prove the special custom which he undertook to establish.

It appears from the record that, in 1861, during the life of their father the late zemindar, the appellant brought a suit in the Civil Court of Tinnevely against the present respondent, to have his right to the succession declared. He founded his claim on the usage in his father's zemindary and "other zemindaries." The

present respondent then relied, as he still does, on the general Hindoo law, and the usage of the family. The Civil Judge was of opinion that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the zemindars of the district that the son of the senior wife was to succeed. The decision of this Judge in favor of the present appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the father; but it has been necessary to advert to the suit, because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late zemindar himself, who was a party to the declaratory suit, and evidently he is not a trustworthy witness, for whilst in that suit he espoused the cause of the present appellant, and gave evidence of the family usage in his favor, he had some years before, and after both sons were born, given equally strong evidence of a custom the other way in support of the claim of the present respondent. It is obvious that the zemindar's testimony was influenced by his partiality for one son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed, in the present suit both the Courts in India have so regarded it.

Then, with respect to the usage of the district, set up by the appellant, the only evidence apart from the conflicting testimony just referred to, which appears on the record, is a statement of certain declarations alleged to have been made by some zemindars under the following circumstances. In the year 1849 the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor sons of the zemindar of Parayur was to succeed him, requested the Collector of Tinnevely and Madura to ascertain the rule of succession "as regards sons by different wives," and it appears from the Collector's letter to the Secretary of the Board, that the opinions of twenty zemindars and poligars were collected, copies of which he sent, giving also, at the same time, an abstract of them in his letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that, whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed. One of these principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the zemindars or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they give them, were not produced. Their Lordships consider, agreeing with the High Court, that the only evidence offered, viz., the Collector's letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the Collector (if it may be looked at) discloses that the zemindars were not unanimous in their view of the custom; and it further appears that their opinions were given with reference to the succession to a zemindary in a family of a different caste. The late zemindar, who was one of those vouched, differed from the majority, and declared that the eldest son, although by the junior wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value,

it negatives the alleged custom, at all events as one prevailing in his own caste and zemindary.

It was insisted by the learned Counsel for the appellant that the fact that the priority of the marriages of the second and third wives was made a question in the declaratory suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the declaratory suit brought in the zemindar's lifetime, and to which he was a party, the zemindar himself, contrary to his former view, set up the custom which would give the succession to the appellant, whom he was then supporting, in opposition to the respondent, his eldest son. When the father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindoo law applicable to this disputed succession.

The case stands in this respect in the same category as that in the appeal relating to the zemindary of Shivagunga,* which was decided by this Board in 1863. Their Lordships, in giving judgment in that appeal, say: "The zemindary is in the nature of a principality, impartible, and capable of enjoyment by only one member of a family at a time; but whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject." Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact that succession by primogeniture is the rare exception to the ordinary rule in Hindoo families, taking place only upon the descent of some impartible subject, as a Raj or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned Counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindoo is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born son is, throughout the books of authority, treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the father's property, by the general rule, descends upon all his sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, Menu, after laying down the cardinal rule of succession that brothers divide the paternal property among them, adds, "The eldest brother may take entire possession of the patrimony; and the others may live under him as they lived under their father, unless they choose to be separated" (c. 9 s. 105).

* 2 W. R. P. C. 31; 1 Suth. P. C. R., 520.

"By the eldest, at the moment of his birth, the father having begotten a son, discharges a debt to his own progenitors. The eldest son, therefore, ought, before partition, to manage the whole patrimony (c. 9 s. 106).

"That son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (c. 9 s. 107). See also ss. 137, 138.

Many of the precepts of Menu have been undoubtedly altered and modified by modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the foundation of the Hindoo law of succession by modern writers and compilers. (See 1 Strange's Hindoo Law, 192, Col. Dig., Book V.)

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can therefore go to one only of several sons, the first-born by reason of his general pre-eminence, should be preferred to his younger brother.

It was not disputed that this would be so in the case of several sons by the same mother; but it was contended that, where there were sons by different wives, the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the sons of wives of the same caste and class.

Thus Menu says, "A younger son being born of a first marriage after an elder son had been born of a wife last married *but of a lower class*, it may be a doubt *in that case* how the division shall be made" (c. 9 s. 123.)

The doubt thus suggested whether, even in the case of a wife of a lower class, there would be inequality of division amongst the sons, raises a strong presumption that there would be none where the mothers were of the same class. But the matter does not rest on presumption, for s. 125 runs thus:—

"As between sons borne of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother; *but the seniority ordained by law is according to birth.*"

It is true the writer is in this section treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest son is entitled, and one of them he had just declared in a preceding section (119) thus:—

"Let them never divide the value of a single goat or sheep; a single goat or sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said that the single goat or sheep is to belong to one son, it is apparently for the same reason that a zemindary so descends, viz., that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, viz., that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several sons is to be deemed the first-born is declared by s. 125 above cited, "there can be no seniority in right of the mother, but the seniority ordained by law is according to birth."

It appears to their Lordships that the rules just cited approach very nearly to a distinct declaration of the general Hindoo law upon the question, when regarded apart from any special custom prevailing in a particular district or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the son of the first wife would succeed before an elder brother by a subsequent wife, and it was contended that, by analogy, the son of the second wife must be entitled to the like precedence over the son of the third.

There are, undoubtedly, authorities which show that the first wife occupies a position of honor and precedence above all others, but it is not necessary for their Lordships to decide whether the admission made in this case is in accordance with general Hindoo law; for supposing the law to be so, no just analogy can be established between the *status* of the first wife and that of any subsequent wife. Her title to special rank and privileges rests upon grounds peculiar to the first wife, and which can have no application to others. (See 1 Strange's Hindoo Law, pp. 55 and 56.) The reasons upon which she alone, of all the wives, is entitled to peculiar honor and privileges, rather point to the conclusion that the wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favor of the right of the first-born son. The inheritances of Hindoos which descend on a single heir, are almost entirely confined to zemindaries, in the nature of a Raj, and to offices (see "Norton's Leading Cases," Part I., p. 278), and it is obviously in accordance with reason and convenience that such successions should devolve upon the son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion that, upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of Bombay (Bhujangra bin Ghorpade against Malojira bin Ghorpade, 5 Bombay High Court Reports, 161).

Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of Madras and to dismiss this appeal with costs.

The 27th April 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, and
Sir Robert P. Collier.

Nattore Raj—Adoption—Registration—Presumption.

*On Appeal from the High Court at Calcutta.**

Rajah Chundernath Roy Bahadoor

versus

Koore Gobindnath Roy, Ranee Shebessuree, and others.

The Privy Council, after a very careful consideration of the evidence in this case, came to the conclusion that the judgment of the High Court was perfectly right; that there was direct evidence of the execution of the *onoomottee pottro* and of the *kottrito pottro*, which was, if not so clear as to remove all doubt, at least so satisfactory that, in the absence of contrary evidence or very strong presumptions to the contrary, it ought to prevail; and that whilst the direct evidence was satisfactory, the presumptions which existed on the one side and on the other, when they come to be weighed, very strongly preponderated in favor of the execution of these deeds.

Their Lordships observed that it would be very much for the interest of proprietors in India if, when

* From the judgment of Steer and Seton-Karr, *J.J.*, dated 30th April 1863, Special No. (Full Bench Rulings), W. R. 106.

they executed deeds giving their widows after their death power to adopt, they would take the precaution to register the deeds.

In this case the widow did not adopt a son until six or seven years after the Rajah's death, and an inference was sought to be drawn therefrom hostile to the adoption with reference to the obligation upon the widow to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. But the Privy Council considered that the presumption against the adoption arising from the neglect of duty by the widow was not so great as the presumption in favor of the Rajah having the power to adopt, because the stronger the duty to adopt a son, the stronger was the presumption that the Rajah would not like to die without leaving power to his widow to make the adoption.

In these appeals the title to the succession to the large and ancient Raj of Nattore on the death of the Rajah Gobindchunder is involved, and it has been thought convenient to determine it before proceeding to deal with the other questions in the suits.

The issue raised on the title is, whether Gobindnath, the respondent, is entitled to the succession as a son by adoption of the late Rajah Gobindchunder. The adoption was made by his widow Shebessuree, and the power to make it is alleged to have been by a deed (*anoomottee puttro*) executed by the late Rajah on the eve of his death. He is alleged to have made at the same time another deed (*kottrito puttro*) giving his mother Kistomonee, or rather his adoptive mother, the management during the infancy; and the whole question on this issue turns upon the validity or invalidity of these two deeds.

Their Lordships do not think it necessary to go into the history of the long and complicated litigation which has arisen out of this succession, though parts of it may be incidentally referred to; and the facts which introduce the period when these deeds were executed are few.

It appears that Gobindchunder died in 1836, having the raj in full right and possession.

He died, leaving his mother Kistomonee, his wife, who was then about the age of 20, and an infant daughter about two years old; and it is material to bear in mind this state of his family in weighing the presumptions which arise from the subsequent conduct of the parties.

The Rajah Gobindchunder had himself been adopted into this family by Kistomonee in the year 1814, and he came of age in 1829. During his minority Kistomonee managed the property, and there were disputes between the Rajah and his adoptive mother, which, when he came of age, led to what has been called by the learned Counsel for the appellant exasperated litigation. There can be no doubt that there was fierce litigation between the mother and the adopted son. In that litigation insults were heaped by one upon the other; and the fair result of the evidence seems to be that they continued for a considerable time in a state of hostility. From conversation held with the Rajah himself, it appeared that only a short time before his death, he was not on visiting terms with his mother. She had left the palace at Nattore, and had gone to live at Saidabad, on the other side of the Ganges. But although that state of hostility between the mother and son is proved beyond all dispute by the evidence, it is also proved, and with equal certainty to the minds of their Lordships, that on the eve of his death the Rajah became sincerely desirous of seeing his mother and becoming reconciled with her. He was taken ill for a few days before the 9th December. On the 9th December, or as one witness says, on the day before the 9th, he was told that his illness was serious; and on the morning of the 9th, when several family physicians were present, when one of his relatives, Hurree Pershad, the father of his wife, was also present, the evidence is that the deeds which are now in dispute were executed, attested, one by nine, and the other by eleven witnesses, and the deed of adoption (*anoomottee puttro*) given by the Rajah to Hurree Pershad, who at once delivered it to his daughter, the Rajah's wife, who was behind the screen in the same room. The other deed the Rajah put in his seal-box intending himself to take it to his mother.

The direct evidence of the execution of the deeds is that to which attention should first be called; and, of course, if that evidence fails to establish that those deeds were executed, the case of the respondent must fail.

Their Lordships having given very careful consideration to the evidence in this case, have come to the conclusion that the judgment of the High Court is perfectly right; that there is direct evidence of the execution of the instruments, which is, if not so clear as to remove all doubt, at least so satisfactory that, in the absence of contrary evidence or very strong presumptions to the contrary, it ought to prevail. Their Lordships also think that, whilst the direct evidence is satisfactory, the presumptions which exist on the one side and on the other, when they come to be weighed, very strongly preponderate in favor of the execution of these deeds.

Several witnesses have been called who were present when these deeds were executed; and in considering the witnesses who were called, and the absence of witnesses, the length of time which had elapsed from the period when the deeds were executed to the time of the enquiry must be borne in mind. The deeds were executed in December 1836, and these witnesses were examined before Mr. Jackson in 1860, twenty-five years after the event.

It is unnecessary to say which of the parties is responsible for the delay. Undoubtedly, when the conduct of Anundnath comes to be considered, there will appear considerable delay on his part; but without casting the responsibility of that delay on the one side or the other, the fact of the delay is certainly important when we come to consider the evidence which was given, and that which, if the case had been heard at an earlier period, might have been expected to be given. Of the witnesses who have been called, without adverting to the others, three appear to be in a respectable position in life, and one of them is a witness whose interest is apparently opposed to the deeds supposed to have been forged, and which he must, if he is saying that which is untrue, be assumed to have assisted in fabricating. This witness, Hurree Pershad Roy, was an old man when he was examined, and the father of Shebessuree, the widow of the Rajah. He says he was present when these deeds were executed. He gives a long account of the way in which it was done, and he gives the names of the writers. He says "Bhoirub Sircar wrote the *onoomottee puttro*, and Kisto Dhone Mozoomdar wrote the *kottritto puttro*." Both these persons are dead. He also gives us the name of the officer of the Rajah who drew the will, Hurrish Chunder Khan, who appears to have been the chief dewan in the Rajah's house, and therefore a person very likely to have been consulted. Hurrish Chunder Khan prepared the deeds and read them over. If this witness is to be believed, Hurrish Chunder Khan read them over to the Rajah; then they were executed, and one delivered to Hurree Pershad himself to be given to his daughter in the way which has been already described.

In addition to that witness there is Needan Chunder Roy, a cousin of the Rajah living with him, and therefore a person who would naturally be present upon an occasion of this kind, and Monomohun, the Court physician, one of the numerous doctors who were in attendance upon the Rajah. Those witnesses were not subscribing witnesses; and undoubtedly that which is least satisfactory in this part of the case is that these respectable persons were not subscribing witnesses, and that only one subscribing witness was called upon the enquiry in 1860. But it appears that, upon a trial which took place before the Principal Sudder Ameen in the year 1852, two attesting witnesses were called. The deposition of one of them has been read, and the other (to adopt the phrase used at the Bar) has in some way dropped out of the record. It appears to have been the deposition of one of the physicians. Other witnesses had died before the enquiry in 1860.

Therefore their Lordships find a considerable number of witnesses called to

prove the execution of these documents. They do prove them in the most direct way, and if any credit is to be given to their evidence, these deeds were executed by the Rajah, and one of them was delivered by his own hand to Hurree Pershad.

On the other side there is no direct evidence, but it is sought to impeach this testimony in favor of the deeds by admissions which were supposed to have been made by the Rajah himself and by his mother the Ranee Kistomonee about the time when it is supposed that these transactions took place. The Rajah himself expressed his desire to be carried to the Ganges to die. His mother lived near the Ganges. In the course of his journey, which apparently was a journey of about 60 miles, he stopped at Rampoor, and there he was seen by a witness, Haradhun Sanyal, a mookhtar, who from his own statement had been employed by several members of this family in transacting their legal business. His evidence appears in the second record, and he is the only witness called by the appellants whose evidence goes very seriously to impeach the testimony as to the execution of the deeds. It is no doubt very important, and is entitled to be very carefully considered, because, undoubtedly, if what he says is taken literally and is true, it is difficult to suppose that the Rajah had executed these two deeds before he had started on his journey. He says he saw the Rajah at Rampoor, and had a conversation with him; and he says: "I told the Rajah that you are unwell, you give a permission for holding of the house; upon which he told (me), 'I have an intention of giving permission. It is not written. I cannot do so until I see my mother. I will go to the banks of the Ganges. Get a boat for me.' Upon which I told him, 'You present a petition intimating the said permission.' He said, 'Let me go to my mother and I will write it. There is no need of giving any information. Get me a boat and cross me over.'"

Undoubtedly, if that evidence is entitled to credit and to be entirely relied on, it is inconsistent with the execution of the deeds having then taken place. But there are various circumstances which tend to impeach this evidence. Haradhun Sanyal, it appears from his own statement, had quarrelled with Kistomonee; she had in some way withdrawn her confidence from him, and he admits that he then took part with Rajah Anundnath. But what appears still more to throw doubt upon his evidence is this: he says that, although he had had this all-important conversation with the Rajah, upon the question which must have agitated the family for many years, although he was acting for Anundnath and in constant communication with him, he never told him of this conversation until after the commencement of this suit. That does appear to be utterly incredible, and to throw not only doubt but discredit upon his testimony.

It is also to be observed that, even if that testimony be true, and although, if the Rajah is assumed himself to have been sincere, his expressions indicate that the deeds had not been executed; yet it is possible that, as he had not employed this man in preparing them, he might not for that reason or for others have chosen to tell him of what he had done; again, supposing the evidence to be entitled to any credit, two circumstances appear from it extremely favorable to the case of the respondent; one is that the Rajah had the intention to give the power of adoption to his widow, and the other is that he was going to see his mother; and from his expressions, as given by this witness, it is plain that he was going not only to see but to consult her, and act according to her advice and wishes. Those two circumstances are strongly in favor of the presumptions of intention on which the respondent relies.

A great deal of evidence appears to have been given in the suit before Mr. Jackson, to show that Kistomonee and Shebessuree had fabricated these deeds, in order to compromise a quarrel between themselves. The learned Counsel, Mr. Field, who very fully and strenuously argued this case, has not ventured to rely upon that evidence. His main support was the judgment of Mr. Jackson, and as Mr. Jackson himself did not believe that story, Mr. Field probably exercised a

wise discretion in not relying upon it. But it is perfectly plain that the appellants had set up a case of fabrication of documents, which entirely broke down and failed to obtain credit. The endeavor to do so, and in a very systematic way, throws great discredit upon the whole of their case.

Anundnath himself was examined, and it appears to their Lordships, as it did to the High Court, that his evidence is very strongly in favor of the validity of these deeds, because it appears that he recognized, by the giving of presents, both the adopted children. He recognized the two sons who were in succession adopted; and the only way in which he gets rid of that damaging fact is by saying that he was not aware that they were adopted under a valid power given to the widow. He says he thought they were merely children about the house brought up by Shebessuree: but their Lordships think that such an explanation is entirely incredible. He was living in the palace at the time the Rajah died. These deeds had been publicly notified to the Collector, and had been filed. He must have known of the deeds and of the attesting witnesses to them; and to suppose that this gentleman believed that these children had not been adopted is really impossible.

A letter was put in evidence when he was examined, which, if it be genuine, is decisive to show that he treated the first child as the legally adopted son of Gobindchunder. The letter is this:—"Having received the letter conferring blessings, I cannot express the mental agony I feel on hearing the news of the death of my brother's son." Nothing can be more precise than that expression. In the mind of a Hindoo, when it was used, it must have been perfectly clear that the child who was just dead could only be his "brother's son" by a legal adoption. There could have been no adoption in this case by the widow, unless by virtue of deeds executed by the Rajah before his death.

A question was made whether that letter was really Anundnath's writing or not. The evidence seems to be in favor of its authenticity. Mr. Jackson says he only faintly denies it. He was examined before that Judge, who had an opportunity of seeing him. The other circumstances referred to in the examination go a long way to show that it was a genuine letter. A man would not "faintly deny" such a letter if he could have denied it honestly; and the faintness probably arose from the feeling that he could not with a safe conscience say that it was not his own letter.

Upon the whole of the evidence, therefore, which their Lordships have considered, but to which it is not necessary to advert in all its parts, their Lordships have come to the conclusion already intimated. But this case has arrived at its present stage, and the litigation has been prolonged, not so much by the result which ought to be drawn from the evidence given on both sides directly applicable to the facts, as from this, that the learned Judge, Mr. Jackson, drew from circumstances not given in evidence in the case, and from general knowledge, inferences, and presumptions hostile to the direct evidence. It appears to their Lordships that some of those inferences are of a strained character, and some of the presumptions unsound; but the Judges of the High Court, who went very carefully through the evidence, have disposed of those inferences and presumptions to a considerable extent, and have made presumptions from the evidence with which their Lordships are very much disposed to agree.

The main presumption which has been relied on in favor of the appellants against the deeds arises from the state of feeling which existed between his mother Kistomonee and the Rajah. Undoubtedly that state of feeling is entitled to be considered. It has already been stated that it existed. But there is surely nothing contrary to the ordinary workings of human nature in the supposition that on the eve of his death he was desirous of reconciliation, and that an entire revulsion of feeling had come over him.

It is said, Why should he entrust the management of this important *raj* to his mother who had managed it so much to his own dissatisfaction? It appears

that the dissatisfaction was that she preferred to manage it herself, and would not let him have the control of it; and he may have thought that, when he left a young wife and an infant child, the mother who was so perfectly capable of managing, was the best manager whom he could select. But that he did desire reconciliation, and was anxious to consult her, is perfectly clear; and that he went out of his way when the hand of death was upon him for the very purpose of seeing and consulting his mother is equally clear.

The next inference suggested as hostile to the deeds arose from their non-publication by the Rajah before his death, or by Kistomonee immediately afterwards. Unquestionably it is most satisfactory when documents of this kind are registered, and it would be very much for the interest of proprietors in India if, when they execute deeds giving their widows after their death power to adopt, they would take the precaution to register the deeds. It might save great litigation, which very frequently wastes the property they desire to preserve. However, it was not done in this case; it was not compulsory on the Rajah to do it; and the time when these deeds were executed, the circumstances under which they were executed, the fact that the transaction was not fully completed until he had taken the deed of management to his mother, and she had accepted the trust, may all account for his not having published them before his death.

Then it is said, Why did not Kistomonee, who, when passing through Rampoora, saw some of the old retainers of the family, tell them, and proclaim that she had the management? It would have been better perhaps that she should have done so; but still the delay in publishing the deeds was not very great. About six weeks after the death of the Rajah, she presented a petition to the Collector, in which the two deeds are referred to, and the evidence appears to be that they were then produced to the Collector. At all events, whether produced or not, they were specifically referred to, and in the following June, six months after, they were regularly filed.

Again it is said, and an inference is attempted to be drawn hostile to the respondent from the circumstance that the adoption of a son did not take place until six or seven years after the Rajah's death. That appears to be explained and accounted for by the circumstance that the Rajah had left a daughter. If she had lived and had married and given birth to a son, that son would have become the representative of the family; he would have been able to have performed the religious rites of the family and of the Rajah, although not to the same full degree that an adopted son might have done; still those circumstances would reasonably account for the adoption not having taken place. Mr. Doyno forcibly pointed out the obligation upon the widow to act upon the power given to her by her husband as speedily as possible, and its great importance as a religious duty. The widow may have neglected her duty, but the presumption against the deeds does not seem very strong from that circumstance; whereas the presumption that the Rajah would leave the power to adopt is very great. The stronger the duty to adopt a son, the stronger is the presumption that the Rajah would not like to die without leaving power to his widow to make the adoption. That he should have postponed it to the eve of his death is a circumstance that does not weigh against the probability of the deeds, for he was only of the age of 24 or 25, having a wife younger than himself.

These seem to be the presumptions which have been most relied on against the deeds, but the presumptions in favor of them are not only strong but almost irresistible.

The theory of the appellants must be that these deeds are forgeries; and if they are forgeries, Shebessuree and her father Hurree Pershad must have been engaged in them. It was clearly against the interest of the widow that there should be an adoption, for she would have been entitled to the raj and all the property for life, and her daughter, if she had married and had had a son, would have continued the succession. And her father certainly could have had no interest

in fabricating a deed which would give Kistomonee the management, because if such a deed had not existed, and his daughter had had her life-estate in the property, he would have been the natural person, as her protector, to have had the management of it. Therefore the presumption against forgery, arising from the interest of these two persons who are supposed to be implicated in the fabrication of the deeds, is very strong.

Then there is the presumption to which allusion has been already made, arising from the duty to have a son by birth or adoption, strengthened by the presumption arising from the usage in this family, in which for 150 years, with only one exception, there has been a series of adopted children. It is very unlikely that the late Rajah should have wished to drop that usage. At all events there is a strong probability that he should have desired to act in accordance not only with the general law, but with the custom of his own family.

The last presumption to which their Lordships think it necessary to refer, is that arising from the conduct of Anundnath himself. It has been already incidentally adverted to, but is so strong that their Lordships desire again to direct attention to it at the close of the observations. Anundnath was a man apparently of wealth and position. He recognized the two children who were adopted in succession, and it is not until the year 1849 that he first comes forward, not directly to put forward his claim, but to intervene in another suit which had been brought by Kistomonee, on behalf of the adopted son, to recover some property from third persons. It would appear from the proceedings which took place before the Principal Sudder Ameen, in which it is now said that the validity of these deeds was in question, that, if that was so, Anundnath brought forward then no witnesses to impeach them, and certainly did not put forward Haradhun Sanyal, the mookhtar, now his strongest witness. It seems that that proceeding, which was a suit to recover property belonging to the raj, took this course: evidence having been given of these deeds by one or two witnesses, and no evidence having been called on the other side, it was supposed that enough had been done to establish the title. That may have been a misapprehension. It may have been that the Sudder Dewanny Adawlut were right in their first judgment in thinking that the matter was fully in issue, and that if that were so, sufficient evidence had not been given to establish the validity of the deeds. It certainly looks as if the case had proceeded very much in the way in which an ejectment proceeds in this country, where an heir brings an ejectment to recover possession from a stranger of property belonging to his estate, he introduces a *prima facie* case, and unless there is evidence given on the other side, it is considered to be sufficient.

However that may be, the Sudder Dewanny Adawlut upon review considered that there had been a misapprehension; that there was an issue which had not been properly tried; and so they sent the case down again.

It is important to observe that, upon that first enquiry, the trial was either treated as one where *prima facie* evidence was sufficient, or if it was treated as one where both parties were to bring forward all their evidence, Anundnath did not bring forward any; and certainly did not bring forward the mookhtar on whom he now so strongly relies.

Their Lordships having come to the conclusion that the judgment of the High Court on the question of succession is right, that decision will dispose of the two appeals of Rajah Chundernath Roy. They will therefore advise Her Majesty to dismiss those appeals with costs. They will also advise Her Majesty wholly to affirm the decree of the High Court made on appeal in the suit originally brought by Anundnath Roy, No. 28 of 1861, and also to affirm the decree of the High Court made on appeal in the suit originally instituted by Kistomonee Dabee against the Collector of Moorshedabad and others in 1849, in which Anundnath Roy intervened, so far as the question of succession is concerned.

The 2nd May 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Limitation—Act XIV of 1859 s. 20—Bond fide proceeding to keep alive decree—Petition for execution of money attached in another suit.

*On Appeal from the High Court at Calcutta.**

Roy Dhunput Singh

versus

Madhomotee Dabia.

A petition presented *bond fide* by a decree-holder for execution in one suit of money attached in another suit is a proceeding taken within the meaning of s. 20 Act XIV of 1859, to enforce or keep in force a decree. The fact that it was in the end abortive, does not take from it the character of a proceeding to enforce the decree.

In this appeal the only question which arises is, whether within three years preceding the application for execution made in the Court below any proceeding had been taken to keep the original decree in force ; the question depending on s. 20 Act XIV of 1859. The precise date of the original decree has not been stated, but that date is immaterial, because the question is whether there was any proceeding within three years preceding the application for execution which was made on the 24th April 1869 ; and undoubtedly it must be shown that within three years of that date some proceeding was taken to keep the original decree in force.

The first proceeding relied on is a former application or suit for execution, the petition in which bore date the 12th December 1865, under which there was an order for the sale of a putnee talook, which was to take place on the 26th February following. On the day of the sale, by agreement, an order was made for the postponement of the sale for two months, and upon that order being made, it was further ordered that the case be struck off the file. It was contended for the appellant that this execution suit must be considered to have continued in living force, although by the suspensory order no proceedings were to be taken by way of sale for two months, and that the three years did not commence to run until the end of these two months. Their Lordships do not think it necessary to decide that question ; they desire to give no opinion judicially upon it ; having come to the clear opinion that the proceedings which were founded by the subsequent petition of the 20th March 1866 are sufficient to take the case out of the operation of the limitation.

The petition of the 20th March 1866, which was filed before the above-mentioned period of two months had expired, after referring to the decree, and to the execution and the postponement of the sale, alleges that the judgment-debtor had subsequently taken out a decree against a debtor of his own, and sued out execution, and caused some property to be sold, and that the purchase-money, an amount of Rs. 551, was received on deposit, and then the petitioner proceeds, " While my execution was pending I caused the amount belonging to the judgment-debtor to be attached and file this petition, and pray that my execution suit may be restored to the file, and that the aforesaid attached amount, Rs. 551, be paid to my mookhtar."

This petition, if *bond fide*, would clearly be a proceeding to enforce the judgment ; its object being to obtain execution of the money attached. It was referred to the officer of the Court, and the officer upon that reference found that

* From the judgment of Glover and Hobhouse, *J.J.*, dated 11th February 1870, 13 W. R. 164.

no moneys were attached in execution of the decree in which the petition was filed, that is the decree in the present suit, but that certain moneys had been attached in another suit between the appellant and the respondent. The report is dated on the 3rd May. On the 12th May an order of the Court is made upon it, which has the following preamble: "Whereas no money has been attached, no orders can be passed for the payment of such money, nor can other steps be taken. It is accordingly ordered that the case be struck off the file and the mookhtarnamah be returned." It seems to result from the report of the officer of the Court, and the order made upon that report, that no execution could issue upon the petition in consequence of the money not having been attached in this suit, and that there was another suit between the same parties, in which that sum of money had been attached.

It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion. It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution.

Then, assuming it to be a *bona fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it; that it was a continuing proceeding duly prosecuted by the appellant up to the time of the report, and further up to the time when the judgment was finally given; and that during the whole of such pendency the decree-holder must be considered as going on with one and the same proceeding. Their Lordships do not consider that the fact that it was, in the end, abortive, takes from it the character of a proceeding to enforce the decree. The consequence will be that the 12th May 1866, when the petition was dismissed, is the date from which the three years ought to commence to run. This decision is entirely in accordance with the judgment of this Committee in the case of Maharajah Dheraj Chund Bahadoor and Bulram Singh,* and does not conflict with any case to which their Lordships have been referred.

The result is that their Lordships will humbly advise Her Majesty to allow this appeal and to order that the judgment under appeal be reversed, and that in lieu thereof the appeal to the High Court be dismissed, and the judgment of the first Judge be affirmed, with costs. The appellant will have the costs of this appeal.

The 3rd May 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Sale of property (not in possession)—Champerty.

* 14 W. R. P. C. 21; and p. 351 *ante*.

*On Appeal from the High Court at Calcutta.**

Ranee Bhabosoonduree Dossee

versus

Issur Chunder Dutt and others.

A, who was entitled to certain property, but had not the means to institute a suit for the recovery of the same, agreed by deed to sell *B* a moiety thereof in consideration of a sum of money which *B* was to pay for the purpose of carrying on the suit in the names of *A* and *B* as plaintiffs. Shortly afterwards *A* entered into a deed of compromise with *C*, who was the claimant and in actual possession of the greater part of the property in question, by which a portion of the property was divided between them. HELD, in a suit brought by *B* against *A* and *C*, that the first deed did not operate as a present transfer of the property, but only as an agreement to transfer it upon certain contingencies which had not happened.

This suit was based upon a deed executed by Jogessur Ghose, in favor of the plaintiff, in August 1866. The effect of that deed, as far as it is material, may be thus stated: it recites that Jogessur Ghose was entitled to certain properties from his maternal grandmother, that he had been dispossessed of the whole of those properties, and thus proceeds:—"It is now necessary to institute a suit in Court for the recovery of possession of the whole of the properties consisting of the aforesaid jote jummah talook, &c., and mesne profits, and as I have not the means to institute a suit at my own expense, I have determined to sell you a moiety or 8-annas share of the 12 annas 6 gundas 2 cowrees 2 krants of the above jote jummah, being the share left by my maternal grandmother, to which I am entitled, an 8-anna share of the talook aforesaid, and an 8-anna share of the mesne profits during the period of dispossession, and having fixed the consideration for the same at Rs. 3,000, and received the purchase-money in cash, I sell the same to you and execute this deed of sale. The said amount is deposited with Dwarkanath Lahory, mookhtar, the agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be paid out of that sum. In the event of the suit being decided in my favor we shall each of us take the costs, mesne profits, jote jummah, and the talook in the shares mentioned above. We will both of us institute the said suit in Court as plaintiffs. Neither of us shall be able without the consent of the other to compromise, settle, or make any adjustment whatever of the case."

It appears that a short time after, in September 1866, Jogessur Ghose entered into a deed, which may be termed one of compromise, with Issur Chunder Dutt, who was the claimant and in actual possession of the greater part of the property referred to in the previous deed, and that by this deed of compromise a portion of the property was divided between them. Thereupon this suit was brought by the plaintiff. It is material to observe that it is not a suit claiming specific performance of or damages for breach of the contract entered into with the plaintiff by Jogessur Ghose, but that it is in the nature of an action of ejectment. It is a suit to recover possession of the property mentioned in the first deed brought not only against Jogessur Ghose, but against Issur Chunder Dutt, the plaintiff seeking to recover possession of the property by virtue of the title acquired under that deed, not only against Jogessur Ghose, but also against Issur Chunder Dutt, whom he alleged to have obtained possession of the property under forged conveyances.

The Court below dismissed the suit upon a technical ground, namely, that the plaintiff could not sue Issur Chunder without joining Jogessur Ghose as a co-plaintiff. The High Court decided, in their Lordships' opinion, rightly that this was not a proper ground for dismissing the suit, and, hearing it upon its merits, determined it in favor of the defendants.

The principal question is the effect of the first deed, whether it operated as a present transfer of the property, or only as an agreement to transfer it upon

* From the judgment of Loch and Mitter, *J.J.*, dated 10th June 1869.

certain contingencies which did not happen. In support of the latter contention the case was referred to of *Rajah Sahib Perhlad Sein v. Baboo Budhoo Singh* (12th Moore's Indian Appeals, page 275).^{*} Without referring at length to that case, the circumstances of which are in many respects similar to those of the present, it may be enough to quote a passage from page 306, wherein their Lordships say,—“The Court below seems to have ruled that the effect of the execution of a bill of sale by a Hindoo vendor is, to use the phraseology of English law, to pass an estate irrespective of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the statute of uses. Whether such a conclusion would be warranted in any case is in their Lordships' opinion very questionable. It is certainly not supported by the two cases cited in the judgment under review” (which are there referred to), “in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title. The bill of sale in such a case can only be evidence of a contract to be performed *in futuro* and upon the happening of a contingency of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do.”

Having regard to this case and to the provisions which have been referred to of the deed, their Lordships are of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Jogessur Ghose and the plaintiff were to be parties.

This construction of the deed disposes of the case, for even if the plaintiff be entitled to complain of breach of contract by Jogessur, she cannot recover under it possession of the property against Jogessur, *a fortiori* she cannot recover against Issur Chunder Dutt, who was no party to the deed. It may be observed that even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the plaintiff to have alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition but was prevented by the wrongful act of the defendant. There are no such allegations; and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the plaintiff was not performance of this condition but something very different, namely, the payment to the defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.

On these grounds their Lordships are of opinion that the judgment of the High Court is right, and they will humbly advise Her Majesty that this appeal be dismissed with costs.

The 10th May 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Evidence—Title—Possession.

^{*} 12 W. R. P. C. 6; and p. 225 *ante*.

*On Appeal from the High Court at Calcutta.**

Wise

versus

Brojendro Coomar Roy and others.

In this case the Privy Council, after a review of the evidence, held that the plaintiffs (respondents) had failed to prove either title or possession, so as to entitle them to disturb the long possession of the defendants (appellants) observing that if their Lordships had been sitting as a Court of first instance, they would have deemed it impossible, upon such proof of title as the plaintiffs had given, to disturb an admitted possession of upwards of ten years. It seemed to their Lordships that the High Court having originally treated the title of the plaintiffs as depending upon a release by the Judicial Commissioners, and finding that the release was not made out, fell back upon a proceeding of the Deputy Collector, and had not given sufficient consideration to the nature of the proceedings of that subordinate officer, and the manner in which they were dealt with by his official superiors.

The appellant in this case has purchased the title of the defendants in the suit to the land in dispute. The respondents were the plaintiffs in that suit, which was brought for the recovery of what may now be taken to be the 2,092 beegahs and 13 cottahs of land, comprised in Dag No. 39, as laid down in the large map of Chur Bhudrasun Talimabad, which is in evidence in the suit, and which was made in 1847 upon the Government survey of 1846. In dealing with the case it will be convenient to speak of the parties as the plaintiffs and the defendants.

The plaintiffs were the owners of a zemindary called Ramnugger, and the defendants were the owners of a zemindary known as Chur Mokoondeah. Both zemindaries have, since their settlement at the time of the perpetual settlement, suffered much from the invasion of the river; but the Chur Bhudrasun Talimabad, which was at some time before 1832 thrown up in the river, and of which the land in dispute forms part, must be taken to have been a chur formally and regularly decreed to be the property of the Government, to no part whereof could either party have shown title against the Government as of right as an accretion to or a re-formation upon their original property. That seems to be the effect of that decision in 1832, in the first resumption suit which is the starting point, so to speak, of the case.

Again, the land in dispute is admitted to have been in the defendants' possession for upwards of ten years before the commencement of the suit. A question has, however, been raised whether by the award in the Act IV case of the 11th July 1848, the reversal whereof is one of the objects of the suit, that possession was affirmed to be a possession then existing in point of fact; or whether the defendants, wrongfully and under color of that order, and shortly after its date, succeeded in obtaining possession of the disputed land. And, as something may turn upon the nature and the commencement of the defendants' possession, their Lordships think it will be desirable to determine in the first instance what was the effect of the Magistrate's proceeding of the 11th July 1848.

In order to do this, it is necessary to advert to some of the earlier proceedings. It has been already stated that the whole of Chur Bhudrasun was found in the resumption suit, some time in 1832, to be the property of Government. The Government appears, however, to have dealt liberally with the neighbouring proprietors who had suffered from the ravages of the river, and it is admitted that by way of compensation, portions of this chur were re-leased to the proprietors, both of Mokoondeah and Ramnugger. It is beyond dispute that the latter, the proprietors of Ramnugger, had previous to 1846 acquired 1,961 beegahs and 17 cottahs of land, the position of which is indicated on the map of 1847 by Dags 10, 7, and 8—at all events by dags on the north of what is marked on the map as a nullah which has elsewhere been called the "Gung:" and that the defendants, the proprietors of Mokoondeah, had also acquired portions of land lying to the north of the same nullah, the position of which or of part of them is indicated by the letter X upon the smaller map, which has been reduced from the larger map.

* From the judgment of Trevor and Campbell, dated 27th January 1865.

It appears that, subsequently to these assignments of land, a further change in the course of the river took place. The nullah is said to have become suddenly a very large stream; to have swept away a good deal of land to the south of the original chur; to have afterwards receded towards what in 1846 was the main channel of the river farther south; and in doing so to have cast up and left a considerable portion of alluvion, forming the chur or portion of a chur in which are situated the two dags which have been so much mentioned in the argument on this appeal, viz., Dags Nos. 38 and 39, and some land to the west of Dag No. 38. In 1846 this land, or at all events some portion of it, became the subject of another resumption suit before Mr. Deputy Collector Fletcher, between the defendants, or those who then represented the defendants, and the Government. The end of that suit was, that, in conformity with a general order of the Sudder Board of Revenue, it was, on the 28th December 1846, struck off the file without prejudice to any further claim on the part of the Government, but leaving the defendants in possession of the land which they claimed in that proceeding for the present, and subject only to such future liability to revenue as the Government by some subsequent suit might establish against them.

The learned Counsel for the respondents have strenuously argued that the subject of that proceeding did not include Dag No. 39, but was limited to Dag No. 38, and possibly to other lands to the westward of Dag 38. It appears, however, to their Lordships, that what was claimed is shown by the report and map of the Ameen Kristomungul Goocho, and, looking to them, their Lordships are of opinion that the claim must be taken to have comprehended the land laid down in the survey map as Dag No. 39.

The report of the Ameen is on pages 117-8 of the record. He says that he proceeded to the spot, accompanied by the witnesses, and "mapped and measured consonantly to the identification, and in the presence of those witnesses, the chur on the immediate south of the Wagoojesta lands of the defendant Kahtoon, deceased, by a line 56 yards in length, which was the standard current in the pergunnah." The map is lying before me, and it seems to their Lordships, comparing it with the other map, that it clearly includes the whole of that southern chur, as I may call it, as it then existed. The Ameen goes on in his report to say, "As the evidence of the said witnesses disclosed that the said lands were restorations of the diluviated lands of the original mouzahs and kistmuts belonging to the defendants, and increments to her Goojesta lands, your humble servant has measured the said lands;" and the 2,277 beegahs of land on the contiguous south of the Goojesta lands under No. 3, and the 102 beegahs of land under No. 1, on the south of No. 3, and the 384 beegahs of land under No. 2, and 810 beegahs of land under No. 4, are all laid down and marked in the map as lands of which Mahommed Jokee Chowdhree was then in possession, which were treated as the subject of the pending contest between that person and the Government.

As to No. 4, the 810 beegahs, it is impossible, their Lordships think, to come to any other conclusion than that, rightly or wrongly, they were placed towards the eastern extremity of the chur, and that they formed part of that which was afterwards put down in the larger map as Dag No. 39.

Their Lordships omit, for the present, to consider the subsequent proceedings of the Revenue authorities, because these relate rather to the title of the plaintiffs; but have dwelt upon the proceedings before Mr. Fletcher because they seem to their Lordships to be in a great measure the foundation of the decision of the Magistrate in July 1848, and therefore, to be material with reference to the question now under discussion, viz., the possession then awarded to the defendants.

The Magistrate's proceeding is at page 187 of the record. The plaintiffs, or rather the petitioners, in that proceeding were Mahomed Ishmael and Mahomed Israel, who claimed under a third title; but the Chowdries who represented

Mokoondeah were originally made the opposite parties, and Nund Coomar Roy, who then represented the plaintiffs' interest and the zemindary of Ramnugger, appears to have come in as a claimant, and to have been afterwards treated as one of the opposite parties. It is remarkable that this proceeding seems to have been the first in which the plaintiffs and the defendants, or those whom they represent, were really litigating any question concerning this land face to face or in presence of each other.

The subject of the proceeding may be taken to have been an accretion only to the land now in question or the larger part of it; but it seems to their Lordships that if the proceeding is examined and the reasons for the Magistrate's decision are looked at, it will be found that he clearly proceeded upon the finding that the defendants and not the plaintiffs were then in possession of the land now in question. He says at page 118, line 33, "Therefore the points to be resolved in this case are as to how, and as an annexation to whose estate, is the disputed accretion formed, and in whose possession the said accretion is;" he then says, "The evidence oral, and the exhibits, adduced on both sides, have been considered, and it appeared, on inspection of the map prepared by the Ameen Kristomungul Goocho, appointed by the Collector of this place, dated the 26th December 1846, and other documents, that the sota, or water-course, which existed on the south in contiguity with the wagojesta lands given in release as an exchange for the diluvion of the said Chur Makoondea, the zemindary in possession of the defendant, and on the north of the settled mouzahs of that pergunnah, gradually gained strength and carried off the original mouzahs, Bisteepore and others, and then threw up an accretion partly in contiguity with the south of the said wagojesta lands;" "that in respect of this new formation a suit under Reg. II of 1819 was brought and struck off consonantly to the letter of the Sudder Board No. 1, dated January 2nd 1846, and that the said chur then came into possession of the Chowdry defendant." Then he says, "It is clear that the disputed land was formed on the immediate east of the 810 beegahs of land indicated under No. 4, on the east of the map prepared by the Ameen, as in the possession of the Chowdry defendant and within the land specified in the alleged roboocarry. Further, on inspection of the map filed by the Chowdry defendant, which quite tallies with the map prepared by the Ameen," and so on, "and from the oral evidence of his witnesses, the disputed accretion is proved to have been formed on the immediate east of the 810 beegahs of land indicated on the Ameen's map as being in a northerly direction of the pepul tree which stands on the cutcherry at the main chowdarussie, and on the immediate west of the gong in the possession of the defendant, and that the Chowdry defendant had been in possession of the same by cultivating it through ryots, &c., on the allegation that it was a re-formation of the diluviated lands and kismuts of Bisteepore, Alumpore, and other mouzahs and kismuts within the said Chur Mokoondeah," and upon these grounds he gave the land then in dispute to the Chowdries as a further accretion to that of which they were already in possession. Reading this judgment by the light thrown upon it by the Ameen's map, and the position thereby assigned to the 810 beegahs, their Lordships think it is impossible to say that the Magistrate did not find, and intend to find, that the possession of the whole eastern part of the new chur, and therefore of the land now in dispute, was in the defendants, or that the fact so found was not the real ground of his determination.

It may be further observed that it is admitted even by the witnesses, whose depositions were read to-day by Mr. Bell, that from the time of that proceeding the plaintiffs lost the possession of that of which they said they were previously in possession, and it seems to their Lordships that there is no independent or trustworthy evidence of any act of dispossession other than the ordinary execution of the Magistrate's order. Therefore, considering this, and also the great improbability that if anything had been done inconsistent with or in excess of the Magis-

trate's order wrongfully by the defendants, the plaintiffs would have slept upon that wrongful act as long as they have slept upon the order, their Lordships are fortified in the conclusion that the effect of the proceeding of the Magistrate was to treat the defendants as in possession of the land in dispute, and to make that possession one which could be disturbed only by a regular suit.

Now, if that be so, the cases cited by Sir Roundell Palmer were hardly required to show that the long possession of the defendants under the order of the Magistrate cannot be disturbed, and ought not to be disturbed unless upon proof, by the most cogent evidence on the part of the plaintiffs, of a superior title.

Then what is the title which the plaintiffs have alleged and proved in this case? As their title was originally stated, it was this. After stating how they got into possession of the 1,961 beegahs and 17 cottahs, and referring to an Act IV case, with another party Ramruttun Bose, they say, "The Uncovenanted Deputy Collector proceeded in the year 1846 to the spot, but did not release to us the said lands, though they had before been released in our favor. He measured the said new re-formed chur, and found it to contain an area of beegahs 2,092-13, whereupon he issued notice to us requiring us to enter into a settlement for the said chur, at a total assessment of Rs. 30, and to pay Rs. 998-9½, on account of mesne profits for the lands on the north bank of the river which had been released to us; upon this we appealed from the said order, of the above Deputy Collector to the Revenue Commissioner, who, on the 17th September 1847, passed an order based on the finding that no original lands, except what had before been released, remained in our possession, remised in our favor the amount measured by the Uncovenanted Collector, who, on the 17th February 1848, carried that order into execution, and from that time we held possession of the said lands and the subsequent alluvials formed contiguously to them." They afterwards go on to mention the Act IV case of July 1848, and say that they were dispossessed under color of the before-mentioned award.

Therefore, it is clear that the title they originally relied upon was a re-lease by an order of the Revenue Commissioner of the 17th, now admitted to be a misprint for the 27th September 1847, an order dealing both with the demand against them of Rs. 998 odd, for arrears in respect of revenue upon the 1,961 beegahs, and with the attempt to assess the Rs. 30 upon the land in dispute, and that they treated the order of the Deputy Collector of the 17th February 1848 as merely an order which carried that order of the Commissioner into execution. The replication relies still more strongly upon the order of the Deputy Collector; but it does not seem, nor does it appear ever to have been understood, to treat that as the foundation of the title or to give up the alleged effect of the order of the Commissioner.

The following is a short history of the proceedings in the suit. The Principal Sudder Ameen found upon the evidence before him in favor of the plaintiffs; there was an appeal from that to the High Court, and that Court, apparently understanding the pleadings in the sense in which they have been stated, and treating the order of the Commissioner as the substantial foundation of the title of the plaintiffs, remanded the case for an enquiry upon one point. The judgment says, "The main contention between the parties is whether the land in dispute is identical with that released to plaintiff by the Revenue authorities on the 17th September 1847; if it is, plaintiffs are clearly entitled to it." It then directs a local investigation by an Ameen; and says, "The Ameen will then, in the presence of both parties, ascertain whether any or all of the lands in dispute are identical with any or all of the lands released to the plaintiffs in 1847, and report the result of his enquiry to the Principal Sudder Ameen. Immediately on the receipt of his report, the Principal Sudder Ameen should, regardless of the number on his file, again take up the case, and give plaintiff a decree for so much of the land as is found to be identical with that released to the plaintiff; should

none of the land in dispute be identical with that released to plaintiff, the Principal Sudder Ameen should dismiss the suit with costs." The Ameen made this investigation, and his report is consistent with what is now admitted to be the fact, namely, that the order of the Commissioner which had been pleaded had not dealt with the land in question, or with the assessment upon it of the Rs. 30 ; but was entirely confined to the claim of the Rs. 998, and to the rights of the plaintiff in the 1,961 beegahs ; and the Principal Sudder Ameen, dealing with the issue sent down to him by the Superior Court, as he understood it, and perhaps as it is literally to be taken, dismissed the suit. There was then a second appeal : and the High Court on that occasion seems to have misunderstood the nature of the admission which had been made by the defendants. They treated it as an admission not that the land in dispute was Dag No. 39, but that Dag No. 39 had been released to the plaintiffs, and held that the appellant was changing his ground when he contended that there was no sufficient evidence that those lands had been released. They no doubt found that although the lands had not been released by the Commissioner's order of the 27th February 1847, they had been released by the order of the Deputy Collector of the 7th February 1848. But acting very much on the notion that the defendant was shifting his ground, and departing from an admission by which he was bound, they do not seem then to have given much consideration to the question, whether the order of the Deputy Collector was such an effectual release of the land as would confer a title on the plaintiffs.

There was then an application for a review, and further documentary evidence, including the report of Mr. Latour, was filed. The review was granted, and the Court upon the hearing of the cause on review adhered to their former judgment ; and in a very short judgment said, "After hearing the petitioner, we are satisfied that, as a matter of fact, Dag 39, being the 2,092 beegahs in dispute, was released to the petitioner by Mr. Deputy Collector Johnson, and that the subsequent report, relied on by the petitioner, while impugning the propriety of that proceeding, by no means shows that it was reversed. On the contrary, the report goes entirely to show that the petitioner had succeeded in obtaining release and possession of the disputed land. We therefore reject this application."

There was then an application for a second review, and that was refused.

The result, therefore, of the decrees, or rather of what took place upon the remand, was to reduce the case to a very narrow compass, namely, to the question whether the proceedings of Mr. Johnson did operate as such an effectual release of the land to the plaintiffs as to constitute in them a title which ought to prevail against the possession of the defendants.

Accepting that as the issue which ultimately became the material issue in the cause, their Lordships have now to consider what is the effect which ought to be given to those proceedings. It would seem that contemporaneously with the proceedings before Mr. Fletcher, which ended on the 20th December 1846, the settlement of the whole Chur Bhudrasun was proceeding under Mr. Deputy Collector Johnson, and the earliest document we have relating to that is the survey chittah which is set out at page 274, dated 2nd December 1846. The second column of that document states the names of the parties in possession of the different dags. The whole chur is divided into the dags which appear upon the larger map, and the survey paper begins by giving the holdings of Nundo Coomar Roy, and sums them up as containing 1,675 beegahs 19 cottahs.

It then goes through the other proprietors, and it gives Dag No. 38 as in the possession of Mohurum Khatoon, that is, of those whom the defendants represent. Then comes Dag No. 39, which is described as "parcel on the east side" (that is of Dag 38, "north of the following river, south of Nund Coomar, with water." In the column of the persons in possession there is nothing but two dots ; and their Lordships are of opinion that it would not be a fair construction, considering that "ditto" is put in many other places when the column goes on continuously with

the same possessors to treat those dots as implying that Mohurrun Khatoon are treated as in possession of Dag 39.

On the other hand, it is clear that from those dots it would be impossible to infer that the possession of Dag 39 was then recognized as being in the plaintiffs; and the fair conclusion which their Lordships would draw from the document is that the dag was therein treated as an accretion still belonging to Government, of which no person was certainly in occupation, and in respect of which no settlement had been made.

Then, at page 42, there are two extracts apparently from that measurement chittah to which I have just referred. No. 122, "copy of chittah dated the 2nd December 1846," contains a description of Dag No. 39, which corresponds almost entirely with that in the larger chittah. The one at the top of the page having given 2,092 beegahs 15 cottahs as the dimensions of Dag No. 39, and treated it as unfit for cultivation, has written on its back the words "Nundo Coomar Roy." Again, at page 41, we find a paper headed "particulars and amount of jummabundee settlement of Khas Mehal:" and in the column containing the names of the parties in possession, Nundo Coomar Roy is put down as in possession of 1,675 beegahs 19 cottahs; and then these words follow, "Parcel 39 chur, not fully formed, on aggregate jumma 2,022 beegahs 15 cottahs," with a jumma or rental of Rs. 30. We have no precise account how that jummabundee, which is not dated, but which is said to be for the year 1846, was made. If genuine, it must have been prepared after the last survey chittah, in which this land was treated as not being in any person's possession or subject to any settlement, was made, and therefore between the 2nd and the 31st day of the month of December 1846.

The next document is the Sheristadar's report, which is dated 15th February 1848; and appears to have been made with reference to a proceeding before the Deputy Collector which took place upon a petition or objection of the defendants' party. It is very difficult to see why it was brought into a proceeding to which the plaintiffs were not parties. But the document is in these words, "Before this, in accordance with the order of the Commissioner, from Chur Bhudrasun Talimabad land was released to Nundo Coomar Roy by raising mounds as directed in Act IV. Order has been passed to put a stop to the realization of rent on account of the same." That seems to refer to the land to the north of the nullah. Then it goes on, "Incarnation of Justice, 2,092 beegahs 15 cottahs of land of the new chur, in the possession of the aforesaid Roy, have been measured, and a total rent of Rs. 30 being calculated, has been included in the jummabundee. Whether that rent is to be struck off or demanded? What is to be done? Incarnation of Justice, is the Master. For Incarnation I represent this."

Then two days afterwards the Deputy Collector, Mr. Johnson, made an order on the objection of the party who then represented the defendants, and that is the order which is now supposed to be the principal foundation, if not the sole foundation, of the plaintiffs' title. The first paragraph of that (at page 253) deals with the objection of the petitioner, which seems to have included or to have related to all the lands that were the subject of the suit before Mr. Fletcher, which was struck off. If, therefore, their Lordships are right in supposing that that suit included the land in question, the objection would relate to the land in question. It would seem that the Deputy Collector did not so understand it; but, however that may be, he dealt with it in this way: he said, "The above-mentioned petitioner filed a petition to the effect that for these lands which have accreted to his released lands he had instituted a suit in my Court, and that that suit has been struck off in consequence of a letter despatched by Government, and that the lands found by Kisto Mongul Goocho, the Ameen appointed in that case, to be in his possession, and who drew a map accordingly, were the released lands belonging to his zemindary. That petition being rejected by me (we have not, I

think, the order rejecting it), the petitioner preferred an appeal to the Collectorate; but the learned Collector, on 17th November of the year 1847, recorded a proceeding to the effect that a suit, No. 106 under Reg. II, being instituted by Mohurrum Khatoon, wife of petitioner (Mahomed Jokee Chowdry) in that Court with respect to the disputed land, and he did not settle them since they were the lands of Mouzahs Bishnopore," &c. That order we have; and that no doubt reversed the order of the Deputy Collector. Then he says, "The order to refund the collections reached my Court on the 1st February last." There he leaves the claim of the defendants; the effect of his order being afterwards to release whatever he had claimed in respect of those lands. Then he says, "The Sheristadar of this Court measured 2,092 beegahs 15 cottahs of Nundo Coomar Roy's land among the newly reformed churs in the last year; for which a settlement was made on a total fixed revenue of Co.'s Rs. 30, and it was included in the jumma-bundee. A report had been sent by him for an order, whether that revenue should be collected or not. Whereas it is my duty to obey the roobakarree and the circular made by the Board of Revenue, on account of which the lands were released from the claims of Reg. II, and to fix the boundaries of these lands which are held by Nundo Coomar Roy, after releasing them from the claim of that jumma, and it being requisite to prepare papers for ascertaining what amount of jumma is deducted on account of the released lands, and how much land is left to Government: Ordered, that in accordance with this proceeding of the Deputy Collector, lands of the aforesaid persons be released, after striking off Reg. II case, and the revenue be remitted."

There has been some contest as to what was the effect of that, whether it might not be a release to the defendants rather than to the plaintiffs; but their Lordships upon the whole, and particularly on looking to the next proceeding, have come to the conclusion that what the Deputy Collector meant to do was to release whatever might be claimed in respect of lands held by the defendants, without determining what those lands were; and that he also intended to treat the lands in dispute as being in the possession of Nundo Coomar Roy; and (though it seems an extraordinary thing to do this by an order made upon a petition of another party) to release the revenue assessed upon them to Nundo Coomar Roy.

This next proceeding is his general report concerning the settlement of the whole Chur Bhudrasun Talimabad. Their Lordships without going through that lengthy document, desire to state that, in their opinion, its general effect as to the matter in dispute was to carry out the intention of the order of the 17th February by treating the Rs. 30 as revenue assessed, but to be remitted, and to be remitted to Nundo Coomar Roy; and that it is impossible to suppose that that was not Mr. Johnson's intention.

This report, however, is obviously and on the face of it a mere recommendation, for the final sentence of it is this: "That this proceeding, with a statement praying for his approval of the settlement, and all the papers, after a comparison thereof with the list be submitted accordingly," that is, to the Collector of the district for his approval. It accordingly then went before Mr. Latour, the Collector, and we have his order of the 16th September 1848. He therein states that the proceeding related to the settlement of Chur Bhudrasun Talimabad; and that the papers had come up to him; and then he takes objections to that proposed settlement. He says, "It is not unknown that he (the Deputy Collector) has unjustly released some lands on the south side of the said mehal to Nundo Coomar Roy and Mohurrum Khatoon, and some lands on the north side to Ramruttun Bose," &c. He also says, with respect to the land immediately in question, "The 2,092 beegahs 15 cottahs of land in the possession of Nundo Coomar Roy ought to be reversed, and these lands ought to be included within the settlement of the lands decreed to Government." And his final order is, "That having included the whole of the particulars of the said mehal in an English report, the papers of the

settlement be forwarded to the Revenue Commissioner for confirmation of the settlement for three years," and notice is to be served upon a party named.

The effect of that order was, as far as it goes, to express the dissent of the superior officer, the Collector, from the recommendation that the 2,092 beegahs 15 cottahs should be treated as released to the plaintiffs; but no doubt it does that, not as dealing with any question of title between the plaintiffs and the defendants, but in assertion of what that officer considered to be the rights of the Government, and the result of his proceeding was to send the whole of the proceedings to a higher authority for further consideration."

With them Mr. Latour sent the elaborate report which was produced for the first time before the High Court upon the review, and is at page 297. In paragraphs 16 and 17 of that paper he treats the plaintiffs as having got a great deal more from Government than they ought to have got: and, after going through other matters, he says that Nundo Coomar Roy has obtained a relinquishment of 2,092 beegahs 15 cottahs fresh formation, and in the margin refers to Mr. Johnson's order, adding the words "overruled, however, by me," clearly treating that as a thing that had not been finally determined. Then, in the 73rd paragraph, he says, "On reference to the map it will be shown that one portion of that new formation 2,092 beegahs 15 cottahs has formed opposite the lands released to Nundo Coomar, and on a representation of Mr. Johnson's Sheristadar, couched in the language rather of an *advocate* for Nundo Coomar than that of a Government servant, these lands, on which an aggregate jumma of Rs. 30 had been imposed, have been released to Nundo Coomar. If the Sheristadar had any legitimate doubts, he could have asked Mr. Johnson orally what orders were necessary."

It is not necessary that their Lordships should express any opinion about the Sheristadar's conduct. It is not clear how the jumma bundee came to show that these lands were in Nundo Coomar's possession; but if that jumma bundee were regularly drawn up, it would not be unnatural for the Sheristadar to address an enquiry concerning the realization of the revenue to his superior.

The final recommendation of Mr. Latour was that the case of Nundo Coomar should be revised and considered. Therefore he clearly was so far from treating by that report the land as finally released to the plaintiffs that he considered it ought to be made matter for subsequent investigation, and that the rights of the parties in it ought to be ascertained.

Now, it is a singular thing that the Revenue officers should have been, as undoubtedly they seem to have been, ignorant of the fact that while these latter proceedings were going on, the Act IV suit had been decided, and that Nundo Coomar had lost, if he ever had, the possession of the land in question. That circumstance may, however, account for the absence of any evidence in this record that action was afterwards taken with respect to Nundo Coomar's holding pursuant to the recommendation of Mr. Latour. And this view of the case seems to their Lordships to be in a considerable degree confirmed by what afterwards took place between the Government and the defendants in the course of the settlement proceedings of 1851 and 1856. It appears upon the face of those proceedings that they were taken in pursuance of Mr. Latour's suggestion, that further investigation of the rights of the Government as against the parties in possession was necessary.

The first of those proceedings, which is at page 192, does not mention expressly the particular Act IV case, which treated the defendants as in possession of these lands. It refers to another Act IV case, which they seem to have had with a person named Hur Coomar Thacoor; but at page 193, line 29, there is this passage, "The said fact was reported to the Commissioner by the former Deputy Collector, Mr. Edward Latour, in his letter No. 269 of the 25th September 1848, in connection with the settlement report, whereupon a fresh investigation was ordered;" and that, it appears, was the investigation which was then taking

place. The previous paragraph refers again to the land measured by Kristo Mungul Goocho, and to the resumption suit before Mr. Fletcher which was struck off.

On this first proceeding, Mr. Reid, the Deputy Collector, seems to have thought that the Government might be entitled to revenue; but he says, at line 65, "As he (the Chowdry) has been in possession of the said lands under the orders contained in the decision in the suit struck off (that is, the suit before Mr. Fletcher), and in the Act IV case, the said lands cannot be at once resumed or settled; therefore I maintain it necessary to draw up a report in English on the matter as directed by the Commissioner in his letter No. 41 of 6th March 1849." Then he orders, "That for the time being the petitioner be retained in possession of all the new formations in the manner he has been holding them; that all particulars connected with the matter at issue be embodied in an English letter, and sent to the Commissioner for the proper orders," and so forth.

It is clear upon the admitted facts of the case that at that time, in 1851, the defendants were in possession of the land in question, and therefore it seems clear that what Mr. Reid intended his order to operate upon was the whole of that new chur including the Dag No. 39, and that that was the subject of the investigation.

This is made even more clear by the final and longer proceeding at page 200, where there is a distinct reference to the Act IV case, in which Ismail was one of the plaintiffs; and the nature of the investigation is clearly stated at page 202, line 10: "By the papers it appears that this case, having been instituted in accordance with the tenor of the letter No. 120½, of the Revenue Commissioner, dated the 2nd July 1851, has been in abeyance up to this time on account of the investigations, &c., not having been completed;" and the final order is, "That the objections of the claimants being rejected, the quantity of 27,459 15 1½ dhooors of land, measured by Gooroodass Sen, Amlah, as new accretions adjoining the petitioner's Wagoojustee, be released to the petitioner free from the Government claim, and that the record be kept among the decided cases." It is to be remarked that though other claimants had come in to dispute the defendant's right to a settlement, the plaintiffs had failed to do so.

Reviewing the whole of these proceedings, their Lordships have come to the conclusion that Mr. Johnson's proceedings gave only what may be called at most an inchoate title to the plaintiffs; that that title was never confirmed; on the contrary, that the propriety of giving that title was disputed at the earliest opportunity by Mr. Latour; that in the meantime the parties themselves came into conflict; that the possession of the lands was awarded to the defendants; that Mr. Johnson's proceedings were never followed up by any further investigation as regarded the plaintiffs, because in fact they had ceased to be (if they ever were) in possession; and that, although the Government officers still asserted for a time a right to assess revenue on this land, they ultimately determined that it should be held free from assessment, and made a final settlement to that effect with the defendants.

If their Lordships had been sitting as a Court of first instance, they would have deemed it impossible upon such proof of title as the plaintiffs have given to disturb an admitted possession of upwards of ten years, and though they feel the force of the objections urged by Mr. Bell, and the difficulty of setting their judgment against that of Indian Judges who have had so much more experience of these revenue proceedings, they are unable to find in the judgments of the High Court any grounds upon which they think that the decree in favor of the plaintiffs can be supported.

It seems to their Lordships that the learned Judges having originally treated the title of the plaintiffs as depending upon a release by the Commissioner, and finding that that release was not made out, fell back upon the proceedings of the

Deputy Collector, Mr. Johnson; and that they have not given sufficient consideration to the nature of the proceedings of that subordinate officer, and the manner in which they were dealt with by his official superiors. Upon the whole case, therefore, their Lordships have come to the conclusion that the plaintiffs have failed to prove either title or possession which can entitle them to disturb the long possession of the defendants; and that this appeal ought to be allowed. The recommendation, therefore, to Her Majesty will be that the appeal be allowed; that the two last decisions of the High Court be reversed; and that the appeal to the High Court against the second decision of the Principal Sudder Ameen be dismissed, and his decree dismissing the suit be affirmed.

The defendants, of course, will be entitled to their costs in the Indian Courts, and the appellant to his costs in this Court as against the respondents.

The 11th May 1872.

Present:

The Lord Chancellor, Lord Westbury, Sir James W. Colvile, Sir John Stuart, Sir Montague Smith, and Sir Lawrence Peel.

Resumption (of Jaidad Tenure)—Seizure of arms and stores—Act of State—Legal right—Status of Begum Sumroo.

On Appeal from the Chief Court of the Punjab.

Forester and others

versus

The Secretary of State for India.

As to Badshapore, the Privy Council, upon the fair construction of the treaty or agreement made by the British Government in August 1805 with the Begum Sumroo, that the Begum was for her life to hold her territories in the Doab from the East India Company as she had held them under Scindia, and that as she was not a Sovereign princess but a mere Jaidadar (*i.e.* a Jaghiredar under obligation to keep up a body of troops to be employed, when called upon, in the service of the Sovereign) under Scindia, she was to remain such under the Company; that the resumption of those lands by the British Government, upon the death of the Begum and the determination of the Jaidad tenure, was not an act of State but an act done under a legal title; that the direct evidence in favor of the sunnuds under which the representatives of the Begum set up a title to a hereditary and transmissible *lakheraj* or rent-free estate was not sufficient to rebut the presumption arising from the non-production of the original sunnud and the failure to account for it, as well as the still stronger presumption arising from the acts, representations, and conduct of the Begum in her lifetime. As to the Arms suit, the Privy Council also held that the seizure of arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the Jaidad upon the Begum's death.

In this suit the representatives of the late Mr. Dyce Sombre claim to recover from the Government of India possession of a valuable estate called Pergunnah Badshapore Jharsa, with mesne profits since August 1836. They do not claim merely a zenindary interest in the lands. They claim to hold them rent-free; that is, free from assessment to Government revenue. And the total value of the claim is assessed in round numbers at a sum little short of a quarter of a million sterling.

The defence to this suit, on the part of the Government of India, is twofold. It is alleged, first, that, on the death of the Begum Sumroo in 1836, the estate, whatever were the nature and extent of her interest therein, was resumed by an act of Government which, having regard to the *status* of the Begum as an independent, or quasi-independent sovereign, was an act of State, the propriety and validity whereof are not cognizable by any municipal court. And in support

of this proposition they rely on the case of the Rajah of Tanjore, reported in 7th Moore, 476,* and similar authorities. It is further alleged that, if the case is cognizable by the municipal courts, the appellants have failed to establish by trustworthy evidence the title to this estate on a rent-free tenure (capable of passing Mr. Dyce Sombre by the deed of gift, or subsequent will of the Begum Sumroo).

In order to test the sufficiency of the first defence, it is necessary to come to a clear conclusion touching the *status* of the Begum Sumroo both before and after the acquisition by the East India Company of the Doab and the territories on the west of the Jumna, comprised in the treaty of peace concluded with Dowlut Rao Scindia, on the 30th December 1803.

It will be convenient to consider the question with reference to the Begum's possessions at Sirdhana and elsewhere within the Doab; because the negotiations and correspondence with her were, up to the time of the final agreement or treaty with her in 1805, confined to those possessions; no mention being made therein of Badshapore, which is on the western side of the Jumna; and because the acts and powers of the Government in the resumption of Badshapore cannot be put upon higher ground than their acts and powers in the resumption of Sirdhana.

The *status* of the Begum, in respect of her Doab possessions before 1803, is admitted to have been that of a Jaghiredar, holding upon a Jaidad tenure, *i.e.*, upon a grant of a certain district together with the public revenues of it, on the condition of keeping up a body of troops, to be employed when called upon in the service of the sovereign of whom the Jaghire was held. The *de facto* Sovereign of the Doab at this time was Dowlut Rao Scindia. There is nothing in the record to show what powers over the inhabitants of the district included in such a Jaghire were, as incident to the tenure, vested in the Jaghiredar. But it cannot be doubted that, practically, the whole administration of the territory included in her Jaghire, whether civil or criminal, was vested in the Begum, who exercised a sort of delegated sovereignty therein.

This being the condition of the Begum in the early part of 1803, Lord Wellesley, in pursuance of the policy by which he succeeded in detaching certain French adventurers from the service of Scindia, appears to have entered into negotiations with her before the actual commencement of hostilities with the Mahratta prince. War, though previously certain, was not declared until August 1803, and Lord Lake's force broke up from Cawnpore on the 7th of that month. But the earliest letter from Lord Wellesley to the Begum that is set forth in the Record (p. 37) is dated the 20th May; that letter shows that a previous correspondence had taken place between them, having for its object the diversion of the Begum and her battalions from the service of Scindia to that of the English. The negotiation so begun was continued throughout the war. Though this negotiation may not have prevented such of the Begum's troops as were actually with Scindia under her Lieutenant-Colonel Saleur, from fighting against us at the battle of Assaye, yet it kept her friendly to us in her own district. Nor can it be doubted that, at the time when peace was concluded, and by the treaty of the 30th December 1803, the sovereignty over the Doab and the territories west of the Jumna, in which Badshapore is situate, passed from Scindia to the East India Company; the Governor-General had fully determined that the future relations of the Begum and the Company, though not as yet precisely defined, were to be friendly, and that our rights of conquest were not to be exercised to her prejudice. This appears from Lord Wellesley's letter to Lord Lake, of the 23rd December 1803 (Appendix, page 60), which admits that the Government could not in fairness establish British authority, or introduce British law into the territory composing the Begum's Doab Jaghire; and the nature of the equivalent

proposed, in the event of her agreeing to exchange those possessions, is also a circumstance which has some bearing upon the present question. It appears for some time to have been in Lord Wellesley's contemplation to make the Jumna the western boundary of the purely British territory, and to form the territories conquered from Scindia on the western bank of that river into independent and protected principalities. And it being then considered desirable to remove the Begum out of the Doab, it was proposed to give her one of these principalities, reconciling her to the inconveniences of the exchange by the accession of dignity implied in treating her as a *sovereign* under the protection of the British Government. This seems to be the fair construction of Lord Lake's letter of the 23rd November 1803 to the Governor-General, and of all that was done upon it. This negotiation was continued (see Letters, p. 61) after the ratification of the treaty of 30th December 1803, and when the sovereignty of the East India Company in the territories ceded by that treaty had become complete. The project, however, was ultimately abandoned by Lord Cornwallis; and the final treaty or agreement with the Begum was made in August 1805. (Appendix, p. 41, No. 42.) The substance of that agreement is that, "Those places in the Doab which have formed the Jaidads of Zeboolnissa Begum shall remain to her (as before) from the Company as long as she may live." What follows may either be the expression of conditions *quæ tacite insunt* in a Jaidad tenure, or conditions superadded thereto.

But the fair construction of the instrument and of the correspondence which led up to it seems to be that the Begum was for her life to hold her territories in the Doab from the Company as she had held them under Scindia; and that, as she was not a sovereign princess, but a mere Jaidadar under Scindia, she was to remain such under the Company, the project of conferring upon her the new dignity of a sovereign princess having been only part of the larger project for an exchange of territory, and abandoned with it. Up to this time there is little, if any, express mention of Badshapore. It is, however, admitted on both sides that the Begum was *de facto* in possession of it when the cession of 1803 took place, and that she continued during her life to hold it, and to exercise therein the same powers of government and administration which she exercised at Sirdhana.

This view of the *status* of the Begum is confirmed by the 9th paragraph of Lord Metcalfe's letter of the 4th May 1836 (see Record in Arms Suit, p. 66). The authority upon such a subject of a man of his experience and character is of the highest value. This being so, the present case is distinguishable from that of Kamachee Boye Saheba in the 7th Moore I. A.* There the Rajah of Tonjore, though he may have had less substantial power than that exercised by the Begum Sumroo, retained at least the shadow of original and independent sovereignty. Lord Kingsdown thus puts the question:—"What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain on the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of municipal law? or was it, in whole or in part, a possession taken by the Crown under color of legal title of the property of the late Rajah of Tanjore in trust for those who, by law, might be entitled to it on the death of the late possessor. If it were the latter, the defence set up has no foundation." The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under color of a legal title, that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue, all lands within its territories upon the determination of the

* 4 W. R. P. C. 42; 1 Suth. P. C. R. 373.

tenure under which they may have been exceptionally held rent free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *prima facie* be cognizable by the municipal courts of India.

The particular case was, no doubt, somewhat complicated by the peculiar nature of the power exercised by the Begum in her Jaghires, and the practical exclusion of her territories during her lifetime from the operation of British law and the jurisdiction of Courts.

Their Lordships think that the regulations, which were the written law of that part of British India, and whatever else may be held to constitute British law, were not introduced into these territories by Reg. VIII of 1805, or until after the passing of Act XVII of 1836. The Begum's territories were treated as excepted from the conquered territories; and although the sovereign rights of Scindia over these territories passed under the treaty of 1803, they passed subject to the rights of the Begum, the precise definition whereof was then the subject of the negotiations which resulted in the agreement of 1805. Accordingly, on the Begum's death, it was thought necessary to pass an Act of the Legislature in order to legalize the introduction of regulation law into these territories by order of the Governor-General. That this was done by legislation, and not by proclamation, affords, perhaps, another argument against treating the annexation of these territories as an act of conquest or arbitrary power, or as the exercise of an original right of conquest which had remained in suspense during the Begum's lifetime. It is probable, however, that the abnormal condition of these territories was one reason why the resumption took place, not as it would have taken place in a province or district wherein the action of Government is fettered by the regulations, by a resumption suit, but in what is called the political department; and thus both parties seem, for some time at least, to have considered that the act was in the nature of an act of State. For it is to be observed that Mr. Dyce Sombre himself asserted his supposed rights by memorials and appeals to one political authority after another, beginning with the Lieutenant-Governor of the North-West Provinces and ending with the Prime Minister; and that it was not until after his lunacy and the order of Lord Chancellor Lyndhurst in that matter, that any recourse to the municipal Courts was had, or apparently even contemplated. These considerations, however, though they may explain much of what appears from the record to have taken place, cannot affect the determination of the question under consideration. They cannot alter the legal nature of the acts of Government, or make the resumption, under the assertion of a legal title, of lands claimed adversely by a subject, an arbitrary act of sovereign power against an independent State. And even if the state of the law in the territories in question at the time when the act of resumption took place gave—as perhaps it did—a larger power of resumption to the East India Company than it possessed in the regulation provinces, that circumstance would not exclude the jurisdiction of the Courts. For these reasons their Lordships are of opinion that the first ground of defence, being that on which the Courts below have mainly proceeded, fails. This being so, it is next to be considered whether the appellants have established their title to Badshapore Jharsa as held in perpetuity by a rent-free tenure; in other words, whether they have proved a grant by the sovereign power of the rent of the lands, which rent would otherwise be payable to the State.

The original suit having been brought in 1848, to recover the estate from the East India Company which had been in possession since 1836, the burden of proving a title sufficient to disturb that possession necessarily lies upon the appellants. This, however, would not have been otherwise had the commencement of the litigation been in 1836, and by proceedings in an ordinary resumption suit. For the regulations touching such suits cast upon the person who claims to

hold land lakheraj, or free from assessment to Government revenue, the burden of establishing a title recognized by law as sufficient to give that exceptional immunity, and require very stringent proof in such cases.

Reg. II of 1819, which the appellants in their original pleading at page 8 invoke as one of those by which the claims of Mr. Dyce Sombre ought to have been determined in 1836, by its 28th section provides, that an ancient sunnud shall not be treated as sufficient proof of its contents on the faith of its seal, or without confirmatory evidence. And s. 3 Reg. XIV of 1825 also shows the high degree of proof required. Nor are such provisions unreasonable, since every grant of this kind implies a perpetual alienation in favor of some individual, and his heirs, of a portion of the land revenue (the impost, if impost it is to be called, which immemorial custom has made the most natural and tolerable to the natives of India), and thus operates not only in derogation of the rights of future Governments, but the injury of the subject on whom the incidence of taxation for the necessary purposes of Government will be the heavier, in proportion as the public revenue is wasted by such alienations.

It is of the utmost importance in a case like the present to observe in what manner and upon what proofs the case of any claimant is first advanced. In the plaint filed in August 1848 by the committee of Mr. Dyce Sombre, it is stated generally and without condescending on the name of the grantee, that the Altumgha Jaghire Badshapore Jharsa was originally granted by the Empéror Shah Allum, and subsequently confirmed by Madho Rao Scindia. But in the substituted plaint, which was filed in January 1864 by the appellants, and must be taken to be the foundation of the existing suit, the statement is more specific. It is this:—"The Pergunnah of Jharsa, inclusive of Badshapore, was granted as an Altumgha Jaghire to the Begum Sombre (or Sumroo) by his late Majesty Shah Allum, in the 30th year of the ascension, and this grant according to sunnud, dated the 2nd Zuffer, the 37th year of the ascension, was confirmed by the Maharajah Madho Rao Scindia." And the 4th, 5th, and 6th of the issues settled in the cause upon which the parties went to trial were, whether the Pergunnah of Badshapore Jharsa was granted by the Shah Allum to the Begum Sumroo, as mentioned in the plaint? Whether, if it were so granted, Shah Allum, at the time of such grant, possessed and exercised supreme power within the territory in which the lands were situated? And whether, if the same were granted, the grant was confirmed by Madho Rao Scindia, as the plaint mentioned?

It will be convenient here to state the history and character of the alleged grant from Shah Allum as disclosed by the documents upon which the appellants mainly rely, viz., the papers procured from Delhi.

The case which the Counsel for the appellant make on these documents is, 1st, that in the month of Shawul in the thirtieth year of Shah Allum, the Begum presented a petition, praying that a new and complete Altumgha sunnud of Pergunnah Jharsa might be granted to her in substitution for one previously granted to Zuffur Yaub Khan, the son of Sombre or Sumroo; 2ndly, that a report was made, recapitulating the prior devolution of the estate, showing that it had been held by certain great officers of the court of Delhi in succession, as part of their respective Jaghires, that it had for some time "continued released" as Jaidad of the battalion of Sumroo Bahadoor Feringee; and on the 15th of Rujub of that year (with the exception of certain villages) had been granted in Altumgha to Zuffur Yaub Khan on a representation that an Altumgha sunnud under the seal of Maharajah Puttail (said in one part of the record to be a title of Scindia) had been lost; 3rdly, that on this report and on the 19th of Shawul the king issued a firman to the effect that an Altumgha grant of Badshapore Jharsa, with the exception of the villages excepted from the grant to Zuffur Yaub Khan, should be made to the Begum in the terms therein expressed; 4thly, that whether the formal grant sunnud was or was not issued to her in pursuance of that firman,

she, two months afterwards, presented another petition, in which she made no reference to the preceding grant to Zuffur Yaub Khan, but stated that all the estate, including the excepted villages, had, since the death of Sumroo, been in her possession as Jaidad; and that in consequence of that petition a sunnud of the whole estate, including the villages before excepted, was granted to her in Altumgha under the Khas seal and Golden Togra of the Emperor on the 9th Zilhij in the thirtieth year of his reign.

If these facts are true, it follows that until the month of Shawul, or that of Zilhij, in the thirtieth year of Shah Allum, whatever interest the Begum had in Badshapore was in the nature of a Jaidad tenure; that Zuffer Yaub Khan never had an Altumgha grant of that estate under a sunnud of the Emperor except for a period of, at most, three months, and that, so far as appears, he was never in possession under that grant.

The original documents, of which the foregoing is the effect, were not produced, and the copies or alleged copies produced in evidence are admitted to have had no existence before 1847. They are said to have been copied from old records at Delhi at the instance of the Committee of Mr. Dyce Sombre, or his legal advisers, with a view to the proceedings commenced in the following year. If the transactions which they represent to have taken place really took place, an original sunnud, in the terms of what in the record at page 32 is called "sunnud No. 3," must have been issued to the Begum Sumroo under the seal of Shah Allum. But of this original sunnud there is no trace. It is not produced; its loss is not accounted for. There is no evidence that anybody ever saw it.

It has been strongly argued for the Government that the non-production of the original not being accounted for, secondary evidence of its contents is not admissible. Their Lordships are by no means prepared to say that an Indian Judge would not do right, according to the practice of the Courts of that country, in rejecting a copy if the absence of the original were not satisfactorily accounted for. There seems to be no reason for assuming that a rule requiring the best evidence producible to be produced, has no application to Courts of which the Judges may be presumed to be, for want of professional training, less capable than they are elsewhere of weighing the effect of evidence. This Committee undoubtedly enforced the rule in the case of Syud Abbas Ali Khan, 3 Moore's I. A., p. 156. There have, however, been other cases in which their Lordships have declined to apply to Indian cases the strict rules of evidence which obtain in this country on trials *at nisi prius*. And, considering that in this case the Judge of first instance has commented on the copies in question, their Lordships propose to treat them as admitted in point of fact, and to consider what credit and effect ought to be given to them. Nevertheless, in weighing the whole evidence given in support of the appellant's title, the absence of proof that the original sunnud once existed, and was subsequently lost or destroyed, is a very grave circumstance, which cannot be excluded from consideration.

The case as to the copies of the sunnud, put forward by the learned Counsel for the appellant, is that they are proved to be copies taken from ancient documents at Delhi, since destroyed in the mutiny, which, whilst they existed, were public records, and of the same value as a duplicate original of the missing sunnuds.

But what is the evidence to these papers? The proof of the most important of them, that called sunnud No. 3, depends on the testimony of the witness Balmokund, given in 1865, and set forth as p. 54 of this record. He has deposed that, in 1847, he was ordered by the then peshkar of the King of Delhi to make the copy in question from an old paper which the latter took out of a cloth. The words of the witness are, "It was out of a dozen or so of the papers of the former times which had 'escaped,' and had been tied up by them in his 'busta,' or record cloth." He goes on to say, "There had been countless papers in the

charge of his (the peshkar's) forefathers ; many of them had doubtless been destroyed by insects, or perished in other ways. By 'escaped,' I mean those old papers or records which had come down from his forefathers into his actual possession." In answer to the enquiry what had become of the paper from which he made the copy, he said, "The peshkar died in 1850, and all trace of his documents has disappeared;" and added, that the different servants of the king had each in their possession a few pounds' weight of documents that had been handed down from father to son, besides those relating to their own time. He had previously said when asked whether he lived in the peshkar's house, "No ; I went there for business ; after the taking of Delhi by the British " (which words as the peshkar died in 1850, must be taken to refer to the original introduction of British authority in Delhi, rather than to the taking of the city in 1857), "the 'duftur' (registry office) of the king hardly existed."

Hence it appears that the paper from which the copy is said to have been made was anything but a record regularly kept and preserved, which afterwards perished in the storming of Delhi, if full credit be given to the witness and to his means of knowledge. It came to the peshkar with a few pounds' weight of other documents, was accidentally preserved when many others perished, and disappeared with him. Their Lordships cannot treat such a paper as having the validity of an authentic record, the value of which depends on its custody in an authorized registry by a responsible officer. The evidence of Chujoo Singh, as to the other and less important paper (No. 4), is of the same character.

An attempt was made to cast further suspicion on these copies and the transactions which they are produced to prove by the dates. It is contended on the part of the respondents that the months of Shawul and Zilhij of the 30th year of Shah Allum, fall within the autumn of 1788, when he was a helpless prisoner in the hands of Gholam Khadir, the Rohilla, who put out his eyes. On the other hand, the appellants assert that the date in question corresponds with the autumn of 1789. There is much that may be urged to support the respondents' contention. It seems to be certain that Shah Allum's reign, notwithstanding a short interregnum, was calculated from the death of his father Alamgir II, which Mr. Elphinstone and the best historians fix in November 1759, corresponding with Rabi II, A. H. 1173. It follows that the "jalus" or accession of Shah Allum is correctly fixed by Mr. Prinsep in his tables as 1 Jumadi I, A. H. 1173 ; and if the 30th year of that Prince's reign is to be calculated in the ordinary way from that date, it would begin on the 1 Jumadi I, A. H. 1202, and end with the 1 Jumadi I, A. H. 1203. The months of Shawul and Zilhij of the 30th year would then fall within 1203, and correspond with the autumn months of 1788. On the other hand, the appellants have referred to some coins and seals, from which it would appear that the 30th year of Shah Allum's reign was treated as identical with A. H. 1203 ; and from this and a passage in Mr. Seton's letter, afterwards referred to, they have argued that the dates in question must be taken to correspond with the autumn months of 1789. This view may, perhaps, be capable of being reconciled with the date of Shah Allum's accession by some peculiar mode of calculating the jalus year ; and their Lordships would be sorry to make their decision turn in any way upon a disputed point of Indian chronology. They may observe, however, that even if the dates in question are taken to fall within the year 1789, there is reason to doubt whether Shah Allum was at that time in a condition effectually to alienate any part of the revenues of the territories within which Badshapore is situated—at least without the concurrence of Scindia ; and that there is no suggestion that the alleged grant received the sanction of the Mahratta power until 1795.

Their Lordships, considering the nature of the documents under consideration, the testimony by which they are supported, have come to the conclusion that the appellants have not given evidence which can be accepted as sufficient proof of a

grant, of which the original is neither forthcoming nor accounted for, unless the presumption of its existence can be assisted by the other evidence in the cause.

The corroboration chiefly insisted upon was of this kind. It was argued that copies of certain sunnuds, showing his title to Badshapore, were proved to have been sent by Mr. Dyce Sombre in 1836 to the officers of Government; that these were not shown to have been returned by the Government, and have not been produced by them in this suit; that they must therefore be assumed to have been identical, or, at all events, not inconsistent with the documents subsequently procured from Delhi. It was further insisted that, inasmuch as Government did not question the genuineness of these sunnuds in 1836, they must be taken to have been then satisfied of their authenticity. This argument is confined to the copies of sunnuds supposed to have been sent by Mr. Dyce Sombre after the Begum's death. It is hardly pretended that the Government ever received from her any document of title except a copy of Scindia's perwannah. The sunnuds sent to Mr. Fraser, whatever they may have been, were returned by her messenger. Mr. Forsyth, on the other hand, argued strongly that Government was not shown to have received from Mr. Dyce Sombre copies of any documents corresponding with those now relied upon; or, indeed, the copy of any document of title except Scindia's perwannah. The evidence on the point is as follows:—Mr. Dyce Sombre, writing in the beginning of March 1836 to Mr. Hamilton, says: "I beg to say I have already forwarded to you the copies of the sunnuds by which her late highness held her Jaidad, and the pergunnah of Badshapore in Altumgha assigned to her by the former rulers of Hindoostan, being antecedent to the British sway of this adjoining district." These words would be grammatically accurate, if nothing relating to Badshapore but a copy of Scindia's perwannah, previously called by the Begum in her letter of 1832 a sunnud, had been sent. And Mr. Hamilton writing to Mr. Hutchinson (p. 116) says:—"I also annex a copy of the sunnud referring to Badshapore, having in the preceding sentence spoken of the sunnuds relating to Sirdhana." The argument that he would not have applied the word sunnud to the perwannah does not appear conclusive. Their Lordships can give no credit to the alleged copy of the letter set out at p. 29. It was hardly pressed by Sir Roundell Palmer in reply. But Mr. Hamilton's letters of the 20th May 1836 (p. 169), and of December 1836 (p. 121), have been strongly relied upon by the appellants. They were written by him as Collector of Meerut, with the object of having applied to the back rents of Sirdhana, which was within his jurisdiction, a more stringent rule than that which his superiors were disposed to apply either to Sirdhana or to Badshapore (with which he had no official connection). He draws a distinction between the two tenures; treating Sirdhana as Jaidad, and Badshapore, whether resumable or not, as the Begum's personal Jaghire. That this was the nature of the Begum's claim would perhaps appear from the copy of Scindia's perwannah; but it must be admitted that these letters are, on the whole, more consistent with the appellants' than with the respondents' theory, concerning the number and nature of the documents sent by Mr. Dyce Sombre.

One great and unexplained difficulty, however, touching the copies of sunnuds supposed to have been sent by Mr. Dyce Sombre is this:—From what were these copies made? If from originals, where are the originals? If from other copies (and it was admitted at the Bar that he must be presumed to have retained copies of whatever he sent), what became of those copies? Mr. Dyce Sombre was in correspondence with the home authorities touching his claim up to 1842 (p. 4). He was presumably then in possession of all the documentary proof he ever had of his title. He was found a lunatic on the 30th July 1843, and Mr. Larkins was appointed his committee in 1844. There was a faint suggestion at the Bar that his documents of title were lost or destroyed during his lunacy. But there is not the slightest proof of this; and the non-production of any such documents in the

suit affords grounds for supposing that neither Mr. Dyce Sombre between 1836 and 1842, nor Mr. Larkins, when he took the advice of Counsel in 1847, had any copies of the alleged sunnuds from Shah Allum ; and, if so, it seems difficult to fix the Government with clear notice in 1836 of the previous title now sought to be established by the copies procured from Delhi in 1847.

Their Lordships are of opinion that even if the Government were fixed with the notice of the claim of such title, it is not to be inferred that, because they did not then dispute, they admitted its genuineness. It is clear from all the proceedings that they did not profess to investigate the title. Their position throughout was that the tenure was, either in its nature or by arrangement, resumable on the Begum's death, and they resumed it when that event happened.

The appellant's case, however, presents still graver difficulties. When a doubtful title is in dispute the first question that suggests itself is—When was it first asserted? and has it been continuously and consistently asserted? In the present case it is clear that this particular title was never asserted by the Begum in her lifetime, but that, on the contrary, she repeatedly asserted a different one, and acted in a manner wholly inconsistent with the presumption of its having existed. The following is the short summary of the correspondence of the Begum in her lifetime with the Government touching Badshapore.

The first mention of any special title to the pergunnah is to be found in the printed correspondence in Mr. Seton's letter of the 24th February 1808, when he complains of the attempt of the Begum on the 25th November 1807 to obtain from the King of Delhi a new firman, granting this pergunnah as an Enam Altumgha to Mr. George Dyce (the father of Mr. Dyce Sombre) and his descendants. Mr. Seton's statement as to the property is that it was bestowed as a Jaghire (which may be a mere estate for life) by Shah Allum in the thirtieth year of his reign, which he treats as corresponding to A.D. 1789, upon Zuffur Yaub Khan ; that the Begum had obtained possession of it in that person's lifetime, and retained such possession after his death ; and had now obtained a new firman bestowing pergunnah Jharsa and the town of Badshapore, formerly the Jaghire of Zuffur Yaub Khan, as an Altumgha upon Mr. George Dyce and his descendants.

The Government of the day objected to this proceeding ; insisted that Badshapore, like the Begum's possessions in the Doab, would revert to the East India Company on her death, and was obviously determined not to recognize as valid any grants of that nature which might be made at that date by the King of Delhi ; but recommended that, in deference to the king and to her, she should be induced by friendly negotiations to give up the new sunnud. The negotiations for this purpose went on till 1811, when the Begum did give up the new sunnud. But the important fact in this transaction is that the case she then put forward (see her letter of the 16th February 1811, p. 83) was the following:—"I had, as I still retain, a firm conviction in my own mind that the pergunnah of Badshapore, and the villages of Bhijapoor and Bhudpore, were held as Altumgha to my late son, and would consequently revert to my adopted son, George Alexander David Dyce, in virtue of his marriage with my granddaughter. On this subject doubts have arisen respecting the nature of the grant, which is not now to be found in the family records. I consequently cannot urge a positive right, but," &c.

This letter contains most important admissions, which are utterly fatal to the title set up in the amended plaint. It shows that at that time no grant could be found ; furthermore, it asserts "the firm conviction" in the Begum's mind that Badshapore was held as Altumgha to her late son, but that in consequence of doubts respecting the nature of the grant which could not be found in the family records, she could not urge "a positive right." Now, it is inconceivable that if she had obtained a grant to herself from Shah Allum, she should not, at this date (1811) have remembered it, and remembering it, should not have put it forward ; and if such a grant ever had existence, and could not then be found among her

family records, what reason can be suggested why she should not then have applied to the Registry of the King at Delhi for a copy of it?

In 1825, after an interval of fourteen years, she proposed to surrender the Jaghires held by her, including Badshapore, a proposal which was never carried into effect. She seems to have then made no statement of her title, but the representation of Colonel Dyce, with whom she was then on bad terms, was that the sunnud on which the Jaghire was held, whatever its effect, was in favor of Zuffur Yaub Khan. Had the Begum at that time been in possession of sunnuds in her own favor, superseding the grant to Zuffur Yaub Khan, she would hardly have failed to produce them.

In 1831 she first expressed a desire that her Jaghires should be assigned to Mr. Dyce Sombre, whom she designates as her adopted son and intended heir. In her letter to Government she speaks of Badshapore and its dependent villages as property "which the deceased Nawab, his grandfather, was possessed of on Altumgha tenure." The Government, as before, appears to have refused its assent to the alienation after her death of any of the lands held by her rent-free; treating the whole as revertible to Government after her death. Some time in 1832, as it is supposed, she made a further application to Government, by the letter of which the substance is set forth at p. 180 of the Record. This letter is the only one which can be taken to contain the assertion of an Altumgha title to Badshapore in herself. She speaks of the estate as "my Altumgha," and forwards with some other documents a copy of Scindia's perwannah; but even in this letter, when combating the supposed objection of Government that Badshapore was included in the arrangement made with her, through Mr. Guthrie, she says:—"I beg to observe that the country of the Doab only is mentioned in it (Mr. Guthrie's letter); while the pergunnah of Badshapore *alias* Jharsa, my Altumgha, and the gardens, &c., were bestowed on Nawab Zuffur Khan, the maternal grandfather of Mr. Dyce, for his expenses." This sentence would imply that the title was that of Zuffur Yaub Khan, though the *de facto* possession was hers.

In March 1833, she again renewed the attempt to get the Government to consent to the transmission of this estate to Mr. Dyce Sombre. The Government again refused to give its consent, treating the estate as held on a life tenure only. But on this occasion the Begum once more clearly (see p. 184) rested her claim upon an alleged Altumgha grant to Nawab Zuffur Yaub Khan, and referred to sunnuds importing such a grant as being in her possession. There was not on this occasion the slightest suggestion of a grant in her own favor.

The discussions, therefore, between the Government and the Begum touching Badshapore and the tenure on which it was held cover a period from 1808 to 1833. The Government throughout that period insisted that her interest was limited to her life, and that on her death the estate would revert to the State. The Begum, on three or four several occasions, at considerable intervals of time, contended that the tenure was Altumgha; sometimes appealed to the Government to continue it after her death as a matter of favor; sometimes attempted to raise a claim as of right; but on every occasion, except perhaps in her ambiguous letter in 1832, rested on the alleged grant to the son of Sumroo, and never pretended that that grant had been superseded by the sunnuds in her own favor, on which the appellants now rely. Her letters, moreover, point to a substantial grant of the estate to Zuffur Yaub Khan in Altumgha, and to the possession of it by him under that tenure. They are quite inconsistent with the case made by the Delhi document, viz., that the Altumgha grant to him endured only three months, and was never perfected by possession. The correspondence also concerning the pensions and the negotiations she entered into on that subject are wholly inconsistent with the theory that she held or claimed to hold Badshapore in Altumgha by a valid grant to herself.

Sir Roundell Palmer endeavoured to meet the strong presumption which this

continued course of conduct and these repeated representations on the part of the Begum raise against the validity of the alleged sunnuds, by an ingenious theory that she may have conceived that claims founded on an alleged grant to Nawab Zuffur Yaub Khan would be more likely to find favor with Government than one founded on sunnuds in her own favor; because they might treat the latter as superseded by the agreement of 1805. This suggestion, which after all is pure speculation, does not really afford a probable explanation of her conduct. If an Altumgha Jaghire had been granted to Nawab Zuffur Yaub Khan, the Begum had virtually usurped his rights before the cession of the territories west of the Jumna by Scindia to the East India Company. The British Government would in no way be bound, and certainly would be little disposed, to recognize a title which had been *de facto* defeated before the territories in question were ceded to them. They would be less inclined to recognize it if the title of Zuffur Yaub Khan had been of so flimsy a character and short duration, as the case now made represents it to have been, and had been *de jure* superseded by a grant to the Begum in 1789. If the case of the appellants is true, these circumstances might easily have been ascertained by enquiry through the British officers at Delhi. Again, the Begum could not make title to the estate through the son of Sumroo. In seeking to transmit the estate to Dyce Sombre, she sought to transmit it as from herself. It was, therefore, more natural, if she had a title in her by valid sunnuds from Shah Allum, that she should put forward and rely on that title, than that she should rest on the old grant to Sumroo's son which she herself had practically set aside. Nor is it easy to explain why, in 1807, she should have obtained from the Court of Delhi a sunnud, little likely to be recognized by the British Government, and founded on the alleged title of Zuffur Yaub Khan, when, if the present case be true, that title had been already superseded by a valid sunnud in her own favor.

If the validity of the documents on which the appellants now rely were supported by strong and independent evidence, it might be reasonable to endeavour to account for the Begum's silence concerning them by theories, more or less plausible, of the nature of that put forward by Sir Roundell Palmer. But if, as has been shown, the direct evidence in favor of the documents is weak and suspicious, then the presumptions arising from the acts and conduct of that astute woman should be allowed to have their full and natural weight against them.

The only remaining question is what effect is to be given to the perwannah alleged to be Scindia's confirmation of the sunnuds? Can it be taken to supply the deficiency in the proof of the sunnuds, and to establish or corroborate the title of the Begum? It is known to have existed in the Begum's lifetime, since a copy of it was sent by her to Government in 1832. There is no other proof, except the seal, of its origin. And the seal, if not fatal to it, casts the greatest suspicion on this document. It is pleaded as a confirmation by Madha Rao Scindia. But the evidence proves that, at its date, Madha Rao Scindia was dead. If, as it has been contended on behalf of the appellants, the confirmation pleaded is to be taken as a confirmation by Dowlut Rao Scindia, the difficulty arises that the document bears the seal of his then deceased predecessor. There was no proof that this seal was adopted and used by Dowlut Rao Scindia, but it was attempted to get over the difficulty by a reference to the case reported in 10th Moore's Indian Appeals, p. 192.* In that case there was evidence that the seal of the deceased zemindar had in several instances other than that in question, been used after his death. Here there is no proof that Dowlut Rao ever in any other instance used the seal of his predecessor. It is highly improbable that he should do so, and it would be dangerous, as well as unreasonable, to hold that, because a loose practice has been shown in one case to have prevailed in the cutcherry of a Bengal zemindar, it may be inferred in another that the same practice prevailed in the Durbar of a powerful

* 8 W. R. P. C. 4; 1 Suth. P. C. R. 562.

sovereign prince. Their Lordships, therefore, cannot treat the alleged confirmation of the Begum's title by the Mahratta prince, in 1795, as established.

Weighing, then, the direct evidence in favor of the sunnuds, weak and suspicious as it is, against the presumptions arising from the non-production of the original sunnud, and the failure to account for it; and against the still stronger presumptions arising from the acts, representations, and conduct of the Begum in her lifetime, their Lordships have come to the conclusion that the appellants have failed to establish the title which they have set up. To decree in favor of a title to an hereditary and transmissible lakheraj estate, on evidence so untrustworthy, would be contrary to the long-established practice of the Courts in India; and such a decision would be a dangerous precedent.

The proceedings in this case undoubtedly disclose many things which in their Lordships' opinion are to be regretted. It is particularly to be regretted that the Government did not, in some way or other, investigate the title of Mr. Dyce Sombre in 1836 as a question of right, instead of dealing with it by an act of power. It is to be regretted that in 1849 they did not fairly try the question of title, instead of meeting it by a plea of the statute of limitations. But after the fullest consideration of the case, and with every desire to give to the appellants the benefit of any inference which may be legitimately drawn from the circumstances of this protracted litigation, their Lordships see no grounds for believing that, if the cause had been tried in 1836 as an ordinary resumption suit under the Regulations, Mr. Dyce Sombre would not equally have failed to show a good title to an Altumgha tenure in the Begum. If it were necessary for their Lordships to express an opinion of the nature of the Begum's interest in Badshapore, they would incline to the opinion that her persistent statement of there having been some grant to Zuffur Yaub Khan was not without foundation; that she had in some way usurped his interest when she got undisputed command of the troops; and that the British power found her in the enjoyment of the estate, and left her so during her life. Any such opinion, however, must be, more or less, matter of speculation. For the determination of this appeal it is sufficient to say that the appellants have, in their Lordships' judgment, wholly failed to prove the fourth and sixth of the issues settled in the cause, and therefore to establish the title pleaded by them; and their Lordships have come to the conclusion that the appeal in this suit ought, on this ground, to be dismissed and the decrees of the Indian Courts affirmed; and their Lordships will advise Her Majesty accordingly.

In "the Arms suit," their Lordships are of opinion, for the reasons already given in the Badshapore suit, that the seizure of those arms and stores was not an act of State, but an act done as under a supposed legal right on the resumption of the Jaidad upon the Begum's death. They think that the evidence shows that the arms and stores were purchased by the Begum, and that there is no authority or evidence to show that those who hold by Jaidad are not entitled to things so purchased. They are entitled to all the rents on performance of a certain duty, which duty ceases on their death, and the next Jaidadar would be bound to provide arms by virtue of his tenure.

Their Lordships think the decree in this suit should declare the appellant entitled to recover from the Government of India the value of the arms and military stores seized, with interest on such value, from the date of seizure, at the ordinary rate of 12 per centum per annum; and that unless the parties agree to name a sum as representing such value, or agree to refer to arbitrators, in this country, the question, what, at the date of the seizure, was the value of the articles seized, the case must be remitted to India, with instructions to the Court there to ascertain such value, and give a decree accordingly. Her Majesty's order on this appeal may be suspended until the parties shall come to a conclusion as to the course to be pursued. The costs in India of each suit will follow the result; and their Lordships think that each party should bear their own costs of these appeals.

The 25th May 1872.

Present :

Sir James W. Colville, Sir Robert Phillimore, and
Sir Montague E. Smith.

Alluvion—(Review of the Law of, in Bengal)—Reg. XI of 1825.

*On Appeal from the High Court at Calcutta.**

Nogender Chunder Ghose and another

versus

Mahomed Esoff, the Collector of Chittagong, and others.

Suit in respect of a portion of *chur* land thrown up by a navigable and tidal river. The appellants who were seeking to disturb the respondents' possession of nearly seven years' duration, and on whom the *onus* lay to show a good title to the land in dispute, claimed the land as and proved it to be a reformation on a site identified with that of lands originally included in their zemindary and afterwards swept away by the river, and were held to have a better title to it than the respondents who claimed it as an accretion to their settled *chur* but failed to prove that it was such a gradual and imperceptible accretion or *incrementum latens* as the Civil Law contemplates.

Review of the Law of Alluvion which obtains in Bengal, as declared by Reg. XI of 1825 and decided cases.

The subject-matter in dispute on this appeal is a portion of *chur* land thrown up by the Kurnafoolee, a navigable and tidal river in the district of Chittagong.

The appellants are the representatives of one Anundonarain Ghose, and, as such, are the zemindars of Turruff Tej Sing, situate on the eastern shore of the river. Their estate appears to have been, in 1837, the subject of a careful Government Revenue survey, and, as then surveyed and settled, comprehended three mouzahs, named Kolagaon, Chakra, and Larka, of which the *chittahs* or measurement papers made on the occasion of that survey are set forth in the record.

The respondents, other than the Collector—so far as it is necessary to notice them—are the co-sharers in an estate known as Talook Koreban Ally, and situate on the western shore or bank of the river. That estate was also surveyed and measured in or about the year 1839, and the *chittahs* of one of the villages included in it, Bakolea, is set forth in the record.

These parties, though made respondents, have not appeared on the appeal, which has been therefore heard against them *ex parte*. Their title, however, has been fully and ably supported by the learned Counsel for the Government, which is in the same interest with them.

From what has been stated, it appears that the estates of the appellants, and these talookdars, whom it will be convenient to call the respondents, speaking of the Government, whenever it is necessary to do so, as the Government, were, as originally measured and settled, bounded and separated by the Kurnafoolee.

Some time before 1847 that river threw up in its main and navigable channel certain islands or *churs*, of which it is only necessary to specify two, viz., Chur Durmeea and Chur Dukhin. A settlement of these was made by Government with the respondents in 1847; the revenue assessed on Chur Dukhin being Rs. 200-6-6. Anundonarain Ghose is said to have presented at least one petition complaining of this proceeding; but, for the purposes of this litigation, it must be assumed that the *churs* in question were the property of Government, and were duly granted to and settled with the respondents. And it appears from some of the proceedings, that they were treated as appurtenant to Mouzah Bakolea.

* From the judgment of Kemp and Seton-Karr, *J.J.*, dated 1st December 1865.

Before the end of 1852 the river had swept away the whole of Chur Durmeea, but had formed another low *chur* in the vicinity of its site. Nor is there now, if there ever was, any question that this, which was known as Lami or Lamcha Chur, was settled by Government with the respondents in lieu of Chur Durmeea in December 1852.

Besides this latter *chur*, however, the river had before 1854 thrown up a considerable quantity of other *chur* land towards its eastern shore. This included the land now in dispute, or so much of it as was then above water. The record shows that Government determined to make no claim to this under Act IX of 1847 as an island thrown up in a large and navigable river, but that, having been claimed by several of the proprietors in the neighbourhood, it was, in order to prevent affrays, attached by the Collector until the right of possession should be determined, and thereupon became the subject of a proceeding under Act IV of 1840 before the Magistrate, who had to adjudicate on the *prima facie* right to possession between no less than sixteen different claimants. That officer began by directing the darogah to make a local investigation, and cause a map to be prepared. The result of this was the darogah's map, No. 43, which is in evidence, and his report of the record. This map shows four principal *churs* on the eastern side of the then main channel of the river, *A*, *B*, *C*, and *D*. Of these *A* and *B* are colored green and represent the land then in dispute. *C* and *D* are colored yellow, and are treated as *churs* not in dispute, which had been settled with the respondents. *D*, their Lordships believe, is admitted to be the Lamchi Chur. Whether *C* is or is not the Dukhin Chur, or whatever remained of that *chur*, is still matter of dispute. But it is perfectly clear that it was, in 1854, treated as *chur* land which had been settled with the respondents, and was then in their undisputed possession.

A was divided into several portions, and the result of the Magistrate's proceeding was to award possession of these to different claimants; Grindochunder Ghose and Sreemutty Noberungeny Dossee, who then as managers or otherwise represented the estate of Anundonarain Ghose, getting part, and the respondents getting the larger portion lying to the west of the old channel of the river which was adherent to their settled *chur D*. It is, however, unnecessary to pursue this part of the case, since the title to no part of *A* is now in dispute. *B* was claimed by those who then represented the appellants' estate as a re-formation on the site of that part of their Mouzah Kolagaon, which had been previously diluviated, or washed away by the river. It was claimed by the respondents as formed by "alluvion on the east of the Dukhin *chur*, within the Chuckbund recorded in their decree of the Appellate Court." The darogah found that *chur B* was an accretion to the *chur* marked *C*, which had been settled with the respondents. But he also found that it had been formed by alluvion in the place where the lands of Mouzah Kolagaon, belonging to the appellants' zemindary were formerly broken; and that during the ebb-tide men could walk on foot from the said mouzah to the said *chur*. The Magistrate's proceeding shows how that officer dealt with the question of possession. He seems to have considered that the disputed *chur*, being still under water at flood-tide, could not have been effectually in the possession of any of the parties; that claims founded on re-formation upon a site capable of identification could not be tried in any but a regular Civil suit, and that the adherence of the lands in dispute constituted a *prima facie* title by accretion, on which he ought to award possession. He accordingly did award possession of *B* to the respondents as the holders of the settled *chur C*, and left those who represented the estate of Anundonarain Ghose to their remedy by Civil suit. The date of this proceeding was the 22nd December 1854.

The present suit was accordingly brought by Mr. Fagan, who had been appointed receiver of Anundonarain Ghose's estate by the late Supreme Court of Calcutta. It was not, however, commenced until the 3rd May 1861, *i.e.*, more

than six years after the date of the Magistrate's award. The appellants seek to account for this delay by attributing it to circumstances connected with the administration of Anundonarain's estate. However that may be, it is obvious that the consequences of this delay, in so far as it may have occasioned any difficulty in the determination of the questions between the parties by means of the loss of evidence, or the intermediate changes caused by the action of the river, ought to fall upon the appellants. The suit, as originally brought, was to recover possession of 71 drones of alluvial land; the defendants to it were not only the co-sharers in Talook Koreban Ally, but also Horo Lal Mohunt, another of the sixteen claimants before the Magistrate; and the lands appear to have been elaimed partly as a re-formation on sites forming part of the wholly or in part diluviated villages of Mouzahs Kolagaon, Chakra, and Lakra; and partly as an accretion to such re-formed lands. The Collector, as representing Government, was afterwards made a party to the suit; Government having an interest adverse to the claim of the appellants, inasmuch as it was entitled to the additional revenue assessable on the lands in dispute, if they were an accretion to the *chur* land of the respondents; whereas it was not entitled to any additional revenue upon them, if they were a re-formation on the appellants' lands, and therefore included within the limits of his formerly settled zemindary.

The first proceeding in the suit, which it is material to notice, is the local enquiry made under the order of the Court by the Ameen Moonshee Ashanoollah. His report bears date the 28th December 1861; and the map accompanying it is No. 7.

The report and the map showed, among other things, that of the 71 drones of land claimed, between 8 and 9 drones composed or formed part of a *chuck* marked in the map with the Bengali letter (*kha*); and were in the possession of the defendant, Horo Lal Mohunt, though claimed adversely to him in another suit by one Abdool Mujeed. A compromise was afterwards effected by Mr. Fagan, as receiver, with this person, who admitted the appellants' title, and there is no longer any question touching this portion of the land claimed, or with the mohunt as defendant.

The report and map also proved that between 44 and 45 drones, forming other part of the land claimed, composed the *chuck* marked in the map with the Bengali letter (*kha*); and that they were held by the defendants, the co-sharers in Talook Koreban Ally on the strength of the Magistrate's award. The son and representative of Abdool Ally, one of these defendants, afterwards made a compromise with the receiver (admitting the title of the appellants) in respect of his share which comprised between 4 or 5 drones of the disputed land. It is not easy, if possible, to distinguish these 4 or 5 drones on map No. 7; but they are indicated on map No. 20 which will be afterwards mentioned.

The result of this Ameen's investigation and his report was altogether in the appellants' favor. He found that all the land in the two *chucks* was a re-formation on sites which, upon local enquiry and measurement, he succeeded in identifying with the *dags* appertaining to the diluviated mouzahs of appellants' zemindary; and in paragraph 5 of this report he seems to intimate that no part of Chur Dukhin was to be found in the disputed land; and that the latter could not be identified by any *dags* as formed on the site of any part of the respondents' Mouzah Bakolea. The last sentence of this paragraph, however, suggests a doubt whether he clearly apprehended the respondents' case; and did not make some confusion between Mouzah Bakolea, as originally settled, and the Chur Dukhin, to which, as they alleged, the land in dispute had accreted. This map did not give in detail the *dags* by which the identification of the site was said to have been established.

The suit, at this stage of it, was transferred from the Principal Sudder Ameen to the Zillah Judge, who caused a second local investigation to be made by another

Ameen, named Guggun Chunder Dutt. His report and the map made by him is that numbered 20. This report and map purporting to be founded on local survey, the comparison of *dags*, and the examination of witnesses, go to establish these facts:—1st, that the whole of the *chur* marked *A* in that map, being all the land that now remains in dispute, was a re-formation on the site of the appellants' diluviated mouzahs; 2nd, that the *chur* marked *B* was a similar re-formation, but comprised the lands in respect of which the compromises with the Mohunt and the heir of Abdool Ali had been effected; and, 3rd, that the *Chur Dukhin* settled with the respondents in 1847 had then been diluviated, no part of it being included in *chur A*, and its site being assumed to be identical with that of a sandy *chur* in process of re-formation near the western shore of the river. These conclusions were supported by, and in a great measure founded on, the supposed tracing and identification of the *dags* contained in the measurement papers of the appellants' estate as measured and surveyed in 1837. No attempt seems to have been made by this Ameen to trace in the disputed land the *dags* of the respondents' Mouzah Bakolea, or Kismut Dukhin *Chur*. His view of the formation of the *chur* in dispute is thus stated in the 5th paragraph of his report:—"The disputed *chur* has arisen on the site of the diluviated lands of the plaintiffs at first on the eastern part of the river, and gradually increasing, has accreted on the southern and eastern parts to the plaintiffs' original land." It is not seen that the alluvion began as accretion to the Kismut Dukhin *Chur* alleged by the defendants to be settled with them.

The suit was after this heard by the Judge, who erroneously dismissed it on the ground that it was barred by limitation. This was set right by a decree of the High Court dated the 22nd June 1863, which remanded the cause, directing the Judge to enquire and decide whether the whole or any portion of the land claimed was in the possession of the defendants for more than twelve years prior to the suit, and, if not, to try it on its merits and with reference to the provisions of Reg. XI of 1825.

The form of this remand seems to have led to another local investigation by a third Ameen, named Gour Mohun Biswas, whose report is dated the 10th March 1865, and whose map is numbered 29. The object of this investigation was to trace, in the disputed land, if possible, land which had been settled with the respondents in 1847, or at all events more than twelve years before the commencement of the suit. The report speaks of Mouzah Bakolea, but their Lordships conceive that the attempt really was to trace the *dags* of *Chur Dukhin*, which, after the settlement and survey of 1847, seems to have been treated as appurtenant to Mouzah Bakolea. This report was altogether adverse to the contentions of the respondents. The investigation occupied fourteen days, and its result was to show that the boundaries of the respondents' settled land would fall within the then main channel of the river, and considerably to the west of the disputed *chur*. This report, therefore, by negating the case of the respondents, went to confirm that made in favor of the appellants by the reports of the two other Ameen.

The cause then came on for a second hearing before the Judge, who tried it on the following issues:—1st, whether the suit was barred by limitation; and, 2ndly, whether the land in suit was a formation on or an accretion to the original site of land in plaintiff's estate; or whether it formed a portion of or an accretion to the land settled with the defendants. He found both these issues in favor of the appellants. He seems to have held that the first was determined by the result of the last local investigation, which showed conclusively that the disputed *chur* contained no part of the land settled with the respondents in 1847. On the second issue he found, in conformity with all the Ameen's reports, that the land in suit was clearly a formation on the original site of the plaintiff's estate, and was connected with it, and that the plaintiff was, therefore, entitled to be placed in possession of it.

This decision was reversed, and the suit dismissed on appeal to the High Court, by a decree dated the 1st December 1865, which, on a re-hearing on review before the same Judges, was confirmed by an order dated the 1st April 1867. The present appeal is against that decree, and that order on review.

Their Lordships cannot say that either judgment of the High Court affords satisfactory grounds for the dismissal of the appellants' suit.

The first deals only with the latest Ameen's report, and explains away the effect of that by assuming that, in making his measurements, he may not have taken a correct starting point. The Zillah Judge, however, in his judgment, expressly states twice that no objection was taken before him to the Ameen's starting point. The investigation was carefully conducted in the presence of the respondents' agents, and it is difficult to suppose that the objection would not have been taken if there was any foundation for it. Again, the learned Judges of the High Court proceeded on the assumed incompatibility of the case thus made by the appellants with the state of things which existed in 1854 at the date of the Magistrate's proceeding. They came to the conclusion that Chur Dukhin was the *chur* marked *C* in the darogah's map; that the Magistrate had carefully decided against the title set up by the appellants and in favor of the respondents; that the disputed *chur*, *B*, was an accretion to Chur Dukhin; and that the latter had never been diluviated.

But if, for the sake of argument, it be admitted that *C* in the darogah's map correctly represented what then remained of Chur Dukhin, it would by no means follow that what constituted *C* in 1854 had not afterwards been washed away, and the conclusion that it still existed as part of the land in dispute seems to be incompatible with the reports of all the Ameens, and notably with that of the last. Moreover, as their Lordships have already observed, the Magistrate by his proceeding seems expressly to have declined to decide on the rights resulting from an identification of site, and merely to have held that the land in dispute, being adherent to *C*, was *primâ facie* to be treated as an accretion to it. Again, the judgments under appeal do not seem to their Lordships effectually to distinguish or deal with the questions raised in the cause.

It undoubtedly lay on the appellants, who were seeking to disturb the respondents' possession of nearly seven years' duration, to show a good title to the land in dispute. They seem to have set up an alternative title, claiming the land either as a re-formation on a site identified with that of their diluviated mouzahs; or as an accretion to their estate by reason of its being a formation opposite to their lands, and only separated from them by a small channel, fordable at low water. This latter was the question chiefly discussed on the review, and if it had been the only ground on which the appellants could recover, their Lordships would have great difficulty in saying that they had made out a good title, or had shown that the Magistrate was wrong in treating the land in question as an accretion to the respondent's settled land represented by *C*, and in awarding possession of it accordingly. But it seems to their Lordships that, inasmuch as the result of all the local investigations, including that of the darogah, was in favor of the assertion that the land now in dispute was a re-formation upon the site of the appellants' diluviated mouzahs, the Zillah Judge was right in finding that fact to be proved. The question then arises, what is the legal result of such a finding? Is the *primâ facie* title to the land thus shown capable of being displaced by any better title existing in the respondents? According to their Lordships' view of the evidence, no part of Chur Dukhin, at the date of the decree, formed part of the disputed land, which may be assumed to be correctly indicated by *chur A*, in the map No. 20 of Guggun Chunder Ameen. They are, however, not so clear that *chur C*, in the darogah's map, did not correctly indicate what remained of Chur Dukhin in 1854. This supposition is no doubt inconsistent with the report of the last-named Ameen, confirmed in

some measure by the map of a Deputy Collector made in November 1852 (No. 30), which also assigns a different site to the now diluviated Chur Dukhin.

On the other hand, it is difficult to see how the award of the Magistrate ever came to be made, if *C* in the darogah's map did not correctly indicate land settled with the respondents, and then in their possession. And this latter map is on that point consistent with the Collector's map, No. 46.

Whilst, therefore, their Lordships think that the appellants have established the identity of the site of the land in dispute with that of lands originally included in their zemindary, and afterwards washed away by the river, they will, for the determination of this appeal, take as also proved, that the *chur* marked *C* on the darogah's map, though it has since been swept away, existed in 1854 as a *chur* settled with and in the possession of the respondents, and that the land in dispute was then adherent to it. They here advisedly use the term "adherent" because it appears to them that there is an important distinction between mere physical adhesion and that "accretion" or *incrementum lutens*, which, by reason of its gradual and imperceptible formation, is recognized by the law as belonging to the persons to whose land it is adjacent. In the present case, the evidence touching the manner in which the *chur* in question was formed, is extremely scanty; and their Lordships are by no means satisfied that it was such as would make the land an "accretion" according to the strict legal definition of the term.

Their Lordships have now to consider what is the law applicable to the facts thus found, and what are the rights of the parties thereunder. And the long and able arguments addressed to them on this subject, render it desirable to review the law of alluvion which obtains in Bengal as declared by the positive provisions of Reg. XI of 1825, or by the decided cases, which the learned Counsel for the respondents have contended cannot easily, if at all, be reconciled with each other.

The first section of the Regulation after specifying as the subjects which called for legislation the following cases, viz., 1st, the throwing of churs or small islands in the midst of the stream or near one of its banks; 2ndly, the carrying away of portions of land by an encroachment of the river on one side, and an accession of land at the same time or in subsequent years, gained by the dereliction of the water on the opposite side; and, 3rdly, similar instances of alluvion, encroachment and dereliction on the sea coast bordering the southern and south-eastern limits of Bengal—enacts that the rules declared by the following sections shall have force of law throughout the Presidency of Fort William. The second section provides that local usage, whenever it exists, shall prevail. The third, that when there is no local usage, the general rules declared in the fourth section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion or by dereliction either of a river or the sea.

This fourth section is divided into five clauses.

The first deals with land gained by gradual accession (*i.e.*, alluvion in the proper sense of the word), and provides that it shall be considered an increment to the tenure of the person to whose land or estate it is annexed, subject to the right of Government to assess additional revenue upon it.

The second provides that the former rule shall not be applicable to cases of sudden avulsion, where the identity of land is not destroyed, preserving in that case the rights of the original owner.

The third makes a *chur* or island thrown up in a large navigable river (the bed of which is not the property of an individual) or in the sea the property of the Government, if the channel between it and the shore be not fordable, but provides that if such channel be fordable at any season of the year the *chur* shall be considered an increment by alluvion to the tenure of the person whose estate is most contiguous to it, and shall be subject to the provisions of the first clause.

The fourth clause deals with *churs* in small rivers, the beds of which have

been recognized as the property of individuals ; giving them to the proprietor of the bed of the river. And the fifth clause provides that, in all cases of claims and disputes respecting lands gained by alluvion, or by dereliction of a river or the sea, which are not specially provided for by the foregoing rules, the Courts shall be guided by local usage, if any be established as applicable to the case ; and, if not, by general principles of equity and justice.

Two observations arise on this statute.

1. There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of "alluvion," viz., land gained by gradual and imperceptible accretion the *incrementum latens* of the Civil law.

2. No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, re-appears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case ; which must, therefore, be determined by "the general principles of equity or justice" under the 5th rule.

That the right of the proprietor in the case last put exists and is recognized by law in India is established by at least two cases decided at this Board, and therefore binding on their Lordships, viz., the case of Mussamut Inam Bandi and another v. Hurgobind Ghose (4 Moore's I. A.),* and the recent case of Lopez v. Muddunmohun Thakoor and others, decided on the 11th July 1870.†

The former is a clear authority that the identity of the site may be established by maps and ancient documents ; although by the long submergence of the land all external marks and means of identification have been obliterated. It is not, however, very clear in that case whether the question between the parties was one of boundaries of the original estates, or of dispute between one party claiming the land as a re-formation on his original land, and the other claiming it as an accretion under the first clause of the fourth section of the Regulation.

The latter, however, was clearly the issue between the parties in Lopez's case. It may, however, be said that that case is distinguishable from the present by its peculiar circumstances, inasmuch as in the former the encroachment of the river had in the first instance swept away the surface of the plaintiff's mouzah, and made the defendant who held lands behind those so swept away for the first time a riparian proprietor ; and because the plaintiff had, by the preparation of the Tannabundee map and otherwise, taken peculiar precautions to preserve and protect his right in the soil against his neighbour as well as the Government.

It was, moreover, contended that some at least of the principles laid down in Lopez's case are in conflict with the previous decision of this Board in the case of Eckowrie Sing and Heeraloll Seal (12 Moore's I. A. 136).‡ That case had not been reported when that of Lopez was decided, and does not appear to have been cited in the argument. Their Lordships cannot, however, perceive any inconsistency between the two judgments. The decision in the 12th Moore seems to have proceeded on two grounds, namely, 1st, that it was not competent to the plaintiffs who had alleged a title to the land as an accretion to their estate, to raise at the hearing of their appeal a different case, viz., one simply of original ownership of the site of the lands re-formed ; and, 2ndly, that had such a title been properly pleaded, the evidence failed to establish the identification of the site. The case of Imam Bandi is cited in the judgment, which throws no doubt upon the validity of such a title if properly pleaded and proved.

Again, the learned Counsel for the respondents, and in particular Mr. Pontifex, argued broadly that by diluviation into *navigable* river, land is permanently lost to the original proprietor, and becomes the property of the State ; and, in support of this proposition, they relied much on an American work, "Houk on

* 7 W. R. P. C. 67 ; 1 Suth. P. C. R. 208.

† 14 W. R. P. C. 11 ; and p. 336 *ante*.

‡ 11 W. R. P. C. 2 ; and p. 171 *ante*.

Navigable Rivers," which they argued was the more deserving of attention, by reason of the similarity which exists between the great rivers of America and those of India in their conditions and mode of action. This authority, however, does not appear to their Lordships to assist the respondents' case. The law of alluvion in America seems to be less favorable to riparian proprietors than that of India or of England. For Mr. Houk draws a distinction between estates consisting of a given quantity of land, and defined a mathematical line, though by one on the margin of a river, and those of which the river is the nominal boundary. He holds that in the former case alluvion, however small, and however gradually and imperceptibly formed, is the property of the State. And after dealing with this question, he says in s. 258, "Nevertheless, it is possible that by the action of the sea, or a change of the channel of a river, the land so granted may be partly lost. No doubt in case afterwards the land should be washed up again, it would belong to the former owner of the estate originally purchased, and no further. While, however, the land is submerged in the river, the title is in the State." This is consistent with the Civil Law, Dig. Lib. XLI, tit. I, s. XXX, and with the law of England as declared in the passage cited in Lopez's case, from Hale "De Jure Maris."

In India the point thus taken seems to be concluded by the authority of the decided cases. The learned Counsel did not contend for a distinction between a tidal river and a navigable river which has ceased to be tidal. Their Lordships have no reason to suppose that in India there is any such distinction as regards the proprietorship of the bed of the river, though in respect of the mode of accretion there must be some difference between the effects produced by the daily flux and reflux of the tide, and the changes which are mainly consequent on the annual floods. Now, if there is no such distinction, it is clear that the Ganges at Bhagulpore, as in Lopez's case, and at Patna, as in the case in the 4th Moore, is a navigable, though no longer a tidal river; and, consequently, that these cases are direct authorities against Mr. Pontifex's proposition. Their Lordships accede to what is said in Lopez's case, to the effect that a proprietor may in certain cases be taken to have abandoned his rights in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847 s. 5. For in the present case there is nothing from which such abandonment can be inferred. If an application for remission of revenue was made, that application was refused.

The appellants having then established a *prima facie* title to the land in dispute as a re-formation, the question is whether the respondents have a superior title to it as an accretion to their settled *chur*. It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site, unless it be that, where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist, and so bars enquiry.

In the present case it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved, and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accretion to their original estate. They claim it as an accretion to the *chur* cast up by the river, and settled with them by Government. Let it be granted that the first effect of the retrocession of the river was to leave bare this *chur* in the midst of the stream, and that the land then cast up was beyond the confines of the plaintiffs' estate. The river continues to recede, more land appears, and the new land, though adherent to that first discovered, is really a deposit on the ancient site of the plaintiffs' land. Why should the ownership of that which is thus regained be altered by the fact that, from some accidental cause, land forming the outer edge

of it first emerged as an island? The darogah's map seems to show that this must have been the course of the river's action. Nor, as their Lordships have already observed, is there any trustworthy evidence which traces the history of the disputed land, or shows that by gradual and imperceptible accretion it became adherent to the *chur*, which upon the whole evidence must be taken to have now ceased to exist. Such a case as the present is very distinguishable from the ordinary case contemplated by the Regulation in which a river, gradually shifting its channel in one direction, continually eats into one bank, and leaves the other, never ceasing to flow between the competing estates.

Their Lordships are not insensible to the difficulties of identification, and to the danger of encouraging claims of this kind on insufficient evidence. They lay down no rule as to the strictness of proof which the Courts in India may require in such cases.

They also consider that a title founded on the original ownership and identification of site is to be confined *primâ facie* to the re-formation on that site. And if, in the present case, it had appeared that some part of the land in dispute had been thrown up beyond the original boundaries of the appellants' estate, a question might fairly have arisen between the appellants and the respondents whether that was to be taken to be an accretion to the estate of the former, or to the settled *chur* of the latter. But upon the evidence they are satisfied that the whole of the land which continues to be the subject of the suit is a re-formation within the limits of the appellants' original estate. This being so, their Lordships are of opinion that the Zillah Judge was right in decreeing the whole to the appellants. And they will humbly advise Her Majesty to allow the appeal, to reverse the decree of the High Court, and to order that, in lieu thereof, a decree be made dismissing the appeal to that Court and affirming the decree of the Zillah Judge. The appellants must have from the respondents, the defendants in the suit, the costs of the litigation in India, and those of this appeal. There will be no order as to the costs of Government on this appeal.

The 25th May 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Mode of decision—Assumed probabilities and not evidence.

*On Appeal from the High Court at Calcutta.**

Rughoobur Dutt Chowdry and another

versus

Futteh Narain Chowdry and another.

In this case which turned upon the validity of the bond on which plaintiffs sued, the decision of the High Court in favor of defendant was reversed, as based upon the assumed probabilities of the case instead of the evidence before them, and in forgetfulness of the most startling improbability of all, viz., that the defendant should, if his case of fraud and forgery were true, have failed to attempt to substantiate it by his own testimony and that of his brother.

Their Lordships are of opinion that the decree of the High Court cannot be supported.

The only question in the cause was whether the defendant Keerut Narain

* From the judgment of Bayley and S. N. Pundit, dated 21st April 1866.

Chowdry, having borrowed Rs. 10,000 from the plaintiffs, had executed to them the bond on which they sued; or whether, as he alleged, there had been no such transaction of loan, no money having been received by him from them, and the bond being a forgery.

The plaintiffs in support of their case, produced and examined the five attesting witnesses to the bond, and were themselves examined as witnesses. The evidence, if true, established the advance of the money and the execution of the bond; and was, on the latter point, corroborated by a comparison of the defendant's alleged signature on the bond, with his admitted signature of the *vakalatnamah* filed by him in the cause. Against this evidence, and in support of the case of fraud and forgery set up by him, the defendant produced only certain witnesses, who, some of them speaking on hearsay, and all giving evidence of an untrustworthy character, endeavored to make out that the plaintiffs' case had been fraudulently got up by one Bunsedhur Chowdry, against whom the defendant had recovered judgment in another suit. None of them gave any evidence which directly contradicted that of the plaintiffs' witnesses. Neither the defendant himself, nor his brother, whose name appeared on the back of the stamped paper on which the bond was written, and who took an active part in the defence of the suit, ventured to put himself in the witness-box: the one to deny on oath his signature of the bond, and his reception of the money; the other to deny his purchase of the stamp, or his knowledge of and participation in the transaction. In these circumstances the Principal Sudder Ameen (the Judge of first instance) naturally found for the plaintiffs; but on appeal, a Division Bench of the High Court, proceeding on certain circumstances of suspicion, which, as they conceived, the case of the plaintiffs presented, reversed the decree of the Lower Court, and dismissed the suit against the strong *prima facie* case made by the plaintiffs, in fact, against all the direct evidence in the cause; and in the absence of the evidence which the defendant might have given, and, if his case were true, would naturally have given.

It is unnecessary to examine particularly the grounds of this judgment because, whatever weight might fairly have been given to them, if there had been a conflict of evidence, it appears to their Lordships that they were entitled to no weight in a case in which the evidence was all one way. In truth the learned Judges, in thus deciding the case upon its assumed improbabilities, instead of the evidence before them, have overlooked the most startling improbability of all, viz., that the defendant should, if his case of fraud and forgery were true, have failed to attempt to substantiate it by his own testimony and that of his brother. Their Lordships therefore feel that they would be sanctioning a mode of decision which would be productive of the worst consequences in the administration of justice, if they were not to advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and to order, in lieu thereof, that the appeal to that Court from the decree of the Principal Sudder Ameen be dismissed with costs. The appellants will also be entitled to the costs of this appeal. The decree of the Principal Sudder Ameen for the sum sued for, and the costs in that Court, will, of course, be against the original defendant, Keerut Narain Chowdry, and be recoverable out of his estate. But the present respondent, who appeared to the appeal to England, but lodged no printed case, will be personally liable for the costs incurred here and in the High Court, and to refund any costs which may have been paid to him, or on his account by the appellants under the decree of the High Court. Their Lordships desire to add that they see no ground for the censure cast by one paragraph of the judgment of the High Court upon the Principal Sudder Ameen, who seems to their Lordships, in a well-reasoned judgment, to have come to the only conclusion to which, upon the evidence before him, he ought to have come.

The 25th May 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Alluvion land—Riparian proprietors—Shifting ownership and right of
possession—Custom—Servitude—Covenant running with land.*

*On Appeal from the High Court at Calcutta.**

Baboo Bissessur Nath and others

versus

Maharajah Mohessur Bux Sing Bahadoor and others.

One of the grounds on which plaintiff sought to disturb defendant's long uninterrupted possession since 1790 of land (which had once been alluvial) lying between two branches of a river, or between two rivers, the volume of water in which from time to time shifted, so that alternately one of those channels was deep, and the other fordable, was by virtue of an alleged custom in the district. **HELD** that the custom which plaintiff was bound to establish by clear and distinct evidence of its existence, was that the ownership and right of possession of the whole intermediate tract of land shifted with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happened for the time being to be fordable.

As to the other ground on which plaintiff relied, their Lordships were of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the lands of any possessor of it by any title, and that consequently a contract between two former zemindars that the ownership and right of possession of the land should shift in the manner above-mentioned, was not binding upon the defendant who derived his title from a person who was a stranger to the arrangement.

This was a suit to recover possession of a large tract of land which had at one time been alluvial, but which for a great number of years had been regularly cultivated and inhabited, lying between two streams described by the plaintiffs (who are now the appellants) as branches of the Ganges, but which might perhaps be more correctly described, the one as being the river Dewha, and the other as being the river Ganges.

The plaintiffs were the owners of a zemindary, of the name of Manjhéc, on the north side of the north channel; the defendants were the owners of a zemindary, of the name of Arrah, on the south side of the south channel, both streams flowing from the west and joining each other to the east of the property in dispute.

It appears that the tract of land between these two channels was, as early as the year 1790, in the possession of one Noorool Hossein, with whom, as occupier and proprietor, a settlement was made by the Government in the year 1790, and that in the year 1800 a permanent settlement was made with his son.

The defendants claim the land in question by purchase from a descendant of Noorool Hossein, and it appears to be undisputed that Noorool Hossein and his heirs and those who succeeded him in title down to the present defendants have held uninterrupted possession of this land from 1790 to the present day.

The plaintiffs seek to eject the present possessors, the defendants, upon these grounds: it appears that, in the year 1849 or 1850, the great volume of water left the northern channel, and took the southern channel, whereby the northern channel which before had been deep became fordable, and the southern channel which before had been fordable became deep, and they allege that, upon that state of facts, they are entitled to obtain possession of the whole of the land lying between these two channels, by virtue, *first*, of an alleged custom; *secondly*, of an

* From the judgment of Raikes and Levinge, *J.J.*, dated 30th June 1863.

ekrarnamah executed in 1780 between the then proprietor of the zemindary Manjhee, and the then proprietor of the zemindary Arrah.

It is necessary to examine separately these two grounds on which the plaintiffs rely. First, as to the custom. The custom on which the plaintiffs rely is nowhere to be found clearly stated in their pleadings, and their Counsel found some difficulty in quite accurately defining it. It appears to their Lordships that, in order to succeed in disturbing a possession of such long duration, under the circumstances of this case, it is necessary for the plaintiffs to establish a custom existing in the district in which these properties are situated to the effect that, where land which had once been alluvial lies between two branches of a river (or it would appear between two rivers), and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermediate land belongs to the landowner on the side of the channel which at any given time is fordable; in short, that the ownership and right of possession of the whole intermediate tract of land shift with the volume of the water, always attaching to the riparian proprietor on the side of the channel which happens for the time being to be fordable.

It should be observed that this custom appears to be based on the hypothesis that at all times one channel is deep, and the other fordable, because it could not apply if both were deep, or both were fordable; it would also appear that this custom is wholly independent of any question of accretion or arrosion of banks; that it attaches merely upon the water becoming deeper or shallower in one channel or the other without necessarily any alteration in the beds or banks of the channels.

This being the custom which it appears to their Lordships that the plaintiff is bound to make out in order to establish his case, their Lordships would require to be satisfied by very clear and distinct evidence of its existence, since the operation of such a custom must be to render the rights of property fluctuating and precarious.

A question has indeed been suggested, whether a custom of this description falls within the terms of Reg. XI of 1825 s. 2. Their Lordships, however, do not think it necessary to decide this question, inasmuch as they have come to the conclusion that no "clear and definite usage" such as would be necessary to support the plaintiffs' case has been in point of fact established by the plaintiffs.

Reference has been made very frequently in the record, and in the course of the argument, to certain proceedings on the part of the Government which took place in 1780, and the *ekrarnamahs* executed by the proprietors of the respective estates at that time in pursuance of those proceedings; but their Lordships are of opinion that the effect of those proceedings and the *ekrarnamahs* amounts to no more than this: that there being a dispute, indeed a violent quarrel, as it would appear, between two zemindars whose properties were contiguous the one to the other, the Government adopted a settlement at the time between them which appeared to be equitable and expedient, and to be in conformity with what had been done on previous occasions by previous owners of the same properties, and that this arrangement made with these two landowners by the Government was acquiesced in, adopted, and ratified by the *ekrarnamahs* which have been referred to which it will be necessary subsequently to state more in detail. This by no means amounts to that clear proof which would be required to support a distinct custom of this description, and to sustain the claim of the plaintiff to transfer to themselves this property from those who have been in possession of it for eighty years or more.

The other evidence which has been relied upon in support of the custom consists mainly of supposed admissions on the part of the defendants in the course of various legal proceedings; but upon examination those admissions do not appear to amount to more than this, that the defendants or their predecessors appear in

certain proceedings to have insisted upon a rule somewhat similar to that which the plaintiffs now allege, but by no means identical with it, as applicable to these zemindaries, and do not point to "a clear and definite usage" binding all property within the district.

Reference has been made also to various proceedings with respect to other properties, in which the Government authorities have treated the main channel of the Dewha as the boundary between certain zillahs; and to one case in which they appear to have intimated that that boundary should be applied also to certain private properties; but the circumstances of these cases are not so distinctly before their Lordships that they are enabled to treat them as proof of such a custom as that which has been before described, and upon which it is necessary for the plaintiff to rely. It may be observed that it by no means follows that, if a certain fluctuating boundary, viz., the course of a river, is adopted between two zillahs, its adoption for that purpose affects the rights of landed proprietors in those zillahs. The case of *Rae Manick Chund v. Madhoram*, in 13 Moore's Indian Appeals, p. 1,* which has been referred to, is to the effect that there may be a fluctuating boundary between zillahs, which by no means affects the rights of landed proprietors.

Their Lordships are of opinion that sufficient evidence has not been given to prove this custom, which is necessary in order to make out the plaintiff's case. They agree, indeed, with Mr. Justice Raikes, who says in his judgment:—"I think it is fully made out that, when claims were preferred to an island, a new formation in the Ganges, by rival riparian proprietors, the custom was to award possession to the proprietor on the side on which the alluvial lands were fordable; and if the question before us was for the possession of newly-formed lands, and we were asked to apply the custom to such lands, I should have no hesitation in doing so;" but their Lordships also agree with what Mr. Justice Raikes further says:—"But this is not the nature of the present suit."

Their Lordships are, therefore, of opinion that the plaintiff has failed to make out the first ground upon which he relies.

The second ground is the *ekranamah* that was entered into between the then owner of the Pergunnah Arrah, Rajah Bickromajeet Singh, who is the grandfather of the defendant, and Tegh Ali Khan, who was then the owner of Pergunnah Manjhee, under whom the plaintiffs claim title; and it is to this effect:—"The Rajah recites that there had been a suit with respect to *diara* lands of certain villages which he describes; then that Mr. Matthew Leslie and Mr. Gream had been sent to survey the land in dispute, and taken the statements of both parties. Then he goes on to say:—"The gentlemen of the Council of Azeemabad and Mr. Gream forwarded to the Council at Calcutta a report of the dispute between the parties, and a map of the *diara* lands," which, unfortunately, is not now forthcoming. Then he recites that orders were received from the Council at Calcutta, that on whichever side the Ganges was fordable, the *diara* lands will appertain to that side; and then that Mr. Leslie and Mr. Gream came again to the *diara* lands, "and finding that the river Ganges on the side of Pergunnah Arrah, Sircar Shahabad, had dried up and was fordable, and on the side of Pergunnah Manjhee was a flowing current with deep water, gave possession to me the declarant, from 1187 Fuslee, of the *diara* lands aforesaid, with all the crops thereon;" and that he therefore took possession. Then he says:—"Therefore I declare and give this writing, that the boundary of the *diara* between Pergunnah Arrah, Sircar Shahabad, and Pergunnah Manjhee, Sircar Sarun, has been fixed in this manner that, if the river Ganges becomes fordable on the side of Pergunnah Arrah, the *diara* lands will belong to the zemindars of Arrah; and if it becomes fordable on the side of Pergunnah Manjhee, Sircar Sarun, they will belong to Pergunnah Manjhee. If any or either of us act contrary to this agree-

* 11 W. R. P. C. 42; and p. 217 *ante*.

ment, our act shall be false and void, and we will be liable to punishment by the Government." A duplicate of this agreement was executed by Tegh Ali Khan, the then zemindar of Manjhee.

It has been contended, on the one hand, that this agreement relates only to newly-formed lands or alluvial lands which may be formed after its date; on the other, that it distinctly refers to the lands in question, at all events in their then state, and that it is applicable to them now. But be that as it may, assuming the meaning given to this document by the appellants to be correct, their Lordships are of opinion that, whatever may have been its effect as a contract between the two zemindars who executed it, it clearly cannot be binding upon the defendants, who derive their title from Noorool Hossein, who was a stranger to it.

Their Lordships are of opinion that it was not in the power of the then zemindar to impress upon the land a *quasi* servitude, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title.

Their Lordships are therefore of opinion that the plaintiffs fail also on the second ground of claim.

That being so, it is unnecessary to go into a question which has been raised of the identity of the lands.

For these reasons their Lordships are of opinion that the plaintiffs fail to make out their case; and they will humbly advise Her Majesty that the decree of the High Court in India be affirmed, and that this appeal be dismissed with costs.

The 31st May 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

*Act VIII of 1859 s. 2—Res Adjudicata—Dowl—Towfeer—Costs (one set of,
to respondents in the same interest).*

*On Appeal from the High Court at Calcutta.**

Woomatara Debea

versus

Kristokaminee Dossee, Wooma Soonduree Dossee, and others.

Where a plaintiff in a former suit saw fit in that suit to admit that no portion of the land then sued for was included within the limits of her talook as originally settled and defined by the *dowl*, but that she had, as talookdar of that talook, acquired title to it as *towfeer*, HELD that she could not, under s. 2 Act VIII of 1859, bring her present suit and claim to fall back upon the other title.

The Privy Council saw no ground in this case for departing from the general rule of allowing but one set of costs to respondents in the same interest, since the Collector, as Court of Wards and representing the infant defendant, would sufficiently have discharged his duty and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other respondents, or at the most had applied for leave to join in their case.

Their Lordships propose to dispose of this appeal upon the only point that was dealt with by the High Court, namely, whether the present suit can properly be brought consistently with the second section of the Act of Procedure. That Clause is in these words:—"The Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a

* From the judgment of Phear and Hobhouse, *J.J.*, dated 2nd December 1868. 10 W. R. 426.

Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim."

The first question that occurs to their Lordships upon that section is, what is meant by the cause of action? And in the present case they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case. The result of those proceedings was to affirm the possession of the defendants in the land which was the subject of the first suit, and to leave the party who felt aggrieved by them to her remedy by a civil suit.

The first suit was accordingly brought, and in the present suit both Courts have found, and it has been fairly admitted at the Bar, that the land which is now in dispute is a portion of the land which was then sued for. The identity, therefore, of the subject-matter of the two suits is admitted, and, as their Lordships have already said, the cause of action in both was the dispossession of the appellant by reason of the proceedings then taken.

It is sought, however, to distinguish the case upon the ground that the appellant, who was the plaintiff in the former suit, saw fit in that suit to admit that no portion of the land then sued for was included within the limits of Talook Shahazadapore, as originally settled and defined by the *dowl*, but that she had as talookdar of that talook acquired title to it as *towfeer*, that is, that by gradual squatting or encroachment she had enlarged the boundaries of her talook, and by bringing the land into cultivation had acquired a preferable right to have the settlement made with her.

Now it is perfectly clear to their Lordships upon the proceedings that the real question in issue to be determined between the parties then was whether the lands then sued for which included the lands now sued for, belonged as of right to the talookdar, or whether they fell within lot 32, which belonged to the defendants? and it was open to the plaintiff, the present appellant, in the former suit to shape her title in either of three ways. She might have said, as she did say, according to Mr. Doyne's argument to-day, that the whole of the land then claimed was *towfeer* land; or she might have said, a portion of the land fell within the talook, as originally settled, and formed part of the 7,000 odd beegahs mentioned in the *dowl*, and the residue of it is *towfeer* land; or she might have put her case in the alternative, and have said that she had a good title to a portion as her original land, but that should the proof of that fail, that portion also was to be considered as *towfeer* land.

With the full knowledge of all the circumstances, she chose to say:—"I admit that I am in possession of all that I was entitled to under the *dowl*, but I claim this land, the whole of it, as *towfeer* land." The contention now is that, although she saw fit to take that course then, she has now a right to fall back upon the other title, and to say:—"The boundary was improperly drawn, so as to include in the defendants' holding that which of right should have been within my originally settled talook; and, as I now claim in that way that which I might have claimed in the former suit, I am not precluded from bringing this second suit." It appears to their Lordships that that contention cannot prevail against the clear terms of the section in question, or indeed upon principle.

It is clear that it does not fall within the principle of the decision * given by Lord Justice Turner at this Board upon the earlier Regulation, in which he takes the distinction that the Regulation "was only to prevent the re-trial of the same question, and that it was not intended to apply to cases like the present, in which new circumstances had intervened and altered the nature and character of the questions to be determined." Here no new circumstances at all have intervened.

Nor does it appear to their Lordships necessary to decide whether, in some

* 3 W. R. P. C. 11; 1 Suth. P. C. R. 570.

of the cases put by Mr. Doyme, where the party was suing entirely under a new and a different title, such a distinction as he contended for might not be taken ; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail ; and that if the talookdar had any title at all, it was by way of *towfeer*.

The Court of appeal, proceeding on the admission of the plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as *towfeer* lands, dealt with that claim ; but it is perfectly clear that, if the plaintiff had chosen to put forward the other title in the way I have suggested, the Court would have dealt with the whole question and considered it, that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the lands sued for from the defendants who are the defendants also in the present suit.

It therefore seems to their Lordships that the case really falls within the principle and letter of the section in question, which has been properly decided to be a bar to the suit.

They think it desirable to remark that the principle upon which their decision in this case proceeds seems to be almost identical with that laid down in a judgment delivered by Lord Westbury in the case of *Kattama Nauchear* in 11 Moore's Indian Appeals, p. 72.* In that case a party had brought a suit, claiming under a will, having, as defendant in a former suit, abandoned his title under that will, admitting that the will did not amount to a devise, and resting his title upon the issue whether the estate was separate or undivided, and Lord Westbury said :—"That being the state of the case, we are now called upon to approve of a suit subsequently instituted by the very person who had deliberately given this character to the instrument, a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suit of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the plaintiff in those suits had no interest therein ; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favor. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward. The present appellant might have insisted on the validity of the alleged will, but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all the title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed."

The present case is even stronger than that referred to, inasmuch as in the latter the party was a defendant in the first, and plaintiff in the second suit ; whilst the appellant is plaintiff in both suits, and as such had in both the means of shaping her case as she chose.

* 2 W. R. P. C. 31 ; 1 Suth P. C. R. 52.

Their Lordships therefore, entirely concurring with the judgment delivered by Mr. Justice Phear in the High Court, are of opinion that this appeal must be dismissed. It is possible that the appellant has lost what she might have been entitled to; but if she has lost it, the loss is entirely the result of her own mode of dealing with her case in the former suit.

Their Lordships have only further to observe that the appeal must of course be dismissed, with costs, but that the ordinary rule of this Board is to give only one set of costs to the respondents in the same interest. We have not had an opportunity of knowing why there has been a severance in defence, or whether there are any special grounds why that rule should be varied.

After some discussion at the Bar on this point, Sir James Colville said :—

Their Lordships see no ground for departing from the general rule of allowing but one set of respondents' costs; and considering that those represented by Sir Roundell Palmer were first in the field and had entered their appearance first, their Lordships think that the Collector, as Court of Wards, and representing the infant defendant, would sufficiently have discharged his duty, and have exercised a sound discretion, if, seeing that the suit was to be substantially defended, he had left the defence in the hands of the other respondents; or, at most, had applied for leave to join in their case. Their Lordships do not think that there was a necessity for his increasing the costs by coming forward as a separate respondent. Their Lordships therefore think they ought not, in justice to the appellant, to do more than give one set of costs, and that they ought not, in justice to the principal and original respondents, to deprive them of any part of their costs.

The 4th June 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

*Benamée purchase—Bond fide purchaser for value—Acquiescence—Enquiry
—Sale—Mahomedan woman—Improvement of property—Indian deeds of
sale—Clause as to consent of family.*

On Appeal from the High Court at Calcutta.

Ramcoomar Koondoo and another

versus

McQueen and another.

It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it.

There is nothing in the position of a vendor being a Mahomedan woman living with her children upon the estate, and sometimes letting it, which should put any one upon enquiry whether she was the real owner or not.

Without laying down any general rule as to the circumstances which should prompt enquiry in cases of this kind, the Privy Council were of opinion that the circumstances must be of such a specific

* From the judgment of L. S. Jackson and Markby, *J.J.*, dated 2nd April 1869.

character that the Court can place its finger upon them, and say that upon such facts some particular enquiry ought to have been made.

The mere fact of a man building upon, or spending money to improve, property belonging to the woman with whom he was living, cannot lead to the inference that, contrary to the apparent title, he had purchased the land for himself; and neither this fact, nor the circumstance of the deed of sale from a Mahomedan woman containing the apparently usual clause that she had made the sale with the consent of the family, was sufficient to put the purchaser on enquiry.

Their Lordships do not think it necessary to call upon Mr. Leith to reply, having come to the conclusion that the judgment of the High Court cannot be sustained.

The suit was brought by the respondents to recover $3\frac{1}{2}$ beegahs of land and some buildings erected upon it situated at Howrah, near Calcutta. The land had been purchased by the deceased father of the appellants, Ramdhone Koondoo, from a Mahomedan woman of the name of Bunnoo Bebee, in June 1843. Their father and they, since his death, have held undisputed possession from that time until the present suit was brought, a period of 24 years.

The short facts are these:—Alexander Macdonald, who lived in Calcutta and co-habited with Bunnoo Bebee as his mistress, had two children by her,—Alexander Macdonald, who is dead; and Maria, one of the respondents, who married Mr. McQueen, the other respondent. The father died in 1834. The history of the property appears to be this: The land, which is perpetual leasehold, at a fixed rent, was conveyed in August 1831, by the then proprietor, to Bunnoo Bebee by a deed of sale, and the price paid at that time was only Rs. 130. In the following September the deed was registered, and thereupon the zemindar granted a fresh pottah to Bunnoo Bebee, at the fixed rent of Rs. 35. It does not appear with any certainty that Macdonald, the father, was in possession of the land and of the buildings. At all events, it is not clear upon the evidence that he ever resided upon the property. There are two witnesses who speak to his residence. One of them says that he did not live in the new bungalow, and the other says he did. The evidence is far from satisfactory to establish the fact that he really did reside upon the property. But it is clear that, after his death, Bunnoo Bebee did go to reside upon it, and she resided there for some time. She afterwards let it, and received the rent from the tenants. Then, in June 1843, she sold the property to Ramdhone Koondoo, and conveyed it to him by a deed of sale. The price she obtained was Rs. 945, and there is nothing to show that that was not the full value of the property. At the time she sold, she made a surrender to the zemindar of the leasehold interest, and a fresh pottah was granted to the purchaser, under which undisputed possession was held for 24 years. During that time the purchaser erected important buildings upon the land, and increased the value to such an extent that the property is valued in the present suit at Rs. 40,000. Bunnoo Bebee died before the commencement of the present suit; there is a contest as to the time of her death, which was material only as regards the question of limitation; and as it is not now necessary to consider that point, it becomes immaterial to determine the precise period of her death, whether in 1856 or 1861. Their Lordships, however, see no reason to dissent from the view which the High Court have taken of that fact in the case.

The claim put forward in this suit is that the purchase, although in the name of Bunnoo Bebee, was a purchase *benamee* by Macdonald; that he was the real purchaser, but had used her name in making the purchase. His will is put in evidence, and the respondents claim under it. Undoubtedly, if the purchase was a *benamee* purchase, they have established a *prima facie* title to this estate, or at least to a moiety of it.

The answer of the appellants is, that their father purchased the estate of Bunnoo Bebee without any notice of the *benamee* title, and that they are entitled to hold it, notwithstanding there may have been, originally, a resulting trust in favor of Macdonald. It certainly would require a strong case to be established on

the part of the respondents, to defeat a possession for so long a period of property for which full value had been given to the person in the apparent ownership of it. The burden of proof lies very strongly on them in such a case. They have of course to establish, in the first instance, the fact that the purchase was really made by Macdonald, and with Macdonald's money, on his own behalf. Their Lordships cannot help observing that the evidence, even on that cardinal fact, is extremely scanty. It rests almost entirely on the admission made by Bunnoo Bebee in the inventory made by her after Macdonald's death, in which she treats the property as part of the estate of Macdonald. There is some evidence that Macdonald improved the property after the purchase, by building a new bungalow upon it; but that evidence, without the admission, would clearly be insufficient to establish the fact that the purchase, contrary to all the documents, was made by Macdonald and with his money. Their Lordships however do not feel it necessary to express any definite opinion upon the fact of the purchase being *benamee*, having come to the conclusion that, assuming it was so, the appellants have established their right to hold the property against the *benamee* title.

It is scarcely suggested that the purchaser had any notice that the title was other than or different from the apparent one. None of the documents give any notice whatever that the transaction was other than it appeared to be. On the contrary, all the documents are entirely consistent with the purchase having been made by Bunnoo Bebee herself, or by somebody for her benefit. The case, therefore, cannot be put on the ground of actual notice, but it was said,—and this appears to have been the ground upon which the High Court decided in favor of the respondent,—that there were circumstances which ought to have put the purchaser upon enquiry; and that if he had enquired, he might have discovered the real title.

It is not necessary to say whether this case is to be decided upon the principles on which the English Court of Chancery acts in cases of resulting trusts, when questions arise between the equitable owner and the purchaser for value without notice; or whether it is to be decided upon the general rules of equity and good conscience, which bind the Courts in India, because the principle of decision must in either case be the same. It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry, that, if prosecuted, would have led to a discovery of it.

The High Court treat the defence as an attempt to introduce "a very peculiar doctrine of the English Court of Chancery." Their Lordships cannot think that this is a correct view of the defence which is set up in this case. It is one to which, no doubt, the Court of Chancery in England gives effect, but it only gives effect to it in a peculiar manner, because of the distinction in England between legal and equitable estates, and legal and equitable remedies. If this case had arisen in England, the respondent would have had no *locus standi* whatever in a Court of law, and must have resorted to a Court of equity.

After the discussion which has taken place, the case seems to result in this,—whether or not, under the circumstances of this case, the purchaser ought to have enquired. The High Court think that he ought to have made enquiry, because of the *status* and position of Bunnoo Bebee. The learned Counsel who has argued this case for the respondent does not himself rely upon that circumstance as one which ought to have put the purchaser upon enquiry, and their Lordships cannot see that there is anything in her position as a Mahomedan woman living with her

children upon this estate, and sometimes letting it, which should have put any one upon enquiry whether she was the real owner or not. It is admitted that, if an enquirer had gone to the office of the zemindar, or to the public Registry, he would have found that she was the owner. She was in possession, and her former life led to no presumption that she might not have had money to purchase for herself, or that others might not have purchased by way of gift to her; on the contrary, the circumstance that she had co-habited with one or two persons of some property, might have fairly led to the supposition either that she had acquired money, or that gifts had been made to her for her advancement and comfort in life.

But circumstances have been relied upon at the Bar which were not adverted to by the High Court. In cases of this kind the circumstances which should prompt enquiry may be infinitely varied; but without laying down any general rule, it may be said that they must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular enquiry ought to have been made. It is not enough to assert generally that enquiry should be made, or that a prudent man would make enquiries; some specific circumstances should be pointed out as the starting point of an enquiry, which might be expected to lead to some result. Mr. Cowie, feeling that the case must really depend upon the existence of such circumstances, has referred to two. First he says that, if any enquiry had been made, it would have been found that Macdonald had been in possession, and had improved the property. It has been already observed that the facts do not show, with anything like distinctness, that Macdonald was in possession during his lifetime. There is evidence that he had built upon the property, but, supposing enquiry had been made, and the fact ascertained, it would not lead to the inference that, contrary to the apparent title, he had purchased the land for himself; for it is quite probable to suppose that he would spend money to improve property which belonged to the woman with whom he was living.

The other circumstance relied on is that, in the deed of sale itself from Bunnoo Bebee to the appellants' father, she says she made the sale with the consent of her family. If this had been shown to have been an unusual clause, or that it had been only usual to insert it in deeds where the consent of the family was really required and obtained, there might have been some ground for the superstructure of argument which was built upon it; but their Lordships have no evidence and no suggestion that this is not in common form; on the contrary, it appears that in the deed of sale to Bunnoo Bebee herself from her own vendor, the same expressions occur. It appears to their Lordships that the clause is one without any specific force or meaning, inserted, like many other general phrases, in Indian deeds, to exclude any possible objection that might be raised against them. It is very like that which so frequently occurs after a full conveyance: "I and my heirs have no longer any claim." Those words are often unnecessary, but they are of very frequent occurrence. Their Lordships therefore think that the two facts relied on as those which ought to have put the purchaser on enquiry do not support the contention made at the Bar, and that the whole case of the respondents fails on its substantial merits.

Other questions have been raised in the case with which it is not now necessary to deal. Their Lordships, in the result, are glad to come to a conclusion by which it is quite evident substantial justice will be done. There has not been a suggestion throughout of any collusion between the purchaser and Bunnoo Bebee, or that the purchase was not made entirely *bond fide* on his part, and without notice of any title other than that he took from her.

In the result their Lordships will humbly advise Her Majesty to allow this appeal and to reverse the judgment of the High Court. Their Lordships will further advise Her Majesty that the suit be dismissed, and that the appellants should have the costs in India and of this appeal.

The 8th June 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Act VIII of 1859 s. 14—Jurisdiction—Disputed situation of land.

On Appeal from the High Court at Agra.

Baboo Puhlwan Singh and others

versus

Maharajah Mohessur Buksh Singh.

A former decision by the Courts in India confirmed by the Privy Council, adjudging the land in dispute to be an accretion to the respondent's settled estate in Shahabad, was held to be a bar, under s. 14 Act VIII of 1859, to the jurisdiction of the Ghazeepore Courts to try the present suit for the same land.

The question with which their Lordships have at present to deal is that upon which the judgment of the High Court of the North-Western Provinces which is under appeal has entirely proceeded, viz., whether the Ghazeepore Courts had jurisdiction to try the cause, having regard to the 14th section of the Code of Procedure? That article is in these words: "If, in a suit for land situate on the borders of the Court's local jurisdiction, the defendant object to the hearing of the suit on the ground that the land is not included within the local jurisdiction of the Court, the Court shall have power to determine the point, and if the Court shall find that the land is included within its local jurisdiction, it shall proceed to try the suit. Provided that, if it be shown that the land in dispute has been adjudged by competent authority to belong to an estate, village, or other known division of land, situate within the local jurisdiction of another Court, the Court in which the suit is brought shall reject the plaint, or return it to the plaintiff, in order to its being presented in the proper Court."

The High Court of Agra have come to the conclusion that that section was a bar to the present suit, and that it was their duty to act under the latter part of the clause in question. Their Lordships are of opinion that that was a correct decision upon the section as applied to the facts of this case.

The question, as it seems to their Lordships, is what was the *res decisa* in the former case? In that suit an objection was taken similar to that which is taken in this suit to the jurisdiction of the Shahabad Court. It was treated as if the land in dispute was within Zillah Ghazeepore, or an accretion to land in the possession of the defendants, which belonged to Zillah Ghazeepore; and it was contended that, by reason of a former decision of the Collector of Ghazeepore, the latter part of this section applied, and that the Court of Shahabad had no jurisdiction to entertain the suit. That was decided against the defendants in that suit, who are the plaintiffs and appellants in this suit.

In order to decide that case, the Principal Sudder Ameen, who was the Judge of first instance, thought it advisable to try the question of jurisdiction, together with the merits of the suit, and he came to the conclusion that the whole of the land colored yellow in the map which has been produced in both suits,—and it is the most favorable way of putting the case for the appellants to suppose that nothing but that land was then in dispute,—was an accretion to the plaintiff the Maharajah's settled estate in Shahabad. That decision was confirmed by the High Court. It then came here upon appeal, and this Board, confirming generally the decisions of the two Courts, held that, treating the whole of the yellow land as alluvial accretion, there were grounds for giving a portion of it to

the defendants, the present appellants, as an accretion to their land, which had formerly, at all events, been in Ghazeepore; but that the other land, the portion on the other side of the line which they drew, was to be treated as an accretion to the land marked green; and that the plaintiff, the Maharajah, in that suit, was entitled to recover that as an accretion to his settled estate; affirming, therefore, with the above exception, all that had been done by the Courts below, viz., that the land was alluvial land, and that it was an accretion to the settled estate of the plaintiff in Shahabad.

Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-matter in the particular suit. And it seems to their Lordships impossible, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the Maharajah in Shahabad. He came as plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence, it is obvious that, if an accretion to his land, it could be an accretion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate in Shahabad.

It seems, therefore, to their Lordships that the decision of the High Court of the North-Western Provinces was correct; and that being the case, their only duty is to advise Her Majesty to dismiss this appeal, with costs.

The 8th June 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Nattore Raj—Deeds of gift—Construction—Presumption—Hindoo usage—Endowment of idols.

*On Appeal from the High Court at Calcutta.**

The Collector of Moorshedabad

versus

Ranee Shebessuree.

From the insertion of an express power of alienation in the subsequent *hibbanamah*, no intention to restrain alienation can be inferred from the omission of such a power in a former *hibbanamah*, unless the two deeds are parts of one design or form a connected series so as to be construed as a whole.

The Privy Council did not consider that the presumption arising from general Hindoo usage, that endowments of idols are usually made by Hindoos with the object of preserving the *sheba* or worship in families rather than of conferring a benefit on individuals, was sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it.

Exposition of the manner in which the Privy Council construed two deeds; one as denoting an intention to perpetuate the worship in the family, and the other as intended to make an absolute gift to the donee, with full dominion over the property and worship.

The remaining question in the appeal in the above suit relates to the effect to be given to four out of five *hibbanamahs* executed by the Maharanee Bhubanee in

* From the judgment of Steer and Seton-Karr, *J.J.*, dated 30th April 1863, Special No. (Full Bench Rulings), W. R. 112.

favor of Joymoney, one of the wives of her grandson Bissonath Roy. The appellants contend that, although Gobindnath has established his title as heir by adoption to Bissonath and to the Raj of Nattore, the properties comprised in these deeds did not descend upon him, because, as they allege, Joymoney acquired under them an alienable estate. It is admitted that, in point of fact, Joymoney in her lifetime gave the properties comprised in four of the above deeds to Doorga Chunder, who has since died, and is represented by Koylas Chunder Roy, the minor appellant, and the property comprised in one deed to his wife Kaseesoondree, the other appellant. The question is whether Joymoney had power to make these alienations.

A decision hostile to the validity of an adoption of Doorga Chunder by Joymoney, under an alleged authority from her deceased husband Bissonath Roy, was given in the course of the protracted litigation referred to in the record : so that he must be regarded as a stranger to the family of her husband Bissonath.

Maharanee Bhobanee, in consequence of minorities, managed for many years the Raj of Nattore, but the property comprised in the deeds in question was acquired by her in her own right. Some part of it, once forming part of the estates of the Raj, was purchased by her at auction sales, when it was sold for the debts of Bissonath Roy. The respondents indeed do not dispute that the property was held by the Maharanee Bhobanee as her *streedhun*, nor her power of dealing with it as she chose ; but their contention is, that she dedicated it to religious worship in such a manner that it became inalienable by Joymoney, and descendible only to her heirs.

There is no sufficient evidence that the idols mentioned in the deeds were ancestral or family idols, or that the property, before the Maharanee acquired it, was devoted to religious purposes. The dedication to such uses, whatever may be the nature and extent of it, appears to have been made for the first time by herself, and she must be considered as the founder of the endowments.

With regard to one of the deeds (No 4), dated 27th August A.D. 1802, no question arises. It contains no reference to worship, and has an express power of alienation. The Courts in India have concurred, and as their Lordships think rightly, in treating it as an absolute gift of the property to Joymoney, with all the rights of unrestricted ownership.

Their Lordships consider also that little difficulty arises with respect to another of the deeds (No. 2), dated 19th July 1802, relating to the "auction purchased zemindary Hoodda Burranagore." That *hibbanamah* contains an absolute gift of the estate to Joymoney ; and the words "you will do virtuous actions, &c., from the profits," do not appear to their Lordships to contain any specific direction or trust capable of being enforced. They appear to be simply recommendatory of a moral duty, and do not qualify the absolute character of the gift. The clause "you shall enjoy it with your sons and grandsons ; if at any time any heir of mine should make any claim, that will be null and void," ought not in their Lordships' view, to be construed as a limitation to the sons, and consequently as a restraint on alienation. It may have been added to express the absolute and irrevocable nature of the gift.

The High Court considered that the absence of an express power of alienation led to the presumption that the gift was limited ; and, apparently disregarding their own rule, that each deed should be interpreted by itself, they infer from the insertion of such a power in the subsequent deed (No. 4), and the omission of it in this, an intention to restrain alienation. Their Lordships think that the subsequent deed cannot properly be referred to for this purpose. If it had appeared expressly, or by reasonable implication from the contents of the deeds, that they all formed part of one entire design, then the construction of any one could properly be aided by the dispositions made and the language found in the others ; but it cannot be inferred from these deeds that they are parts of one

design, or that they form a connected series to be construed as a whole. Their Lordships consider that this *hibbanamah* No. 2, construed by itself, contains an absolute and unrestricted gift of the property comprised in it to Joymoney, and consequently that the judgments given by the Courts in India in favor of the respondents, on the ground that she had no power to alienate, cannot be sustained.

The three other deeds, No. 1, No. 3, and No. 5, are different in their character from the two hitherto discussed. They contain provisions for the endowment and support of idols and their worship, which are in the nature of trusts impressed on the property to be performed by the donee. In the case of a bare trust leaving no beneficial enjoyment to the donee, there would be strong ground for the implication that the property was not alienable, and was to descend to the donee's heirs as trustees in succession. But it was contended that in these grants the trust is coupled with an interest, giving the donee a right to the enjoyment of the surplus usufruct of the property, after making due provision for the sustentation of the idols and their worship, and therefore that there is a beneficial ownership capable of alienation.

The case of *Sonatun Bysack v. Sreemutty Juggutsoondree Dossee*,* 8 Moore I. A. p. 66, was cited to show that such a beneficial interest may exist as a secular right in property dedicated primarily to the worship of idols. In that case, it is true, a disposition of the surplus was expressly made by the will of the donor; but their Lordships do not doubt that cases may occur where, from the nature and terms of the gift, the intention of the donor to confer a beneficial and alienable interest in property so dedicated may be inferred.

The question arising for decision on these several deeds is, whether it can be collected from their language that the donor Maharanee Bhobanee intended to make such a gift, or whether she meant that the worship and the endowments shall remain in the family of Joymoney.

It would unquestionably be more consonant with the genius and spirit of Hindoo law and usages that endowments of this kind should be made to a family, by whose members in succession the worship might be performed, than to an individual who might sell or give them to a stranger.

The following cases were referred to on this subject during the argument:—
1 S. D. A. Reports (1807) 180; 4 *Idem* (1829), 343; 5 *Idem* (1832), 210; 5 W. R. 202; 7 *Idem* 266.

There is considerable difficulty in arriving at the intention of the donor in the present case, in consequence of the peculiar position of this family, and the vague and varying language of the several grants. The Raj of Nattore was from its nature an impartible estate, descending on a single heir; and the Maharanee certainly does not seem to have intended to annex this property and worship to the Raj. She clearly also did not desire that they should go to her grandsons, Bissonath Roy and Sheebnath Roy. It may be inferred from the *hibbanamahs* that she intended one of two things: either to make an absolute gift to Joymoney, giving her full dominion over the property and worship; or to vest them in her, and her heirs, as family property and *sheba* in such manner that the succession should be to her heirs, passing over her husband Bissonath and his brother. It is important to observe that Joymoney at the time of these deeds was the mother of two sons.

Bearing in mind, whilst construing these *hibbanamahs*, the presumption already adverted to, that endowments of this nature are usually made by Hindoos with the object of preserving the *sheba* in families, rather than of conferring a benefit on individuals, their Lordships have been led to the conclusion, with regard to the *hibbanamah* No. 1, that upon the right construction of that deed, Joymoney had no power to alienate the property contained in it. In that *hibbanamah*, dated 8th November 1798, the Maharanee Bhobanee says:—"I have certain

* See p. 37 *ante*.

property for the service of the gods worshipped by me at Mamoodpore, &c. . . . My eldest grandson is Rajah Bissonath Roy ; his understanding is unsettled, he is incapable of managing the property, and the zemindary in his hands is gradually diminishing. My second grandson, Koer Sheebnath Roy, is a minor, and disobedient to my commands ; by neither of these two can the service of the gods be performed."

She thus declares her motive for desiring to exclude her immediate heirs, but that motive does not afford a reason for a desire to allow the *sheba* to go entirely out of her family.

The deed goes on :—" Knowing you are the wife of my grandson, and the mother of a son ; moreover you are always employed in taking care of me, you will be able to take care in a very good way of the service of the gods, and my property will remain intact."

The above passages which refer to Joymoney being the mother of a son, and to her ability to take care of the service of the gods, and the conclusion the Maharanee draws from these facts, seems strongly to indicate an intention " that the property should remain intact " in the family.

The deed goes on :—" For these reasons the worship of the aforesaid gods, and their *debutter* pergunnahs (naming them), the ornaments of the gods, and all the property appropriated to the worship of the gods, I make over to you, by a gift. Having caused your name to be enrolled in the *shebaettee*, you will take possession of the *debutter*, &c., and continue to perform the prescribed worship of the gods from generation to generation. You have the power to appoint a *shebaet* for the worship of the gods."

The power to appoint a *shebaet* is perhaps consistent with either construction. The words " from generation to generation " may, in some cases, mean no more than to express the absolute character of the gift ; but, considering the subject-matter, it seems more probable that in this deed they were used in their natural sense to denote an intention to perpetuate the worship in the family.

The words " I and my heirs have no concern with it," were strongly relied on by the learned Counsel for the appellant, and they undoubtedly favor his construction ; but their Lordships consider, although not without some doubt, that those words may be satisfied by referring them to the intention of the Maharanee to exclude her grandsons, who were her immediate heirs, and that they are not sufficient to rebut the construction derivable from the other parts of the document.

The judgment on this deed will therefore be in accordance with the decision of both the Courts in India.

Their Lordships have come to an opposite conclusion with respect to the *hibbanamah* (No. 3), dated the 12th August 1802. It contains no words of succession, nor any reference to family or descendants. In it the Maharanee says she has in her Burranagore house the worship of the idol Sree Sree Ishwur, that her daughter was *shebaet*. " I worship now." She goes on :—" For the purpose of worship there is *turruff*, &c., and the ornaments, &c." " I give it to you as a gift ; you will take possession in accordance with the *hibba* ; you will always perform the worship of the gods ; you will cause your name to be written as *shebaet* in the Government records, and will always pay the revenue. Therefore I give this deed of gift."

No words occur to limit the completeness of the gift to Joymoney, subject to her making due provision for the worship of the idol. It may be that the Maharanee Bhobanee intended that Joymoney should enjoy this property and worship as fully and in the same manner as she herself had held them ; and their Lordships do not consider the presumption already referred to arising from general Hindoo usages is sufficient of itself, in the absence of any language denoting the intention of the donor that the gift should belong to the family, to impress that construction upon it. Their Lordships, therefore, with regard to this deed (No. 3),

disagree with the judgment of the High Court, which reversed the decision of the first Judge (Mr. L. Jackson).

The construction of the last deed (No. 5), dated 5th September 1802, depends very much on the same considerations and reasons as those which determine, in their Lordships' view, that of the *hibbanamah* No. 1. These deeds are substantially to the same effect. The Maharanee in the last says:—"The *sheba* of Sree Sree Doorga is mine; of that *sheba* I had a desire to make a gift to a daughter-in-law, Ranee Sunkary." She then refers to having purchased property sold for arrears due from Bissonath, and paid the value in the name of the goddess, and to the death of Sunkary, and then goes on:—"For this reason I make a gift of the same *sheba* to you (Joymoney), who are my grand-daughter-in-law, of the entire talook, *turruff*, &c., and the ornaments of the goddess, and all the *sheba*. You will have your name registered as *shebaet*, and take possession of the mehals through your men, and continue to perform the worship of the gods from son to grandson, and so on. For this reason I give this deed of gift."

Their Lordships do not think it necessary to repeat the reasons already given in commenting upon the first deed, which led them to the conclusion that the Maharanee intended that the endowments and worship should remain in the family of Joymoney. They think the declaration of the donor that the worship should continue "from son to grandson, and so on," and that for that reason she made the gift, construed with the aid of the presumption arising from the nature of it, sufficiently indicates this intention. Their Lordships must therefore hold, in accordance with the judgments of both the Courts below, that the alienation made by Joymoney of the property comprised in this last deed cannot be supported.

It was not disputed, in the end, that the respondent Gobindnath Roy, having established his title as heir by adoption to Bissonath Roy, became also heir to Joymoney, and entitled to recover such of the properties comprised in the *hibbanamah* as should be held to be inalienable by her.

In the result their Lordships will humbly advise Her Majesty in the appeal of the Collector of Moorshedabad in the suit originally brought by Kistomonee Dabee in 1849, as follows, that is to say, that, with respect to the properties comprised in the *hibbanamahs* Nos. 1 and 5, the appeal be dismissed, and the judgments of the Courts below affirmed; that with respect to the property in the *hibbanamah* No. 2, the appeal be allowed, and the judgments of both the Courts below reversed, and the suit, so far as it relates to this property, dismissed; and that with respect to the property in the *hibbanamah* No. 3, the appeal be allowed, and the judgment of the High Court reversed, and that of the Judge of Rajshahye affirmed.

The parties to the last-mentioned appeal will bear their own costs of that appeal; and their costs in the Courts in India should be apportioned according to the course of those Courts in cases where the plaintiff is only partially successful.

The 12th June 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Sale of Minor's Property—Suit for Damages (by Purchasers against Vendors)—Costs.

On Appeal from the Sudder Court at Agra.

Bhoopnarain Chowbey and another

versus

Rughoonath Gobind Roy and another.

It is not for the public benefit that, where two parties knowingly deal with the sale and purchase of property of infants who have not by law the power of sale, one of the parties (the purchasers) who obtain possession of the property in a manner calculated to injure the infants should be able to sue the other party (the vendors) for damages. The Privy Council even refused to give costs to either party, considering them both *in pari delicto*.

The circumstances which give rise to this case are as follows: In 1845 some land was sold which belonged at that time to a joint Hindoo family consisting of five brothers, to the plaintiffs in the suit, who are the appellants. It appears now that at the time of this sale three of those brothers were minors, and therefore incapacitated from being parties to it. The deed of sale is not before their Lordships. It would appear, according to the statement of the defendants in this suit, that it purported to be executed by all the brothers, and there is reason to suppose that it purported to be executed by each on his own behalf, inasmuch as there is a finding in a suit, which will be subsequently referred to, of the three brothers against the present plaintiffs, that "the deed of sale in dispute has not been executed through a guardian on the part of the minors but by all the sellers themselves; its execution, in good faith or otherwise, is not a point for consideration." At all events it purported to be executed by all the brothers, either each executing on his own behalf or the two executing on behalf of the other three.

It appears that this transaction was regarded by the plaintiffs as well as by the two elder brothers as open to question, for it was thought necessary at the same time to take an *ikrarnamah*, executed by the two brothers in favor of the plaintiffs, which states,—“We, the two elder brothers, are owners of the property which is sold;” and further: “We have unconditionally sold our own respective rights and interests in this estate and those of Balka Gobindroy, Balkurum Gobindroy, and Byjoo Gobindroy, to Ramdial Chowbey, son of Moteeram Chowbey, for Rs. 5,500, and have executed the deed of sale and receipt for the sale price on the part of all the five brothers, and have delivered them to the purchaser.” The reason of the non-execution by the younger brothers is thus explained: “Balka Gobindroy and others could not come to this city for the execution of this deed of sale as they were not at leisure.” This is obviously a false excuse for the non-execution by the brothers, whose non-execution was owing to their being incompetent to execute the deed, and probably they were altogether unaware of this sale.

As soon as the younger brothers came of age they instituted a suit against the present plaintiffs to recover their share of this property, and they succeeded in that suit. It may be as well to observe what were the issues which were framed and the judgments which were then given as far as they are material to the present case. That suit was decided on the 6th December 1861. One of the issues is, “whether at the time of the execution of the deed of sale the plaintiffs were minors, and Rughoonath Gobindroy and Balka Gobindroy were the only two of the sellers who had attained majority;” and then it goes on: “and the deed of sale in dispute was executed by collusion of the adult sellers with the insertion of the plaintiffs’ names, or whether at the time of execution of the deed of sale, all the plaintiffs had attained their majority and were living together, and the deed of sale in dispute was executed without collusion and in good faith.” Collusion between the defendants and the elder brothers appears to have been one of the issues, perhaps not very formally stated. Upon that issue there was this finding: “Whereas the deed of sale in dispute has not been

executed through a guardian on the part of the minors but by all the sellers themselves, its execution in good faith or otherwise is not a point for consideration. All that requires to be determined in this case is whether the plaintiffs, at the time of the execution of the deed of sale, had attained their full age or not, and as their minority has been proved, the deed as to the sale of their share is to be considered null and void, and there is no doubt that the execution of the sale-deed was effected collusively by the purchasers and the adult sellers." Upon an application for a review of this judgment, the Judge, Mr. Swindon, also finds this: "There is no doubt that the sellers, who were adults, did, in collusion with the purchasers, sell the plaintiffs' share with their own." There appear, therefore, to have been findings in that suit, both in the Court of first instance, and in the Court of Appeal, that the sale was fraudulent and collusive on the part both of the vendors and the purchasers. In the present suit the finding of the Court below is very much to the same effect. The Principal Sudder Ameen finds that, "although the defendants' total denial of the agreement relied on by the plaintiffs, which is registered and has been proved by witnesses, is utterly false and dishonest, all proceedings of plaintiffs also from first to last are not free from the taint of bad faith. For in the first place Ramdial, the plaintiffs' father, made defendants execute in his favor a sale-deed in their own names jointly with those of Balka Gobindroy and others, three minor brothers, without making any mention of the fact of their minority, with the object of appropriating the whole village, and took possession of the whole, in which unlawful act the defendants took part with him." Then he goes on to say: "He made defendants also execute an ikrarnamah as a pre-contrivance, and in order to conceal the fact of the minority of the defendants' brothers he caused the following clause to be entered therein, viz., 'that for want of leisure Balka Gobindroy, &c., cannot come to this city to execute and complete the sale deed,' whereas the sale was not completed by registration, while the agreement was registered." He also adverts to this, that instead of registering the deed of sale in the ordinary manner, a fictitious suit was instituted against all five brothers, and that what may be called a fictitious confession of that suit appears to have been given in the names of all five.

Such is the finding of the Court below in this case, a finding which is in substance confirmed by the Court above. The main difficulty which has pressed upon their Lordships has been this: whether in this suit the question of collusion between the vendors and purchasers with a view to defraud the infants was raised as distinctly as it ought to have been by way of plea or statement by the defendants, or whether at all events it was raised with sufficient distinctness in the issues in the cause. Unquestionably the defence on which the defendants have succeeded, and on which the judgment of both Courts proceeded, is not raised as clearly as would be required in pleadings in this country by the statement of the defendants, nor by the issues which were framed in the cause. The only issue at all referring to this question appears to be the second, which is in these terms: "In the event of the plea in bar being overruled, are the plaintiffs entitled to recover from the defendants Rs. 3,300 principal, and Rs. 3,300 interest, being the portion of the purchase-money due on account of three-fifths share of Bijjo Gobindroy, and other brothers of defendants, under the ikrarnamah dated 3rd June 1845; or, as pleaded by defendants, is the ikrarnamah alleged by plaintiffs false, and did the plaintiffs cause a sale-deed to be executed by defendants and their brothers without any mention of the minority of the latter?" It is only under those words that, according to their Lordships' view, this question, if it could be raised at all, was raised in the suit below. At the same time it is to be borne in mind that the learned Judge of the Court below does appear to have considered that this question was in issue, and it is further to be observed that in the grounds of appeal the plaintiffs do not contend that his finding was

beyond his powers on the ground that it was not. If they had so contended, it is possible that the High Court might have framed an issue distinctly raising it.

Under those circumstances, although their Lordships undoubtedly cannot regard as satisfactory the form of the issue in this case, they are not disposed to take upon themselves to reverse the finding of the two Courts upon a question of fact, which both appear to have supposed to be before them, and which neither party seems to have denied to be before them.

With respect to the evidence in support of this finding, it is not for their Lordships to deal with the case as a Court of first instance. It is enough for them to say that they are unable to declare that the Courts below were not justified by the evidence in coming to the conclusion at which they arrived. It appears certain that the present respondents, at the time of the transaction in question, in 1845, were minors. It is probable that the present appellants knew this. It is certain that they knew that the transaction was one liable to be impeached, otherwise they would not have thought it necessary to take an indemnity. That indemnity shows that they themselves had notice that three of the brothers were unable for some reason to execute the deed of sale. If they knew that they were minors, they must have been aware that the reason alleged for their non-execution of the deed of sale was a false one; and the further proceeding of obtaining a fictitious judgment against five brothers, and getting the three minors to confess that judgment, instead of the ordinary course of registering the deed, is certainly a proceeding of a suspicious character.

Their Lordships therefore are unable to say that there was no evidence to support a finding, which appears to be in fact a finding of four Courts. In the ejectment suit two Courts have found that there was collusion between the vendors and purchasers. In the present suit the Court below and the Court above have found substantially to the same effect, though not precisely in the same language.

Under these circumstances it appears to their Lordships that the decree of the Court below ought to be supported. It is not for the public benefit that a party engaged in a transaction such as this must now be taken to be, wherein both vendors and purchasers are aware that they are dealing with the property of infants, who have not by law the power of sale, and that they are obtaining possession of this property in a manner calculated to injure those infants, should be able to sue another party to the transaction for damages.

For these reasons their Lordships will advise Her Majesty that this appeal should be dismissed; but considering the circumstances which have been alluded to, the nature of the defence, the absence of a distinct plea raising this question, and above all the fact that both parties must be considered *in pari delicto*, their Lordships are of opinion that neither party should have the costs of this appeal.

The 13th June 1872.

Present:

Lord Westbury, Lord Justice James, Sir James W. Colville,
Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

*Execution of orders of Privy Council—Procedure—Act II of 1863 s. 14—
Declaratory orders.*

*Proceedings on a Petition to enforce Execution of Her Majesty's Order in
Council on an Appeal from an Order of the Judicial Commissioner of the
Punjab.**

* 17 W. R. 77; and p. 521 *ante*.

In re Barlow v. Orde.

A party in a suit, desirous of executing an order or judgment of Her Majesty in Council, ought to apply, in conformity with s. 14 Act II of 1863, to the Court from which the appeal was finally brought to the Queen in Council, to enforce and execute the decree of Her Majesty in Council; and it is the duty of such Court to give directions for executing the decree to the Court of first instance by which the suit was originally tried.

A declaration of Her Majesty in Council must not be considered as not being equivalent to an order. When Her Majesty in Council does make a declaration, the form in which that declaration is conceived, and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed. If any difficulty should arise in that form, or be sought to be produced from having recourse to that non-existent ground of objection, the Privy Council will not fail to recommend Her Majesty to deal with such obstructiveness in the most serious and stringent manner.

Mr. Leith.—I have now to apply to your Lordships, upon petition, in respect of the non-execution of a judgment or order of Her Majesty in Council, which was made on the 31st March 1870, under a judgment of your Lordships' Board, bearing date the 9th March 1870, by which judgment your Lordships reversed the judgment of the High Court, which had been pronounced against my client. The effect of that reversal was to leave standing and in full effect the judgment of the Lower Court, of the Court of first instance, which had decreed in favor of my client, and had decreed possession in respect of the property which was the subject of the suit. When the order of Her Majesty in Council was received, it was remitted to India, and the usual application was made by my client that the order of Her Majesty in Council should be carried into effect by the proper Court.

Lord Justice James.—What Court?

Mr. Leith.—The Court in the Punjab. It was sent to the Commissioner.

Lord Westbury.—The order is :—"Their Lordships do this day agree humbly to recommend your Majesty to reverse the decree of the Judicial Commissioner of the Punjab of the 21st January 1865." That was the original decree, was not it?

Mr. Leith.—Yes, that is the Appellate Court.

Lord Westbury.—Was that the Appellate Court?

Mr. Leith.—Yes. That decision was against my client. We appealed against it, and your Lordships reversed that order.

Sir J. W. Colville.—Then you see there are two decrees reversed. Are they both appellate decrees.

Mr. Leith.—They are both appellate decrees.

Lord Westbury.—Because the second decree is earliest in point of date?

Mr. Leith.—Perhaps it would be as well that I should state what were the decrees originally. I took it for granted that your Lordships had them. I will state the proceedings. The suit was commenced on the 4th June 1863, and was brought in the Court of the Officiating Deputy Commissioner of Hissar by my client on behalf of herself and the guardians of the infants to establish the will. On the 13th October 1863 the judgment and decree was made by that officer, the Officiating Deputy Commissioner. That is the one that remains standing, which I have referred to as being the Court of first instance.

Sir Montague E. Smith.—That is the decree reversed by the Commissioner?

Mr. Leith.—Quite so. That decree found and decided all the issues in favor of my client, stating that a moiety of the one, and the fifth part of the other share, which was all we sued for under the devise of the two wills, "passed by the devise thereof contained in the latter will to your petitioner and his said infant son." That was the decree which is in terms the same as your Lordships' subsequent decree, reversing the decree of the High Court, deciding everything in favor of my clients, all they have claimed.

Sir James W. Colville.—It ends, I suppose, with something mandatory?

Mr. Leith.—Yes, in the usual way. Then on the 26th January an appeal was instituted against that judgment of the first Court, and on the 26th January 1864 the Officiating Commissioner or Superintendent and Civil Judge—all these

offices meeting in the same individual—of Hissar recorded his judgment and decree by which he allowed the appeal and reversed the judgment of the Lower Court. He decided the claims and dismissed the suit. He refused to establish or to decree the claims of my client. We appealed against that decision, and on 21st January 1865 the Judicial Commissioner, the officer in the Appellate Court of the Punjab, made and recorded his judgment and decree, by which he dismissed our appeal, and affirmed the decision of the intermediate officer which I have referred to. Then, my Lords, we applied for the ordinary leave to appeal to Her Majesty in Council against that judgment of the Judicial Commissioner. I may mention that the Judicial Commissioner is the highest functionary, that is, the highest Court of Appeal in the Punjab, and the appeal is therefore direct from the Judicial Commissioner to Her Majesty in Council. We made the usual application, by petition for leave to appeal to Her Majesty in Council, which was granted, and that appeal came on, and was argued before the Lords of the Judicial Committee.

Lord Westbury.—Is this the state of things? The Court of first instance made a decree in your favor upon all the points, and concluded that decree by finding for the plaintiff on all the issues. There was an intermediate appeal which reversed that decree, and there was an appeal from the Court so reversing it; and that appeal was rejected, with all the costs, whether in this Court or the Courts below. From that decree, or rather from the two decrees of intermediate Courts of Appeal, the appeal to Her Majesty was presented. Now will you be good enough to tell us this? How came it to pass that, in dealing with that appeal to Her Majesty, we were not content with annulling the decrees of the two intermediate Courts of Appeal, and affirming the decree of the Court of first instance which had given you all you desired? Do I make myself understood?

Mr. Leith.—I really do not know.

Lord Westbury.—Does there appear any reason on the face of the judgment?

Mr. Leith.—No, none. It goes on very minutely in dissecting the case, and proceeds to adjudicate upon every point, but does not go on to say that possession shall be given, or, in a mandatory way, that the parties shall be put into possession, at the end of the judgment.

Sir James W. Colville.—There is one part of the order of Her Majesty which perhaps was new, which was an enquiry.

Lord Westbury.—An enquiry at the request of Mrs. Orde. An enquiry is directed, that is, an additional thing to the decree of the Court of first instance, because you see before we proceed to deal with what has been done in the Court below, one wants to see whether the order which Her Majesty made on the recommendation of this Committee was in itself complete, so as not to afford room for any mistake or misapprehension. Now I want to see how it came to pass that we should have subverted the foundations of the decree of the Court of first instance with which you were content, and which in effect we built up again; because you know we might have reversed the intermediate orders on appeal, and have affirmed the decree of the Court of first instance, and, in addition, at the request of Mrs. Orde, might have directed the enquiry. My Lord suggests, which is no doubt the fact, that, if we did not deal with or touch the decree of the Court of first instance, and if the declarations made are all consistent with that decree, the only addition being that enquiry at the option of a particular party, the course should have been that it should have gone back to that Court, and that Court would have had no difficulty whatever in giving effect to the whole of it. But then comes what is to me a difficulty; how comes it that it did not go back to that Court, but that it went back to an intermediate Court of Appeal?

Mr. Leith.—That is according to the Code of Procedure. I will explain that

presently. With reference to this enquiry, as your Lordship has just pointed out, which I was going to answer, which his Lordship had suggested to his mind before, that was an option left to be decided in India by my client. It was not a suspension of any part of your Lordships' order, but was independent of the order which confirmed the original Court's decree. It was a question raised by the respondents with regard to certain of the property; and then it was said:—"If however, Mrs. Sophia Orde"—that is my client, the present applicant—"requests, and is content to take at her own risk an enquiry on this subject, their Lordships will recommend that such enquiry shall form part of the order to be made. Their Lordships will humbly advise Her Majesty to reverse the decree appealed from, and to declare that Mrs. Sophia Orde and James, the son and daughter of Major James Skinner, are entitled in equal shares, by virtue of the will of Colonel Skinner, to one equal fifth part of all the estates and property thereby devised and bequeathed to the testator's five sons in equal shares, and also to declare that one equal fifth part of all the estates and property purchased or acquired after the death of the Colonel, by means of the rents, profits, or income arising from the estates and property, devised and bequeathed to the said five sons of the testator, belonged absolutely to his second son," and then it goes on to say also "and at the request and risk"—that is to say, if Mrs. Orde requests—"of Mrs. Sophia Orde, let an enquiry be made by or under the direction of the Court from whose decree this appeal is brought, whether any renewals or leases of lands that had been held by the Colonel during his lifetime were made or granted by the Government or any other persons to the executors or managers of the Colonel's will, and under what circumstances, and for what consideration the same were made. There remains the subject of costs," and then the costs of the appeal are dealt with.

Sir Montague E. Smith.—The enquiry is directed to be made by the Court from whose decree the appeal is brought.

Mr. Leith.—It would be made so.

Sir Montague E. Smith.—That is the intermediate Court, is it not?

Mr. Leith.—No, that would be the highest Court of Appeal; they would send it down to the other Court.

Sir Lawrence Peel.—They would direct the enquiry to be made according to the practice of that Court.

Mr. Leith.—When we received the order of Her Majesty with the report, a certified copy thereof was transmitted to India, and we applied under ss. 262 and 234 and 235 of Act VIII of 1859, in respect of the execution of the said order. The Code of Procedure was extended to the Punjab in 1866.

Lord Westbury.—Let us see exactly the course that ought to have been taken. Her Majesty's order supplied in her declarations a foundation for the principal parts of that decree, and superadded an optional enquiry. Now, then, which was the tribunal in India that ought to have been applied to, to give effect to that decree?

Mr. Leith.—The Court in which the original decree was made, supposing that the Code applies.

Sir J. W. Colvile.—Is that so? Would not it be the duty of the highest Court, the Court from which the appeal comes to us, when the record is remitted to them, to amend the decree? because our duty is to make the decree which that Court ought to have made. Then, as I understand, that Court ought to have amended the decree, and put it in the proper form, and sent it down to the Lower Court for execution.

Mr. Leith.—The whole of that turns on the section. I will give you the section upon which they acted. Probably the ruling of your Lordships' Court would be that the highest Court there, the Court of the Judicial Commissioner, from which the appeal came, and whose judgment was reversed, would have the

duty cast upon it of executing your Lordships' judgment. I think that would appear, but they have been misled by taking the Code as their guide, in regard to what is done in a decision by an Appellate Court in India, not by your Lordships' Court. The section which is referred to, 361, has this provision, that a copy of the decree certificate of the Appellate Court shall be transmitted to the Court which passed the first decree, and it shall be filed with the proceedings, and an entry made in the original registry of the suit of the judgment of the Appellate Court, so as to make it a judgment of that Court; and then s. 362 points out that the party must make an application for execution of the decree of the Appellate Court, that is, in that Court to which it was remitted, "to the Court which passed the first decree, and shall be executed by that Court as an original decree, when the decree cannot be executed by that Court," and then it goes into another jurisdiction as in this case. But upon those two is founded the error in this case. They treated the order of Her Majesty in Council as a decree of an Appellate Court under the Code. Therefore it is open to your Lordships now to decide that that does not apply to a decision of your Lordships' Board followed by the order of Her Majesty in Council, which ought to be executed by the Court of last resort in India.

Lord Westbury.—We must not go too fast, if you please. This is a mere entrance to the labyrinth: You agree that these sections give the rule?

Mr. Leith.—Yes.

Lord Westbury.—Well, then, if it was a rule, it was incumbent upon you to observe it. Now see what the rule is in 361:—"A copy of the decree or other order disposing of the appeal,"—that would be Her Majesty's order,—"*certified by the Appellate Court, or the proper officer of such Court, and sealed with the seal of the Court, shall be transmitted to the Court which passes the first decree.*" Now what Court answers that description?

Mr. Leith.—That is the Court of the Assistant Commissioner.

Lord Westbury.—What I have called the Court of first instance?

Mr. Leith.—That would be the Court of first instance. That would be the Court which I have designated as the Court of the Officiating Deputy Commissioner.

Sir Lawrence Peel.—Do I understand you went to the second Court of Appeal?

Mr. Leith.—No; to the first.

Sir Montague E. Smith.—What did that Court do?

Mr. Leith.—It said it was a declaratory order, and not mandatory.

Sir Montague E. Smith.—It is described as the Judge of Meerut.

Mr. Leith.—Yes; it was sent to another jurisdiction under another clause of the Act.

Lord Westbury.—We want to know whether the directions of Her Majesty ought to have been carried into effect by the Court of first instance, or by the last Court of Appeal, but I am told we need not discuss that because it is settled by an Act.

Mr. Leith.—Quite so. There are two Acts; there is one of 1852, which applies to the Regulation Provinces; there is an Act, No. II of 1863, which applies to the Non-regulation Provinces, within which category this comes. And by that Act it is provided that, if a party in a suit is desirous of preferring an appeal to Her Majesty in Council from any final judgment, decree, or order made on appeal or revision by the Court of highest civil jurisdiction in any province in British India not subject to the general Regulations,—which this is,—or from any such final judgment, decree, or order made in the exercise of original jurisdiction by the said Court, in any case in which the sum or matter at issue is above the amount or value of Rs. 10,000, or which judgment, decree, or order shall involve directly or indirectly that sum, or when the Court shall declare it to be a fit one for appeal, then such appeal shall be allowed.

Lord Westbury.—Does this case come within those numerous descriptions?

Mr. Leith.—Quite so. This was an appeal from the Court of highest appellate jurisdiction in a Non-regulation Province, so it comes exactly within the terms. Then, after providing for other matters connected with the security to be given, and the proceedings forwarded, and the expenses, then comes s. 14. The intermediate sections do not apply. The 14th is:—"The orders or decrees of Her Majesty in Council, when duly certified, shall be enforced and executed under the directions of the said Court."

Lord Westbury.—What is "the said Court"?

Mr. Leith.—The following words explain it:—"By the Judge or officer by whom the suit was originally tried in the manner and according to the rule."

Lord Westbury.—That does not explain it at all. What is "the said Court"?

Lord Justice James.—Then it is all to go back?

Mr. Leith.—To the Court of first instance.

Lord Westbury.—Are you quite sure of that? "The said Court" must refer to a Court previously described. What is the previous description? You see you wander up and down in an Act of Parliament as in a wood.

Mr. Leith.—There is no immediate antecedent to that word.

Lord Westbury.—Cannot you tell what "the said Court" is?

Mr. Leith.—I have given my own construction that it is the Court of first instance.

Lord Justice James.—You are making a suggestion against yourself. This seems clear that the Court from which the appeal comes is to give directions to the Judge or officer by whom the suit was originally tried.

Mr. Leith.—I think so.

Lord Westbury.—Then "the said Court" is the Court appealed from to Her Majesty?

Mr. Leith.—No doubt.

Lord Westbury.—Then the order of Her Majesty should be certified and delivered to the Judge of that Court, and his duty it is to transmit the order and the directions to the Court of first instance.

Mr. Leith.—I think so.

Sir Lawrence Peel.—Many hundreds of appeals come here. This tribunal is not supposed to know the practice of each Court. Their duty is to execute Her Majesty's command according to the practice of the Court, and if there is any error, to see that it is corrected.

Mr. Leith.—The Registrar will be able to state also that it is the practice here to send to the Appellate Court the order of Her Majesty in Council.

The Registrar.—Her Majesty's orders commonly say nothing about the Lower Courts. Appeals frequently come from the High Court of Calcutta, and their Lordships address the Judges of the High Court. It is then the duty of those Judges to send down an order to the Zillah or inferior Court to execute it in the province wherever it is. That must be so. Her Majesty always addresses the order to the High Court.

Lord Westbury.—Now, Mr. Leith, having ascertained the prescribed order of proceeding, namely, that this decree, made by Her Majesty in Council, should have been sent to the Court of highest civil jurisdiction, namely, the Court from which the appeal was presented, and having ascertained the duty of that Court, which is prescribed in s. 14 of the Act of 1863,—“the orders or decrees of Her Majesty in Council, when duly certified, shall be enforced and executed under the directions of the said Court by the Judge or officer by whom the suit was originally tried,”—that will be their duty. Now, what is the name or denomination of the Court of civil jurisdiction from which the appeal was presented?

Mr. Leith.—The Judicial Commissioner.

Lord Westbury.—Of Meerut?

Mr. Leith.—No, of the Punjab.

Sir J. W. Colville.—But since that there has been a change.

Mr. Leith.—Yes; I have not explained that to his Lordship.

Lord Justice James.—To which Court did you apply?

Mr. Leith.—It is stated in the petition, "that your petitioner, on receiving in India a duly certified copy of the last-mentioned order of your Majesty in Council, duly applied, under ss. 362, 234, and 235 of Act VIII of 1859 (in respect of the execution of the said order) to the Court of the Officiating Deputy Commissioner of Hissar."

Lord Westbury.—We must go through this much more narrowly. Tell us first from what Court the appeal was originally presented to the Queen.

Mr. Leith.—From the Court of the Judicial Commissioner of the Punjab.

Lord Westbury.—Was that Court in existence after you got Her Majesty's order?

Mr. Leith.—Yes.

Lord Westbury.—Did you apply to that Court?

Mr. Leith.—It does not appear on the face of it, further than that it appears by the judgment of the Court which has refused to execute the order of Her Majesty, that a copy of the decree had been transmitted, as required by that section, that is, from the High Court. That is the only evidence I have.

Sir J. W. Colville.—What I should like to know is whether you applied for execution in the Court of the Deputy Commissioner.

Mr. Leith.—We did under the section.

Sir J. W. Colville.—For execution of what decree did you apply?

Mr. Leith.—For the execution of the decree of Her Majesty in Council.

Lord Justice James.—You did not go to the right quarter.

Mr. Leith.—With submission, yes. The High Court, that is, the Court of the Judicial Commissioner, transmitted the order of Her Majesty in Council to the Hissar Court.

Sir Montague E. Smith.—Where does that appear?

Mr. Leith.—By this judgment: the judgment states it.

Sir J. W. Colville.—They transmitted only the order as it stands. They did not draw up or amend the decree of the Court of first instance, and so send the complete decree down to the Lower Court.

Mr. Leith.—They only sent a transcript of the original order in Council of Her Majesty to that Court to put it in motion; and then we, under the section I have cited, s. 362, made the application to that Court, being then in possession of the record to execute it, and then subsequently what made the difference of the name Meerut is this: it could not be executed by that Court, in consequence of its not having jurisdiction over the property, and then it was, under ss. 234, 235, and 236, remitted to the Court which had the local jurisdiction, that is, Meerut, and then the present judgment which your Lordships have to consider was pronounced by that Meerut Court.

Sir R. P. Collier.—You must first get it from this Court. By whom did it go?

Mr. Leith.—By the Registrar; it was sent direct. I take it, that is the ordinary course of practice.

Lord Westbury.—To whom was it sent?

Mr. Leith.—Your Lordships' Registrar will say whether it has been sent to the Judicial Commissioner or the Governor of the Punjab.

The Registrar.—The Queen's orders are not sent at all by this office to the amount of the order abroad. All orders are given to the agents of the parties, and it is their duty to serve them in the proper manner. This order on the face of it, is directed to the Governor-General of India, the Judicial Commissioner, or Judges for appeal, Punjab for the time being.

Sir Montague E. Smith.—It appears as if it had been sent to the Commissioner, and transmitted to the Judge at Meerut.

Sir R. P. Collier.—There is an intermediate Commissioner.

Sir Montague E. Smith.—What the Judge at Meerut says is, it had been transmitted by the Deputy Commissioner under the provisions of s. 285.

Mr. Leith.—I am instructed by my solicitor that he sent a copy of it to his client in India.

Lord Westbury.—That does not help us.

Sir J. W. Colville.—We do not know what the client did with it. It is evident that it goes to the Court of the Deputy Commissioner at Hissar for execution. The Deputy Commissioner says:—"I cannot execute it against this property, because this property is not in my jurisdiction. I will send it to the Deputy Commissioner of Meerut, within whose jurisdiction it is;" and then the Deputy Commissioner at Meerut says:—"I cannot execute this decree, because it is a mere order of Her Majesty containing declarations, and there are no mandatory words, and I do not know what I have got to execute."

Mr. Leith.—Quite so.

Lord Westbury.—You see you have got into this predicament: The Court of first instance, when it gets the decree, says, "This is no child of mine, for the property is not within my jurisdiction." Then you go to the Court which has the property within its jurisdiction, and that Court repudiates the decree in like manner as not being addressed to it. The course you ought to have taken, whatever that be, is contained in s. 14. Now s. 14 says:—"The order of Her Majesty shall be enforced and executed under the directions of the said Court." Now we have ascertained that that uncertain expression "the said Court" means the Court from which the appeal was finally brought to the Queen in Council. Therefore it was the duty of the parties to have brought the decree of Her Majesty in Council to the knowledge of that Court, and asked that Court to enforce and execute the decree, and it would be the duty of the Court to give directions for that purpose. Of course, it has no primary power of doing it; but it is to be enforced and executed, under the directions of the Court, by the Judge or officer by whom the suit was originally tried. The course of conduct was clear. You should have taken the decree of Her Majesty in your hand, and applied to the Judge of the said Court, that is, the last Court of Appeal, and asked that Judge to send directions for executing the decree to the Judge or officer by whom the suit was originally heard. Now, have you done that?

Mr. Leith.—I am sorry I am not in a position to—

Lord Westbury.—You appear not to be in a position to say where the fault lies, or where the defect lies.

Mr. Leith.—All I have is the letter to my solicitor, which says:—"I applied to the Judge of Meerut under a certificate of the Punjab Civil Court for execution of the decree," without saying what Civil Court.

Sir J. W. Colville.—What order do you now ask their Lordships to make?

Mr. Leith.—I had a difficulty in framing it, but this is what I ask your Lordships to do:—"Your petitioner now humbly prays that your most Excellent Majesty in Council will be graciously pleased to order and direct that the said Judge of Meerut, under the said reference made to him as aforesaid by the said Officiating Deputy Commissioner of Hissar, or the last-mentioned Judge himself, do forthwith execute the said original judgment or decree of the last-mentioned Judge, or that your Majesty in Council may be graciously pleased to make such other order, directing and ordering thereby possession of the shares aforesaid, together with mesne profits in respect thereof, to be forthwith given to your petitioner according to the declaration and the decree of right contained in the said order of your Majesty in Council."

Lord Westbury.—Suppose, in your perplexity and difficulty, we were to do

this—that we were to recommend Her Majesty to make a supplemental order touching the mode of executing the decree, and that that supplemental order should follow distinctly the language of s. 14; then, if you took that in your hands, do you think it will land you in safe ground?

Mr. Leith.—I see the objection which was taken by the Judge of the Court below, and the distinction he draws between what he calls a declaratory judgment and one which is mandatory, in which he refers to the Code as defining what is declaratory and what is mandatory, that he would have no authority to give effect to a mere declaration of right, unless your Lordships went on to recommend Her Majesty that possession should be given.

Sir Lawrence Peel.—The objection is that your Lordships have not drawn up the decree in mandatory language, but only made a declaration. It would be quite impossible for your Lordships to hit the exact practice of every Court in every part of the world from which an appeal lies. It is an obligation imposed upon all those Courts that they should put the thing in the right course, so that the party may have his rights declared.

Sir J. W. Colvile.—They might take this over to the highest Court with a direction that the decree should be drawn in accordance, and then it would be exactly in the ordinary way. I thought the property in dispute was in the hands of trustees, and that it was a question of your getting your share?

Mr. Leith.—Quite so; there is no adverse title.

Sir J. W. Colvile.—Then an order on the trustees would be sufficient?

Mr. Leith.—It was a petition with regard to property purchased subsequently as being declared to be part of the original estate. I think it would be certainly the safest course that there should be something in the supplemental order of a mandatory character.

Lord Westbury.—One would deal tenderly, no doubt, with any difficulty which has been felt *bond fide* by the Judge, though the difficulty would have been removed if the subject had been better understood. But you know we cannot advise Her Majesty, when a Judge in a Court below miscarries as to his understanding of her order, to make the order more explanatory and clear, simply for the purpose of giving that Judge a better understanding of the subject. In the last 52 years of my experience at the Bar and on the Bench, I have never known such a difficulty, and yet almost every day in the House of Lords, if there had been any room for the difficulty, it would have arisen. Nothing is more common than in the case of a Scotch decree to say “their Lordships” (speaking of the House of Lords) “do declare and find,” and then follow the declarations, and then the direction is “and their Lordships do direct that the cause with these findings and declarations be remitted to the Court below to carry the same into effect.” There is no difficulty about that. I never found any difficulty; and if there were difficulty that could reasonably be expected to be produced, it is not likely to escape the fertile imagination of Scotch lawyers; I have never known such a thing. Well, now, to meet the difficulty that you feel, you must remember that the language of the section (which I should propose, if their Lordships agree to it, should be followed) is this:—“The orders or decrees of Her Majesty in Council shall be enforced and executed.” Surely those words involve the giving every necessary direction for the purpose of enforcing and executing?

Mr. Leith.—Quite so. I think that would be sufficient.

Sir M. E. Smith.—According to their own practice.

Lord Westbury.—No Court of Appeal can by any possibility tell what is the exact form of execution that is required. If we are making an order, we cannot exactly tell what are the words that may be necessary for giving effect to the order.

Mr. Leith.—I think that would be sufficient.

Sir Lawrence Peel.—Possession in this case means nothing more than paying over money.

Mr. Leith.—There is some land.

Lord Westbury.—This is an important matter. I am only afraid that it may open the door to obstructiveness. We must take great care to avoid that. It is possible that the present case may have arisen from the circumstance (and I do not wonder at it) that you have mistaken the exact course which ought to have been taken. It would not be a bad thing to have this added to a form of order of Her Majesty in Council in a proceeding similar to this:—"And with these declarations remit the cause to the said Court with direction to enforce and execute the order in conformity with s. 14 of the Act of 1863."

Mr. Leith.—Quite so.

Lord Westbury.—It is not for that Court to enforce and execute. I should have said to *give directions* to enforce and execute. It is to be the medium of originating and transmitting the directions for enforcing and executing to the Court of first instance.

Sir J. W. Colville.—You did not apply to the Chief Court, did you, after this refusal?

Mr. Leith.—I cannot say. It is under these ambiguous words, "a certificate of the Punjab Civil Court." It does not say what Court, whether it was the Judicial Commissioner's, or any other Court.

Sir R. P. Collier.—The certificate might have amounted to a direction.

Lord Westbury.—It seems at present to be the conclusion of their Lordships that the safer way would be to let this petition stand over with the following minute:—"It appearing to their Lordships that it was the duty of the petitioner to have made application in conformity with s. 14, and the duty of the Judges therein mentioned to have carried the directions of that section into effect, let the present petition stand over until a further application has been made."

Mr. Leith.—I am much obliged to your Lordships; that is sufficient.

Sir J. W. Colville.—I take it for granted that all the powers and duties of the Judicial Commissioner were transferred to the new Chief Court of the Punjab?

Mr. Leith.—Oh, yes. I take it for granted that all causes must have been transferred in the state in which they were at the time the new Court was appointed.

Lord Westbury.—Your clients will take care to understand, and it must be generally understood, that their Lordships do not recognize the existence of any doubt or difficulty in that which has embarrassed the Court below, namely, that a declaration is not equivalent to an order. It is the duty of an Appellate Court frequently, and all that it can do, to make a declaration, and then the form in which that declaration is conceived, and the words in which the order is framed, amount to a direction to the Court below to clothe that declaration in the proper form of a mandatory order, and to give effect to the mandatory order so expressed. It must not be supposed for a moment therefore, that, if any difficulty arises in that form, or any difficulty is sought to be produced from having recourse to that non-existent ground of objection, this tribunal would fail in recommending Her Majesty to deal with such obstructiveness in the most serious and stringent manner.

The 13th June 1872.

Present :

Sir James W. Colvile, Lord Justice James, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Procedure—Duties of Court—Issues—Evidence (Disregard of)—Deciding on
suspicion—Falsification of bond.*

*On Appeal from the High Court at Calcutta.**

Baboo Bhugwan Doss

versus

Baboo Hunnooman Pershad Sahoo and others.

It is the duty of a Court (whether of first instance or of appeal) to act upon the issues and upon the proofs in the case, and not (upon a suspicion derived from its own notion of what is the habit of the people or anything else) to throw aside the whole evidence, and give effect to their suspicion as if it were legal proof, more particularly where the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favor the Court has decided.

The Privy Council observed that the plaintiff and his witnesses in this case had great cause of complaint in that they were pronounced guilty of an offence (the fraudulent falsification of a bond) on which they had not been heard, and not only without evidence but without allegation.

Their Lordships are of opinion that the decree of the High Court of Calcutta reversing the decree of the Zillah Court cannot be supported.

The plaintiff's case was *prima facie* a very simple and plain one. He sued the defendant upon a mortgage-bond, which he annexed to his plaint within a very short time indeed after the bond became due. The defendant's case was that he had never borrowed any money at all from the plaintiff; that he never had any transaction which would justify the bond; that he had never put his name to the bond; and that it was an entire forgery. This was the sole issue which he tendered in the Court below; that is what he puts in his answer; and that is what he stated in his deposition when he was examined as a witness in his own behalf. Upon this the plaintiff calls witnesses; he calls the writer of the bond, and all the attesting witnesses; he puts in evidence a *mookhtarnamah* to authorise the registry of the bond, and he proves his case as completely as it was possible for a case to be proved by evidence. Unless the whole of that evidence is to be put aside at once as utterly false from beginning to end, the plaintiff's case is a case not admitting of controversy. On the other hand there is this: that the defendant maintained and persisted on oath in the assertion that the signature was not his, and he is found by both Courts, both the first Court and the Appeal Court, in this to have been guilty of deliberate perjury. Moreover, both Courts agree in this, that for the purpose of giving more effect to his false statement, for the purpose of giving more color to his perjured evidence, he signed his name to his deposition in a feigned hand, in order that, upon comparison of that signature with the signature to the bond, the Court might be induced to come to the conclusion that that signature was, as he alleged, a forged signature. Both the Courts have arrived at the same conclusion with respect to the defendant's contention and the defendant's conduct.

Their Lordships further observe that the plaintiff, upon being called upon so to do, put in evidence his own books and the entries of the transactions which were connected with the bond, thus enabling the defendant to cross-examine the plaintiff, and to put him to give any explanation of anything which appeared on the face of the books. As far as their Lordships can see upon these proceedings, no attempt was made to cross-examine the plaintiff with respect to the books, nor

* From the judgment of Norman and E. Jackson, *J.J.*, dated 9th January 1864.

was there any suggestion made with reference to them such as has been made at their Lordships' Bar to-day by Counsel, that there is something in the books themselves which amounts to suspicion and to evidence of something wrong, from which the corollary is that the bond itself was wrong and a fabrication.

The Judge of the first instance came to the conclusion upon the evidence, seeing the witnesses and having an opportunity of seeing the books, that the plaintiff had established his case, and gave a decree accordingly. From that there was an appeal to the High Court; and there, without any fresh evidence, the High Court, agreeing as to the fact that there was a loan for Rs. 6,200, part of the Rs. 16,200, the sum for which the bond was given, agreeing as to the fact that the signature was a genuine signature, took upon themselves to follow a course which their Lordships are bound to say they have noticed with great surprise and great regret. They took upon themselves, sitting in error from the Court below, not to deal with the case upon the issues and evidence that had been before the Court below, not to deal with the case upon any fresh materials, or any fresh evidence that was before them, but on a mere inspection of the document, and a suggestion that there was an alteration apparent in an endorsement made by the obligor of the bond, to frame out of their own minds the following theory, viz., that the bond was originally given in blank, so far as the body of it is concerned, and that the real thing which the defendant had signed, and intentionally signed, was the marginal portion of it in the *mohajunee* character; that he had given that with a limit, limiting it to Rs. 6,200; that then it was filled up by fraud with Rs. 16,200, instead of the genuine Rs. 6,200; and that then, or as connected with that, without the knowledge or assent of the defendant, there had been a fraudulent alteration of the endorsement, from Rs. 6,200 to Rs. 16,200; and that, therefore, the whole thing was to be treated as a forgery, this being a theory wholly inconsistent with the case ever made by the defendant himself. It was a case which the Court took upon itself to imagine and to declare proved by the mere inspection of the document. If, upon the inspection of the document, it had appeared to that Court that there was something on the face of it which required explanation,—and it does seem to some of their Lordships that there is something which might properly have been enquired into,—it was the obvious duty of the Court to have summoned the parties, to have examined the witnesses, and to have put the thing in train for investigation by the examination and cross-examination of the plaintiff, by the examination and cross-examination of the defendant himself, and by the examination and cross-examination of the witnesses. The Judges, in corroboration of their theory, observe that there is a line which appears to have been thrown out of its proper place by the signature of a witness, from which they infer that the bond must have been written after the signatures of the witnesses. But no question was put to the writer of the bond or to the witness, nor was any explanation sought as to this assumed displacement.

Their Lordships cannot but think this to be a grave misapprehension of the duties of a Court, either of first instance or of appeal. It is their duty to act upon the issues and upon the proofs in the case. Of course, they must receive all evidence with careful scrutiny; if necessary, with suspicion; but they must after all decide the rights of people according to the matters which are proved before them; and it never can be allowed that a Court is, simply upon a suspicion derived from its own notion of what is the habit of the people or anything else, to throw aside the whole evidence and give effect to their mere suspicion as if it were legal proof. This obviously applies with great additional force to a case where the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favor they have decided.

Their Lordships think it right to make these observations, because one of two cases have come before them recently in which there seems to have been the

same sort of readiness to disregard testimony in favor of suspicion, and because they feel that the plaintiff and his witnesses in this case have great cause of complaint in this, that they were pronounced guilty of an offence, the fraudulent falsification of a bond, on which they were not heard, and not only without evidence, but without an allegation. Their Lordships will recommend Her Majesty that this decree be reversed, and the decree of the Zillah Court affirmed ; and that the appellant have his costs of the appeal and in the High Court.

The 14th June 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Suit—Execution—Sale—Representative—Act XXIII of 1861 s. 11.

*On Appeal from the High Court at Calcutta.**

Chowdhry Wahed Ali

versus

Mussamut Jumae.

The Privy Council, dissenting from the general proposition laid down by the High Court that a party sued in a representative character is not a party to the suit within the meaning of s. 11 Act XXIII of 1861, observed that, where a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit within the meaning of that section, with respect to any question which may arise between him and the other parties relating to the execution of the decree ; but affirmed the decree of the High Court and held that Act XXIII was not a bar to the present suit, on the ground that there did not exist any decree authorizing an execution against the respondent's (plaintiff's) estate, and that consequently the question in the present suit was one not properly relating to the execution of a decree but to a sale under orders which had not the support of any decree.

This was an appeal from the judgment of a Full Bench of the High Court at Calcutta, affirming a decision of the Principal Sudder Ameen of Patna in favor of the respondent, the plaintiff in the suit below.

The suit was brought by Mussamut Jumae, the respondent, to obtain a declaration that an execution sale of certain mouzahs under color of a decree made in a former suit brought against her and others by the appellant should be set aside, and her possession of the mouzahs confirmed.

It may be convenient to designate the former suit, which led to the sale complained of, as suit A. Suit A was itself the sequel of a protracted litigation, and became in its turn the starting point of new and intricate proceedings.

The appellant, who was mortgagee of mouzah Mayjara, had obtained decrees in suits against his mortgagors for the mortgage debt under which he attached their interest in that mouzah. Waris Ali, the father of the respondent, and the respondent and other persons intervened, claiming interests in the mouzah. Waris Ali claimed to have advanced money to the mortgagors under certain *bhurnanamas*. The respondent's claim was distinct. She was married to Enayet Ali, and she claimed certain shares of the mouzah under a purchase made previous to the appellant's mortgage. Notwithstanding these claims, the mouzah was sold under the appellant's decrees, and purchased by him. Being unable to obtain possession of the mouzah, the appellant brought suit A to recover it, making Waris Ali and the respondent and other persons (in all 103) defendants, charging them with combining to keep him out of possession.

* From Full Bench judgment, dated 13th August 1868, 11 W. R. F. B. 1.

Waris Ali set up his claim under the *bhurnanamahs*, which was ultimately held to be invalid. The respondent, however, established her title to the shares of the mouzah she claimed. During the pendency of suit *A*, viz., in January 1856, Waris Ali died, and thereupon, under s. 104 Act VIII, his heirs, viz., the respondent and her brother and sister, were entered in the register as defendants in his place. Thus the respondent became a party to the suit in a double capacity, which led to the confusion in the proceedings to be presently noticed.

On the 29th November 1861 the Judge of Patna made a decree in favor of the appellant for possession, and "for mesne profits to be charged on the defendants jointly and separately." Although the Judge had stated in his judgment that the title of the respondent to the share she claimed was proved, and therefore ought to have decreed to that extent in her favor, his decree does not so find, nor does it separate her from the other defendants in the award of possession and mesne profits against them.

This ill-advised and erroneous decree in suit *A* was the origin of a labyrinth of intricate and too often irregular proceedings, through which it is not easy to find the way to a definite end.

The respondent Jumae, amongst others, appealed against it to the High Court. On the 10th July 1863 that Court gave judgment to the effect that, it having been adjudged by the Judge at Patna that Jumae had a good title as purchaser to the share of the mouzah claimed by her, she was needlessly made a party to the suit, and it was ordered that she should be released from it, with costs.

This judgment undoubtedly went too far in releasing Jumae altogether from suit *A*, as her learned Counsel, Mr. Cowie, fairly admitted; because the grounds on which it proceeded do not touch her liability in her representative capacity as one of the heirs of Waris Ali; but apparently the decree stands unreversed—a circumstance which it is material to bear in mind.

Although no attempt appears to have been made to review or alter this decree, proceedings, now to be noticed, were taken, by force of which the sale (sought to be set aside in the present suit) of Jumae's private estate to the appellant, as purchaser under his own decree, took place. They are succinctly described by the Chief Justice in the following extract from the judgment now under appeal:—

"On the 17th August 1863, Wahed Ali, the then plaintiff, applied to the Court at Patna to execute the decree which he had obtained for mesne profits. Jumae, the present plaintiff, appeared upon that application and urged that, according to the decree of the High Court of the 10th July 1863, she had been wholly discharged from liability. Wahed Ali admitted that she had been discharged by that decree so far as her private interests were concerned, but contended that she remained liable as one of the heirs of Waris Ali. The Judge of Patna took that view of the case, and on the 5th October 1863 ordered a sale of that part of the property which belonged to her own right, and which had been attached in execution of the decree. On the 7th October 1863, the plaintiff petitioned the Judge, contending that even if she were liable as heiress of her father, she could only be liable under ss. 203 and 211 Act VIII of 1859, to the extent of assets inherited from him. On the same day the Judge ordered the petition to be rejected; and, on the following day, the 8th October 1863, the plaintiff's own portion of property which had been attached under the execution against her in her representative capacity, was sold under the execution, and Wahed Ali, who was then the plaintiff in the suit, became the purchaser under his own decree. Numerous other proceedings took place to which it is not necessary to refer. It is sufficient to say that, on the 15th March 1864, the Judge confirmed the sale.

"The present plaintiff petitioned the High Court against the order for execution and the sale of her property; and, on the 8th July 1864, the High Court

ordered that the decree of the 5th October 1863 should be amended by declaring that the present plaintiff was only liable to the assets inherited from her father, so that, in fact, the order under which the plaintiff's private property was sold in execution was so far altered that it did not justify the sale which took place under it on the 8th October 1863.

"The plaintiff again appealed to the High Court against the order of the 15th March 1864, confirming the sale under the execution; and, on the 30th January 1865, the Court declared that the sale could hold good only if the plaintiff had received assets from her father's estate, and in that case only to the extent of the assets so received. The case was therefore remanded to the Judge to make enquiry upon that point. The Judge upon that remand found that the plaintiff had inherited nothing from her father, and on the 27th May 1865 set aside the confirmation of the sale.

"From that order Wahed Ali appealed to the High Court; and, on the 18th September 1865, a Division Bench held that as the sale had been confirmed, there was no power to cancel it; that the two orders of the 8th July 1864 and the 30th January 1865 were wrong; and they advised Wahed Ali to apply to the High Court for a review of the order of the 30th January 1865. Wahed Ali acted upon that advice, and applied for a review of the judgment of the 30th January 1865, and, on the 28th September 1866, the Division Bench held that the sale could not be set aside except by a suit by the present plaintiff in the Civil Court. They amended the order of the High Court of the 30th January 1865, and the order of the Judge of the 27th May 1865, and restored and confirmed the Judge's order of the 15th March 1864, by which the sale had been confirmed."

The above summary seems to be in substance correct, except that the order of the 8th July 1864 appears to be, technically, not an order to amend the decree, but to declare in the execution proceedings what was the limit of Jumae's liability under it.

The result, so far as a result can be extricated from these involved and contradictory proceedings, appears to be, that whilst the High Court held the sale of Jumae's private property to be utterly wrong, and at first ordered it to be set aside, they, in the end, reversed their own orders, on formal grounds, leaving the order for sale and confirmation to stand, but suggesting to Jumae to obtain redress by a new suit.

Accordingly, she brought the present suit and obtained the concurrent judgments of the Courts of India in her favor, which the appellant now seeks to reverse: 1st, on the merits; and 2nd, on the ground that it was not competent to the respondent to bring this suit.

On the merits it was at first contended that she was personally liable in suit A for having acted in concert with the other defendants to disturb the appellant's possession. Their Lordships, however, think that not only is this liability unsustained by the evidence, but the amended decree, in any view of the amending order, absolves her from it.

It was next contended that she had received assets from her father, Waris Ali, and was therefore liable. It was scarcely insisted that any had descended from her father, but it was strongly urged that from the time of his death to the end of suit A, a period of five years, she was in joint possession, with her co-heirs, of the mouzah which was the subject of suit A, and must therefore have received profits, which she was bound to account for. It is sufficient to say that their Lordships can discover no clear and definite proof, either in suit A or in the present suit, that this was so; and the Courts below having assumed to the contrary, it is impossible their Lordships can now, for the first time, find the fact of such possession.

The case is thus reduced to a question of procedure, viz., whether it was competent to the respondent to bring the present suit. The appellant's contention

is founded on s. 11 Act XXIII of 1861, which, among other things, enacts that "any question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit, and the order passed by the Court shall be opened to appeal."

This enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation. They therefore feel bound to say they are unable to assent to some of the reasons on which the High Court have founded their judgment. They cannot concur in the general proposition, that a party sued in a representative character is not a party to the suit within the meaning of cl. 11 of the Act of 1861, which is, as the Chief Justice observes, to be read as part of Act VIII of 1859.

The 203rd Section of Act VIII makes express provision for the manner of execution in such cases, viz., (1) against the goods of the deceased person, and (2) in certain events against the defendant "to the extent of the property not duly applied by him, in the same manner as if it had been against the defendant."

It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that under certain conditions his own private property may be attached and sold. It is true, that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable, and proper to be ascertained in the suit in which the decree is made, during the progress of the execution proceedings founded upon such decree.

It does not seem to their Lordships to follow that, because all the provisions relating to execution cannot be applied to a defendant sued in a representative character, such a defendant cannot be regarded as a party to the suit within the meaning of such of them as may be applicable to his case.

It may be true that "cross-decrees" cannot be set off between parties to suits in different characters under s. 209; and that decrees cannot, in the first instance, be enforced by imprisonment against a party sued only in a representative character under s. 201. But it may be observed, that in a case where there is a finding that the property of the deceased has not been properly applied, and when the decree under s. 203 may be executed against the defendant to the extent of the property wasted, as if it had been against him personally, there would seem to be no inconsistency in holding the clause relating to imprisonment to be applicable.

In a case then, in which a decree has been properly passed, and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree, within the meaning of cl. 11 of the Act of 1861.

But their Lordships consider that there are other grounds upon which the judgment in the present case may be supported. In their view it is not satisfactorily established that there is an existing decree which warranted any execution whatever against the respondent. It has been already pointed out that the original decree was amended by the High Court on appeal, by a decree directing Jumae to be released from the suit altogether. This decree was obviously erroneous, for it is clear she ought not to have been released from the suit in her representative character as one of the heirs of Waris Ali, but only in her own personal capacity. The decree releasing her from the suit altogether was, as the Chief Justice observes, probably so drawn up by mistake. Still it was so drawn up, and it does not appear to have been ever formally set right. It is true that by the order of the High Court of the 8th July 1864, upon Jumae's own appeal against the order for sale of her private estate, the Court, by declaring that her

liability under the decree as one of the heirs of Waris Ali extended only to such property as she might have inherited or received as such heir, implied and affirmed that she was liable to this extent. But this order was made, not on an appeal against the decree, but against the order of sale made in the execution proceedings. In point of form, therefore, the decree releasing her altogether was left standing; and although the mistake may have been in substance corrected by the order of the 8th July, that order was not acted upon by the present appellant; and, on the contrary, it was at his instigation swept away by the subsequent proceedings above referred to.

If that order had been acquiesced in and acted upon by the appellant, it might perhaps have been regarded as a virtual amendment of the decree, but even in that case the sale of the respondent's private estate, of which she now complains, could not properly have taken place under it. However, the appellant refused to acquiesce in it, choosing to rely on his strict right; and upon his objection that in point of procedure it was wrong and could not affect the orders of sale of the 5th October 1863, and of confirmation of the 15th March 1864, it was set aside, or at least declared to be without force.

When, therefore, the appellant insists that the present suit is not competent, because the questions relating to the execution ought to have been determined in the former suit *A*, his objection, which relates only to procedure, may, their Lordships think, be properly met by the counter-objection that in point of procedure his own decree in suit *A* is ineffectual, as actually drawn up, to support any execution against Jumae, and that the proceedings which may have virtually set it right, and warranted some execution, have lost all efficacy for that purpose by his own acts. Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorizing an execution against the respondent's estate; and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree.

Their Lordships, therefore, being of opinion that the decrees under appeal are substantially just, and that under the peculiar and exceptional circumstances of the case Act XXIII of 1861 was not a bar to the suit, will humbly advise Her Majesty to affirm the decrees, and to dismiss this appeal, with costs.

The 15th June 1872.

Present:

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Practice of Privy Council—Questions of fact—Authority of agents.

On Appeal from the High Court at Agra.

Baboo Lall

versus

Luttoo Ram.

Where the sole question raised in both Courts in India was whether or not certain documents purporting to be an allowance of plaintiff's accounts by the defendant's agent were signed by the agent, the Privy Council declined to allow the defendant to raise before them the question as to the authority of the agent to bind him (the defendant).

This was a suit by a sub-contractor against a contractor with the Government for work and labor done. The defence was that the defendant had been

fully paid, and indeed overpaid. The questions raised were all questions of fact, and those questions of fact have been found in the plaintiff's favor by the Court of first instance, and by the Appellate Court in India.

Under these circumstances the rule of their Lordships not to interfere with a decision of two Courts in India on a question of fact at all events *prima facie* applies.

It is, however, contended that this case does not fall within the rule, or is taken out of the rule upon the following grounds:—First, it is said that certain documents, which purport to be an allowance of the plaintiff's accounts by one Mahomed Khan, the overseer of the defendant, were improperly received in evidence. The objection to their reception is that Mahomed Khan was not shown to have had any authority from the defendant to make a statement of accounts binding upon him. It is to be observed, however, that this defence was not taken in either Court. The sole question raised in the Court below was this, whether or not the documents referred to were in point of fact signed by Mahomed Khan, and the defendants put Mahomed Khan in the box to deny his signature. The Judge, however, disbelieved him, and believed the witnesses who affirmed the documents to be genuine, and now it is not contended but that that finding is right. It is further to be observed that, in the reasons given for the appeal which was preferred to the superior Court in India, none is to be found to the effect that Mahomed Khan had not authority from the defendants to bind them, but the same issue is again raised, namely, whether or not Mahomed Khan actually signed these documents? If the question of Mahomed Khan's authority had been raised, then it is possible that the plaintiff might have been prepared with evidence for the purpose of supporting that issue, but his attention was not called to that, and it certainly would appear to have been understood by the Courts, and it probably was understood by both sides that if, in fact, Mahomed Khan signed these documents, he had authority to sign them on the part of the defendants, for whom undoubtedly he was acting, and whose overseer he was.

Secondly, it is contended that there was a miscarriage in the rejection of a document put in by the defendants. In order to contradict the rate of charges which are allowed by Mahomed Khan in these documents which must now be taken to be genuine, the defendants put in what they declared to be the original agreement, under which these works were executed, whereby a different rate of charges is agreed upon; and they contended that that being taken as the rate of charges, the plaintiff had been paid in full. Whether that be so in point of fact, supposing the document proved, does not distinctly appear. The plaintiff's case, on the other hand, was that the original agreement had been fraudulently abstracted by Mahomed Khan, and that the document produced and sworn to by him and one or two other witnesses was a fabrication. The Judge below has adopted that conclusion. Undoubtedly the defendant called one or two of the witnesses attesting that document to prove its genuineness, and they gave evidence to that effect. But it appears that the document purported to be attested by Mr. Brown, an Englishman; the defendants called two witnesses to prove his signature: one of them gives no clear evidence on the subject, and the other, Captain Whish, gives his opinion that the signature which appears in that document as that of Mr. Brown is not his. It is to be observed that, assuming the accounts signed by Mahomed Khan to be correct, which they must now be assumed to be, and that Mahomed Khan was the agent of the defendants, and therefore not probably disposed to allow the plaintiffs a higher rate of charges than they were entitled to, undoubtedly some suspicion is raised against a document which places the rate of charges on a different footing from those agreed to by Mahomed Khan. On the other hand, an observation was made by the learned Counsel for the appellants entitled to a great deal of weight, that it does not appear that the Court below called upon the plaintiff, or that the plaintiff put

himself forward or his witnesses to prove that this document was false. Undoubtedly, this issue can scarcely be said to have been tried quite satisfactorily; and if this Board were sitting as a Court of first appeal from the decision of the Court below, it is possible that their Lordships might have thought it necessary to remit the case for further investigation. But it is to be observed that this finding of the Court below upon the question of fact that this agreement put in by the defendants was a fabrication is in substance, though not in precise terms, affirmed by the judgment of the Court above. The Court above, dealing generally with the evidence, say that they see no reason to believe the defendant's witnesses more than the plaintiff's, and in fact did not think it necessary to interfere with the judgment of the Court below, which proceeded upon the general ground that the plaintiff's case was substantially correct, and that the defendant's case was a false one. It must be assumed now as clear that the defendant's case, as far as regards the signature of those documents by Mahomed Khan, was entirely a false one.

But then, thirdly, it is said that even, assuming these documents, purporting to be signed by Mahomed Khan, to be genuine, and putting aside the agreement, there was no evidence whatever on the part of the plaintiff of the rest of his demand. If that were so, the question would become one of law. Their Lordships, however, without saying that the evidence on this subject was of a satisfactory character, are unable to say that there was no evidence upon which the Court below was justified, if it thought fit, in acting with respect to this part of the claim.

Three witnesses are called, who speak in general terms, certainly, not in a manner most satisfactory, to the whole of the work which the plaintiff claims as having been done, and to the prices which he charges for it. And it is to be observed that, as far as their Lordships understand, the actual measurements are not disputed. It is further to be observed that the Judge of the Court below appears to have come to a conclusion, as a question of fact, that the plaintiff's charges were reasonable, and he refers to a comparative account prepared in his office showing the amount of profit the plaintiff would derive, and therefore having some bearing on the reasonableness of the charge. It would appear that the Judge of the Court below did enter into some investigation of this case, and that some account was prepared, which is not before their Lordships. It would also appear that Mahomed Khan himself in his evidence speaks of some work to the value of upwards of Rs. 5,000 done by the plaintiff before December, and it is only after December that his certificates apply.

Under these circumstances, their Lordships are not able to say that there was no evidence upon which the Court below was justified in coming to the conclusion that the plaintiff had made out the whole of his demand; and inasmuch as the High Court have affirmed the judgment of the Court below on what, after all, does appear to their Lordships to resolve itself into a question of fact, their Lordships have come to the conclusion that this appeal must be dismissed.

The 20th June 1872.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Lawrence Peel.

Practice of Privy Council—Special leave to appeal on facts—Evidence.

*On Appeal from the High Court at Calcutta.**

Golam Ally

versus

Kalikisto Tagore and another.

The Privy Council will only, under very special circumstances, grant an appellant from a judgment of the High Court passed in special appeal, *nunc pro tunc*, special leave to appeal from the decrees of the inferior Courts in India on the facts.

In this case the Privy Council declined to grant that leave, and agreed with the High Court that a certain *chitta* was fairly admissible as evidence, and that it tended very much to negative the case put forward by the appellant.

[In this case the Counsel for the appellant on the hearing of the appeal, which was from a decree of the High Court at Calcutta made on special appeal, applied to their Lordships, if they should think it necessary for the due administration of justice, to recommend Her Majesty to grant to the appellant, *nunc pro tunc*, special leave to appeal from the decree of the inferior Court in India, on the facts.

Upon this preliminary application, their Lordships delivered the following judgment :—]

Their Lordships have considered Mr. Doyne's application, and the conclusion they have come to is this, that, for the reasons which I am about to state, they would not be justified in the present case in giving special leave to include in this appeal an appeal against the decisions of the two Judges who have dealt with the questions of fact in the cause,—the Deputy Collector and the Judge to whom there was an immediate appeal from him.

They have looked at the petition of appeal to Her Majesty, and it is perfectly clear that appeal is preferred simply against the order of the High Court on the special appeal. It is undoubtedly true that it has, recently at least, been the practice to allow the whole case to be opened upon questions of fact, as well as questions of law, although the High Court, the appeal to it having been merely a special appeal, has been able to deal only with the latter. The mode of accomplishing this, if the party thinks it necessary for the justice of his case, is to apply to their Lordships in due time for special leave to appeal against the decisions of the Subordinate Courts; an application to be granted, not as of course, but on sufficient grounds. No such application has been made in the present case; but it is stated by Mr. Doyne that the Board has been in the habit of granting this privilege at the hearing *nunc pro tunc*, if they thought the justice of the case required it. We are not aware of, nor is Mr. Doyne able to refer us to, any case in which this was done, nor does our recollection supply one; although, if their Lordships saw clearly that the justice of the case could not be reached without allowing such an application, they do not say that they would not grant it under any circumstances, or upon any terms. They are of opinion that nothing but very special circumstances ought to justify the granting of leave to appeal against the other decrees at so late a period as the hearing of the appeal; and that no such circumstances exist in the present case. The question is one of those which it is extremely difficult for a tribunal like this to deal with,—the simple question of parcel or not parcel, whether a certain portion of *chur* land is included in a particular tenure, or remained liable to assessment for rent. It is emphatically one of those questions which are best decided, and can only be satisfactorily decided, upon the spot; and in re-opening the decisions on the facts in the present case, we should be running counter to that general rule which governs the proceedings of their Lordships, namely, that, where there have been two concurrent findings upon questions of fact, this tribunal will not, except upon very special grounds, disturb them. Therefore their Lordships think they would not be justified in granting this application. Of course, they are ready to hear whatever may be argued further upon the question whether the decision of the High Court

* From the judgment of Bayley and Macpherson, *J.J.*, dated 5th August 1868.

upon the special appeal was correct or not; and if it were not correct, what order that Court ought to have made on the grounds before it.

[Counsel proceeded further to address their Lordships, who ultimately pronounced the following judgment:—]

This litigation began in the Court of the Deputy Collector, in consequence of a notice by the respondent served upon the appellant with a view to the assessment of rent upon land which had been measured, and was stated to contain 10 drones and some odd kanees. The land was the land indicated in the first map to which their Lordships were referred, being map No. 18. The appellant resisted the claim of the respondent upon the ground—at least this is the only ground which it is now necessary to consider—that the land in question, or a portion of it, was included in the *durputnee* lease, or the *putnee* lease which had been granted to him by the respondent at a fixed rent. In the course of the litigation, which it is not necessary to pursue particularly, it became an admitted fact that all the land from the east of the *kole* on the map was land which the appellant, the defendant in the suit, admitted was liable to be assessed, but that the land to the west of the *kole* was still, as he contended, included within his *putnee* tenure, and was therefore incapable of any further assessment. In that state of things one would have supposed, though it is not necessary for their Lordships' decision to rule that it was so, that the burden of proof lay rather upon the defendant than upon the plaintiff, the former relying upon his title as zemindar to receive rent for the land of which the other was in occupation, and that claim being met by the allegation that the land in question was protected from further assessment by being included in a perpetual tenure at a fixed rent. However that may be, the issue upon which the parties went to trial upon the last remand was whether that land which was situated on the western side of the *kole*, and which, by one of the documents in the record, appears to have comprised little more than 6 drones of land, was or was not included within the *durputnee* tenure. Now what was that *durputnee* tenure? It may be described as such, although the title of the appellant to it rested upon two distinct grants; one made by the respondent in the character of zemindar, the other in the character of a *putneedar*; and it is not very clear whether these grants were each a grant of an undivided 8-anna share in the same subject, or whether they were grants of different subjects. It is immaterial, on the present appeal, to express any opinion on that point; because it is perfectly clear that certain land, described as *lukht kole chur* lands of Mouzah Bowsia, was excepted out of the tenure granted, and that the question in dispute between the parties was ultimately reduced to the issue whether the land west of the *kole* was such *lukht kole chur* land of the mouzah, and therefore excepted from the *durputnee* tenure, or whether it was included in it. That case when remanded was tried again, first by the Deputy Collector, and afterwards on appeal by the Judge, and both Courts, proceeding upon a local investigation, came to the conclusion that the land in question was within the excepted land, and that it did not fall within the *durputnee* tenure of the appellant.

The decision which their Lordships pronounced upon Mr. Doyne's application in an early stage of the hearing precludes any consideration of the propriety of this finding upon the mere question of fact; and they have now only to decide whether the High Court, in dealing with the special appeal brought before it after these last decisions of the Lower Courts, was correct or not.

Now, the grounds of special appeal are stated in the record. They are summarized by the learned Judges. The summary does not, perhaps, entirely agree with the grounds filed, for the first is stated to be "that the *chitta* of 1261 was not receivable as evidence; 2ndly, that even if receivable, it can be treated only as corroborative evidence;" whereas in the grounds of special appeal, as filed, it was rather that there was not evidence sufficient to support the judgment

that the land in dispute did not appertain to the *putnee*; and that, admitting for argument's sake, that the *chitta* filed by the plaintiff was genuine, the *dags* relied upon did not show that the disputed *chur* was excluded from the *putnee*.

The High Court, in dealing with what they understood to be the special grounds of appeal, put a construction upon the lease in these words:—Mr. Justice Bayley said:—"Again, 11 drones 9 kanes are stated in the lease as the area of Geirlaik, unculturable, *i.e.* sandy *chur*; and if we look to the terms of the lease, we find that the contract was that a certain quantity of *chur* land was to go with the lease; but if there were any deficit by diluvion, the deficit was to be made up from the accretion, and that every further accretion beside that was to be considered as being beyond the defendant's lease. Therefore, when the Lower Appellate Court refers to the area of the lands, it only refers to it as one item of evidence on which the case is decided in plaintiff's favor. I cannot think that this objection is one which in special appeals affects the case on its merits." The inference which their Lordships would draw from that passage of the judgment is this, that the High Court, putting upon the lease and the grants the construction most favorable to the appellant,—a construction which it may be admitted for the sake of argument was not consistent with the construction upon which the Lower Courts appear to have acted,—still thought that the *chitta* being admissible as corroborative evidence, and there being a considerable body of other evidence in the cause, there was a sufficiency of evidence upon which the Courts below might properly have decided in the plaintiff's favor.

Their Lordships, as I said before, are merely, on this occasion, in the position of the High Court. They are by no means prepared to say that, if they had to construe the terms of the grant for the first time for themselves, they should put the construction which the High Court has put upon it. The documents are ambiguous, and there are considerable difficulties, they think, in the way of that construction. It might well be held that the stipulation which has been so much relied upon might import only that, in case there was a loss by diluvion, that loss should be afterwards made up by any accretion that might take place; but they do not think it necessary for them to say to what construction, if the question was really open before them, they would finally adhere. It is sufficient for them to say that they agree with the High Court in thinking that the *chitta* was fairly admissible as corroborative evidence; that it tended very much to negative the case which appears to have been put forward as the case of the appellant, and which it was almost necessary for him to put, namely, that the land which he claimed, as included in his tenure, had been included in the tenure of the *modafat* and that it is impossible to say that the High Court was wrong in coming to the conclusion that the grounds for special appeal had not been made out, or that there was no evidence upon which the Courts below might have properly decided in the plaintiff's favor.

Their Lordships therefore, under these circumstances, can only humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 25th June 1872.

Present :

Sir James W. Colville, Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Act VIII of 1859 ss. 26 and 29—Titles (Omission of)—Plaint (Rejection of).

On Appeal from the High Court at Madras.

The Hon. Sri Maharajah Meerja Vijaya Rama Gajapati Raz Manca Sultan Bahadur Garu, of Vizianagram, K.C.S.I., sued as Sri Rajah Vijayarama Gajapati Raz Bahadur, Zemindar of Vizianagram, *v.* Sri Rajah Lakshmi Challaya, Ranee of the Zemindary of Bobbili, widow, and heiress of the late respondent, Sri Rajah Sitaramakristna Rayudappa Ranga Row Bahadur Garu, Zemindar of Bobbili.

The Privy Council held, upon the proper construction of the Code of Civil Procedure, that the description contemplated by s. 26 includes all those titles by which a party is known; and that if the plaintiff from animosity, pique, or anything in fact but a *bond fide* dispute as to the right to a title, obstinately refused to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult, but will exercise a sound discretion, under s. 29, in first requiring the plaintiff to amend his plaint, and afterwards in rejecting the plaint should the first order be contumaciously disobeyed.

This is an appeal against the judgment of the High Court, which reversed the decision of the Judge of the Civil Court of Vizagapatam, dated—and the date is material for the decision of the present question—the 5th July 1865. The question which the appeal raises is the effect to be given to ss. 26 and 29 of the Code of Procedure. S. 26 requires that the plaint shall contain the name, description, and place of abode of the defendant, as far as they can be ascertained, and s. 29 provides that, if the plaint does not contain the several particulars therein before required to be specified therein, the Court may reject the plaint, or at its discretion, may allow the plaint to be amended.

In the present case a plaint was filed by the Rajah of Bobbili, against the appellant, whom I may shortly describe as the Maharajah of Vizianagram. The objection taken to the plaint was that the defendant was described on the face of that plaint by titles which did not correspond with the full titles to which he was entitled, and by which he ought to have been described. The Judge thought that objection was made out, and he directed that the plaintiff should have liberty to amend his plaint by amending the description of the defendant, in accordance with the description which had been given to him in the Gazette, by which he was appointed a member of the Governor-General's Council for making laws, namely, the "Honorable Maharajah Meerja Vijaya Rama Gajapati Raz Manca Sultan Bahadur Garu, of Vizianagram." He gave the plaintiff a "week's time to amend his plaint by entering the name and distinction of the defendant as above set forth, and in default the plaint will stand rejected." The plaintiff, the respondent, declined to amend his plaint, and failed to do so. The Judge then rejected the plaint under s. 29, and upon appeal to the High Court, that order of rejection was reversed, and it was held that the identity of the appellant having been ascertained by the imperfect description, the order to reject the plaint ought not to have been made.

The dispute between these parties seems to have been a very ancient one. There appears to have been a feud between these two great proprietors for a considerable time as to the titles to which they were respectively entitled. It further appears, however, that as early as 1861, the then agent of the Governor of Madras in Vizagapatam had ascertained what titles were the titles by which these parties were respectively known. I think the phrase is "what titles were in vogue," and he ordered that in all official documents, those titles should be given by the one to the other. The respondent or his father raised an appeal against that order. There was an elaborate report made by a Mr. Carmichael to the Government, and the Government of Madras passed an order upon that, which is dated the 26th April 1865, by which they ruled that the order of the agent should stand, and that those titles should be treated as the titles necessary to be given in official documents. That, therefore, was a recognition by the Local Government of Madras that the appellant was entitled to the titles specified in the order of the agent,

Mr. Fane. It was also something more, because, while this question was pending before them, the Government of India, by the then Viceroy, had formally conferred upon the appellant the title of Maharajah. Therefore, if there had been any question upon his claim to that title at an earlier date, that doubt was entirely removed by the formal act of Government, and the grant of the title from that which must be taken to be in India the fountain of honor.

Now it is no doubt the fact that the plaint in the present case was filed before that order of the Government of Madras to which I have just referred. It was, however, filed after the grant of the title of Maharajah; and after the appointment of this gentleman to be a member of the Governor-General's Council for making laws, by the notification in the Gazette in which he received his full titles, and was described in the manner in which the Judge afterwards required the respondent to describe him; and, further, it is certain that the order of the Government of Madras was passed and issued before the question raised upon this objection under the Code came to be tried, and the decision of the Judge upon it was passed, because that, as I stated, was not until July 1865.

In these circumstances the question for their Lordships' consideration is, whether the order of the Judge, which was competent to pass, and indeed ought to have passed, under the Code of Procedure, or whether the decision of the High Court reversing it, is the correct one.

No doubt the question which is now brought before their Lordships might by some persons be considered frivolous. It does not appear to their Lordships, however, to be by any means a light question. It is certainly (as one of their Lordships remarked in the course of the discussion) strongly against the policy of the law that anything should be done which tends to increase that which has been always one of the great social evils of India, *i.e.*, the indisposition of persons of consequence to appear as suitors in Courts of Justice. It appears to their Lordships that, upon the proper construction of the Code, the description contemplated by s. 26 includes all those titles by which the party is generally known; and that if a plaintiff from animosity, from pique, or anything in fact but a *bond fide* dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is generally recognized, the Court ought not to permit or sanction that species of insult, as insult, no doubt, it would be treated, not only in India, but even in other countries.

In the present case it is not necessary for their Lordships to consider whether, if there were a *bond fide* dispute in the suit, or otherwise, as to the existence of the title, or as to the right of the party to bear a particular title, the Judge would in every case exercise a sound discretion in rejecting the plaint. For it appears to their Lordships that here the matter was entirely put by the proceedings already referred to beyond dispute, and that it was impossible to say that the titles, if properly treated as falling within the term of description, could not be ascertained. An order had been passed in the district, with the view, apparently, of keeping the peace between these great proprietors, that in all official documents each should describe the other by a certain title; that order had been recognized after appeal and discussion and enquiry by the Government of Madras; the titles themselves had been recognized by the authority in India,—by the Governor-General in Council, and confirmed by a distinct grant of the principal title, that of Maharajah,—and therefore there could be no pretence or excuse for saying that there was any doubt whatever as to the legal right of the appellant to bear those titles which he claimed to bear. Their Lordships are therefore of opinion that the Judge of the Civil Court was competent to pass the orders which he passed; and that he exercised a sound discretion in first requiring the respondent to amend his plaint, and afterwards in rejecting that plaint when the first order had been contumaciously disobeyed.

The only point on which their Lordships have entertained a doubt is whether

it was essential for the Judge to require the term "Honorable," which seems to be less matter of description than a mere honorary distinction, applying to those who are members of the Council, to be stated in the plaint. It is, however, to be observed that the respondent, when he appealed to the High Court, did not raise any point as to that. He raised broadly the question whether he was bound to give the appellant what he called his honorific titles, or whether it was not sufficient simply to describe him in a way in which he could be distinguished from any other person.

Their Lordships are aware that, in coming to the before-mentioned conclusion, they are ruling that which is in some degree in conflict with a decision passed by the High Court of Bengal in the case cited from the 12th Weekly Reporter, p. 450. It is to be observed, however, that, as it was fairly admitted at the Bar, that case is in one particular distinguishable from the present, inasmuch as there the defendant had not taken the objection in the first instance, but had asked for further time, and afterwards took the objection by way of after-thought. It is, however, scarcely necessary to observe that even if the case had been on all fours with the present, it would not have been a decision passed as it was by a Division Bench of the High Court, which would have been binding upon their Lordships; and for the reasons which I have stated, their Lordships are of opinion that it is not the true construction of the Act in question to say that, where a man has titles, the claim to which titles cannot rationally be disputed, and by which he is generally known, all that the Code requires is that he should be described in such way as has been contended for by the respondent.

Their Lordships, under these circumstances, will humbly advise Her Majesty that the decree under appeal be reversed, that the order of the Zillah Judge be affirmed, and that the respondent do pay the costs of this appeal and in the High Court.

The 5th July 1872.

Present :

Sir James W. Colville, Lord Justice James, Lord Justice Mellish, Mr. Justice Willes, Sir Montague E. Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Hindoo law of inheritance—Gifts inter vivos and by will—Construction—
Estates-tail—Donees in existence—Life-interest—Maintenance.*

*On Appeal from the High Court at Calcutta.**

Jotendromohun Tagore and another
versus

Ganendromohun Tagore.

The distinction adopted by the law of England in the course of inheritance between inheritable freeholds and personalty is not known in Hindoo law.

According to the Hindoo Law of Inheritance (unlike the law of England), the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the testator.

A gift *inter vivos* or by will cannot prevail against the Law of Inheritance.

A benignant construction should be used in the case of transfers by gift, the real meaning of the document being enforced if it can be reasonably ascertained from the language used.

All estates of inheritance created by gift or will, so far as they are inconsistent with the Hindoo

* From the judgment of Sir Barnes Peacock, C.J., and Norman, J., dated 26th May 1869.

Law of Inheritance, are void as such, and no person can succeed thereunder as heir to the estates described in terms which in English law would designate estates-tail.

A person capable of taking under a will must be such a person as can take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator.

Trusts of various kinds have been recognized and acted on in India in many cases.

Under the guise of an unnecessary trust of inheritance, a testator cannot indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust.

A trust cannot be said to fail because one of the trustees had renounced or had not acted; where a will distinctly provides for the case of a trustee not acting and gives a directing power to fill up the number of trustees when required.

Having regard to the principles above laid down, the Privy Council held that Jotendromohun Tagore was beneficially entitled to a life-interest under the will in the real property, and also in the personalty or the fund into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities; that upon the failure or determination of such life-interest, the beneficial interest in the said real and personal property was vested in the plaintiff Ganendromohun Tagore as heir-at-law; and that the marriage gift of a *primâ facie* adequate income to the plaintiff was a sufficient provision for maintenance.

These were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (Appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Honorable Prosonocoomar Tagore, a Hindoo inhabitant of Calcutta, who died on the 30th August 1868, leaving his only son, the plaintiff, and two widow daughters, with six grandchildren, the children of daughters, him surviving.

The defendants are three of the trustees and executors under the will of Prosonocoomar, dated the 10th October 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed). The trustees and executors are Opendromohun Tagore, Jotendromohun Tagore, and Doorgapersaud Mookerjee.

Jotendromohun Tagore is named as the first tenant-for-life, and he had, and has, no son.

The defendant Sourendromohun Tagore (named in the will Shooshendromohun Tagore) is also named as tenant-for-life.

The defendant Promodecoomar Tagore (a minor) is the son of Sourendromohun Tagore, and was born in the lifetime of the testator. He is described as tenant-for-life.

The remaining defendant, Suteendurmohun Tagore (a minor), is the grandson of Lullitmohun Tagore, who was dead at the date of the will. He was born in the lifetime of the testator. His father and grandfather died before the testator. If the will be valid, he is entitled to an estate-in-tail male.

It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised, except as to the alleged want of any description of the capacity in which Jotendromohun Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the plaintiff's marriage in the year 1843, when there was settled upon him absolutely, by his father, a zemindary, which then fetched Rs. 7,000 per annum, and the present value of which the plaintiff does not state. Upon the death of the plaintiff's first wife, his father also paid him the value of her jewels, to which he laid claim.

The explanation of the exclusion of the plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been

attempted. Nor does any such question arise as was discussed in *Abraham v. Abraham* * (9 Moore, P.C., 195), as to the law applicable to the convert's own property or as to the personal relations of him and his family. The Act XXI of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for the most part by his personal industry, and that the testator had already made such provision for his son Ganendromohun Tagore (the plaintiff) as he considered sufficient, and that Ganendromohun Tagore would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom Jotendromohun Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust.

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or the income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities.

To pay annuities afterwards given (except Rs. 1,000 a month afterwards given for worship) and legacies payable after the investment, and

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust, moneys, and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely for the person or persons entitled under the limitations and directions hereinafter contained and expressed, to the beneficial or absolute enjoyment of my said real property :"

And as to "realty or immoveable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities :"

To pay Rs. 1,000 a month for the worship of idols :

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desires that the "trustees or trustee shall hold the said real estate generally for the use and benefit of such last-mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive Rs. 2,500 a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The will then directs as follows :—

"And so soon as all the legacies and annuities (save and except the said sum of Rs. 1,000, for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then in trust forthwith, to convey the said real estate and premises unto and to the use of the person who shall under

* 1 W. R. P. C. 1; 1 Suth. P. C. R. 501.

the limitations and directions herein contained be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed, of and concerning the said real estate, so far as the then conditions of circumstances will permit and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at Molla Johur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the Rs. 1,000 before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the Tagore Law Professorship.

The will then disposes of the real property as follows :—

"And whereas I am, amongst other property, possessed of and entitled to a zemindary talook, called Pergunnah Patleadah, and Kismut Patleadah, in Zillah Rungpore, subject to an annual consolidated jumma, payable to Government, of Rs. 40,555-13-3, and I am also possessed of and entitled to other estates and property in Zillah Rungpore and other districts, and also to a ghaut, which I have erected and built on the river bank side of the Strand Road in Calcutta, and also to land and buildings opposite thereto, abutting on and near to the said road, and also to the Boitakhannah house, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and subdivision of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenant thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same. Now, therefore, I give and devise (subject always to the devise to the said Romanauth Tagore, Opendromohun Tagore, Jotendromohun Tagore, and Doorgapersad Mookerjee hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farmyard, furniture of the Boitakhannah, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say :—Unto and to the use of the said Jotendromohun Tagore, for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said Jotendromohun Tagore, who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of the said Jotendromohun Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said Jotendromohun Tagore, who shall be born during my life successively, according to their respective seniorities, for the life of each such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said Jotendromohun Tagore and the heirs male of their respective bodies issuing, so that the elder of the sons of the said Jotendromohun Tagore born in my lifetime, and his first and other sons successively, and the heirs male

of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said Jotendromohun Tagore born in my lifetime, and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said Jotendromohun Tagore who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and take before the younger of such sons and the heirs male of their and his respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, then to the use of Shooshendromohun Tagore, the second son of my brother Hurrucumar Tagore, for the term of his natural life; and after the failure or determination of that estate,"—

Then to the sons of Sourendromohun Tagore and their sons and the heirs male of their body respectively, in like manner as for Jotendro's, and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their body of Lullitmohun Tagore successively, and respectively in like manner as in the case of the sons of Jotendro and Sourendro. Like limitations as to other persons, as to which no further question arises.

Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create, as follows:—

"And I declare that, in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and failing descent, by adoption, and his issue or heir male by descent, and failing descent by adoption, shall be preferred to every younger son and his issue or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate."

It next provides that such estates of inheritance shall not be alienable, as follows:—

"And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindoo born and resident in Bengal may give or control the inheritance of his estate, or a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed."

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder "to be sold for arrears of Government revenues, or, in case of failure, to keep up in a due state of repair, and to use as his residence in Calcutta," the testator's house and furniture, &c., in which case the person next in succession is to take as in case of death.

Then follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor."

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes

that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The plaint, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the *corpus* of the personal estate, consisting of company's paper, and that there is danger of future waste.

The plaint prays in substance that it be declared :—

1. That the plaintiff, as only son and heir-at-law, is entitled to represent the estate.

2. That the testator had no absolute power of disposition, especially of ancestral estate.

3. That the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void save so far as they give Jotendromohun Tagore a life-interest, and that plaintiff is entitled after Jotendromohun Tagore's death.

4. That the plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest, and

5. For further relief.

The answer of the trustees and executors, and that of Sourendromohun Tagore, admit the main facts, with some qualifications not at present material; and that of the trustees and executors denies that they have improperly disposed of the estate. They submit that the will is valid, and ask for proper declarations and directions.

The infant defendants respectively pray that their rights, if any, may be protected by the Court.

The following issues were settled by the High Court :—

"*First*.—Does the plaint disclose any cause of action ?

"*Second*.—Did the testator die intestate with respect to any, and what, portion of his estate ?

"*Third*.—Was any, and what, part of the immoveable property of the testator ancestral estate, and, if so, had the testator power to dispose thereof by will ?

"*Fourth*.—Are any, and which, of the gifts or limitations contained in the will and codicils of the testator void in law ?

"*Fifth*.—What are the rights of the parties respectively under the will and codicils ?

"*Sixth*.—Whether the plaintiff is entitled to any, and what, maintenance out of the estate of the said testator ?

"*Seventh*.—Whether the executors, defendants, have misapplied any, and what, portion of the testator's estate ?"

At this stage the cause was heard before the High Court (Ordinary Original Civil Jurisdiction), and the learned Judge, Mr. Justice Phear, dismissed the plaint.

Upon appeal before the High Court (Appellate Jurisdiction), present Chief Justice Peacock and Mr. Justice Norman, it was decreed—

(a.) That the decree of the Lower Court be reversed.

(b.) That the plaint in this suit does disclose a cause of action.

(c.) That Prosonocomar Tagore, the testator in the pleadings, did die intestate as to certain portions of his property.

(d.) That part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will.

(e.) That the plaintiff is not entitled to any maintenance.

(f.) That the devises and gifts to Jotendromohun Tagore for life are valid, and that (subject to debts, legacies, and annuities) he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the

legacies and annuities shall fall in and be satisfied, to receive the sum of Rs. 2,500 a month out of the net rents of the immoveable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interests, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended.

(g.) That the said Jotendromohun Tagore is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate.

(h.) That it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied.

(i.) That the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the plaintiff, as the heir and representative of the said testator.

(k.) That the executors and trustees are bound to render to the plaintiff an account.

(l.) And after disposing of the costs it was ordered and decreed

(m.) That the case be remanded to the Lower Court, with a request that it will try the sixth* issue, and return its finding thereon, with the evidence, to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the plaintiff, by Jotendromohun Tagore, and by Sourendromohun Tagore, respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the defendant, Suteendurmohun Tagore, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and decided according to the Hindoo law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindoo system, in which property, whether moveable or immoveable, is in general subject to the same rule of gift or will and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty,—a distinction not known in Hindoo law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property (*Tyler v. Walford*, 5 Moore, P.C., 304). In the Hindoo law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer

* Intended for the seventh.

does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat, 2413.)

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjomonee Dossee v. Denobundoo Mullick* * (6 Moore, I.A., 555):—"A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favor of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void as such, and that by Hindoo law no person can succeed thereunder as heir to the estates described in the terms which in English law would designate estates-tail.

It remains, however, to be considered whether the persons described as heirs-in-tail or heirs of inheritance not recognized by law are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life,

* 4 W. R. P. C. 114; 1 Suth. P. C. R. 291.

having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs-in-tail, or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law.

This makes it necessary to consider the Hindoo Law of Gifts during life and Wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be alienated by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least,* the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the *Dayabhaga*, c. i, v. 21, by the phrase "relinquishment in favor of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children (so much relied upon during the argument), it is distinguishable because of the peculiar law applicable to that relation. The Hindoo law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is until revocation a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of will has, however, grown up, so to speak, naturally, from a law which

* As to Madras, see to the same effect Valinayagam Pillai v. Paehche, 1 Madras High Court Rep. 326; 1 Norton L. C., 334, S. C.

furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wenleysdale in the opinion delivered by him as a Judge in the House of Lords, in the case of *Mirehouse v. Rennell*, (1 Clark and Finnelly, 546), in accordance with principles generally recognized.* "This case," said Lord Wenleysdale, "is in some sense new, as many others are which continually occur, but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our judgment of what is right and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science." The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice Knight Bruce, in the case of *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*† (9 Moore I. A., 135), was much relied upon to show that the English law as to executory devises ought to be applied in dealing with Hindoo succession, and Mr. Justice Phear, upon the authority of that case, held that "there is nothing in Hindoo law to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council) if at all, immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon, was as follows:—"We are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindoo law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of

* See this well stated in the introductory disposition of the Civil Code of Italy, Article 3, "Qualora una controversia non si possa decidere con una precisa disposizione di legge, si avrà riguardo alle disposizioni che regolano casi simili o materie analoghe; ove il caso rimanga tuttavia dubbio, si deciderà secondo i principii generali di diritto."

† 4 W. R. P. C. 114; 1 Suth. P. C. R. 291.

*Bhoobun Moyee Dabia v. Ram Kisshore Acharj Chowdry** (10 Moore I. A., 279), in which the testamentary power of disposition by Hindoos in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindoos in India. It is obvious, therefore, that the conclusion arrived at in the Lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principle of Hindoo law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindoo law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would apply equally to a gift as to a will, and next to those which affect the will in question.

It was argued on behalf of the plaintiff, in the first place, that the will is void by reason of its being founded upon the creation of an estate in trustees, absorbing the whole interest in the property, and out of which the interests of the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindoo law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument, that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the bill, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay *A* an annuity, and subject thereto in trust for *B*; if the trust be void, it should simply be struck out, and *B* would have the property, subject to the annuity.

Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindoo law. But it is obvious that property, whether moveable or immoveable, must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases.

Implied trusts were recognized and established here in the case of a benamsee purchase in *Goopeekist Gossain v. Gungapersaud Gossain* † (6 Moore I. A. 53); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries and their interest is in the proceeds of the

* 3 W. R. P. C. 15; 1 Suth. P. C. R. 574.

† See p. 13 *ante*.

property (to which no objection has been raised) the creation of a trust is practically necessary.

If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships, the contention that under the guise of an unnecessary trust of inheritance the testator could not indirectly create beneficiary estates of a character unauthorised by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that after the determination of those interests the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objection fails.

As for the argument that the trust failed because one of the trustees had renounced, or more correctly speaking had not acted, their Lordships think this criticism unfounded in law, and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

Having disposed of the question whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estate and personalty settled therewith, is as follows:—

Rs. 2,500 per month to the "*person or persons* for the time being entitled," under the will, "to the beneficial enjoyment of the said real property ;"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible ;"

And as soon as the legacies and annuities shall have fallen in or been satisfied, then the trustees or trustee are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be ;"

The limitation referred to was as follows in the present tense, and therefore to operate at the moment the will took effect, though "subject always to the devise to the trustees."

1. To the defendant, Jotendromohun Tagore, for life ;
2. To his eldest son born during the testator's lifetime for life ;
3. In strict settlement upon the first and other sons of such eldest son successively in tail male ;
4. Similar limitations for life and in tail male upon the other sons of Jotendromohun Tagore, born in the testator's lifetime, and their sons successively ;
5. Limitations in tail male upon the sons of Jotendromohun Tagore, born after the testator's death ;
6. "After the failure or determination of the uses and estates hereinbefore limited" to (the defendant) Sourendromohun Tagore for life ;
7. Like limitations for the sons of Sourendromohun Tagore and their sons as for the sons of Jotendromohun Tagore. Under these limitations the defendant, Promodecoomar Tagore, who was alive at the death of the testator, is (if the will

be valid) entitled for life, subject to the life estates of Jotendromohun Tagore and of his father ;

8. Like limitations in favor of the sons of Lullitmohun Tagore, who was deceased at the date of the will, and their sons in tail male, as for the sons of Jotendromohun Tagore. Under these limitations (if the will be valid), the defendant, Suteendromohun Tagore, as the son of a son (his father having died during the testator's lifetime) would take an estate in tail male. He is the only defendant in that situation.

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindoo purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred."

This clause shows an intention that each tenant though of inheritance should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Arbergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that upon the face of it the will contains a variety of limitations which are void in law, as, for instance, the limitations in favor of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male which is a novel mode of inheritance inconsistent with the Hindoo law.

The first life-interest in Jotendromohun Tagore next requires attention. It was objected to on two grounds. First, because it was said that Hindoo law recognizes only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, and so forth. Secondly, it was said that the life-interest was void, because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of Rs. 2,500 per month, so that it is said this life-estate may never come into existence, because the legacies and annuities and interest on arrears may never be completely satisfied.

As for the first objection, it amounts to this : that because there is, as was contended, only one estate technically known to Hindoo law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the plaintiff that annuities given and charged upon land are valid ; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that

no objection to a similar interest being given by will.

As to the second objection to the life-interest, namely, the uncertainty of the period at which it was to commence, that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life-interest was to begin at once. It was subject to the devise to trustees who were to receive the rents, allow the life-holder Rs. 2,500 per month out of the net proceeds, apply the remainder in aid of the interests of the personalty, to pay off the legacies and annuities, and when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession to enjoy the whole. If the trust is not to be read to make estates valid which otherwise would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that upon the ground of public policy such law ought to extend to India, which the character of the law of gifts there seems to render unnecessary.

Whether Jotendromohun Tagore took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favor of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindoo law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents would be disregarded as an attempt to legislate. Accordingly it has been argued in support of the will, that as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created, ought to be rejected, and such an estate of inheritance as the law would uphold and sanction ought to be read out of the will, and conferred either upon Jotendromohun Tagore, whose family was intended, so long as it produced males descended of males, to represent the estate described by the testator, by treating his life-estate as converted or expanded into an estate of inheritance, according to Hindoo law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male, whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance not merely in details, but in substance and effect, with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. (Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nichols v. Nichols*, 2 W. Bl., 1159.) The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of

inheritance, and that until that estate fails, the second and so forth shall not succeed. (Testing this alone by English precedents, it might plausibly be maintained by *Pitt v. Jackson*, 2 Brown, C. C., 51.) The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance, which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvement, which show, in common with the rest of the will, that the intention of the testator was to give and to give only such an inheritance as would keep together the property inalienable so long as a male descended in a male line from any of the indicated sources of inheritance should be in existence, and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate ; and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guess work as to what the testator might have said if he could be asked his meaning ; for it would be to contradict in every article what he has intelligibly expressed.

These observations dispose of the case of *Humberston v. Humberston* (1 P. Wms., 1), so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the testator, estates of inheritance will be inferred against the particular expression, in order to benefit as nearly as may be in a lawful way all whom the testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit, against established principles of construction, and (again to refer for illustration to English law) against the authority of *Monypenny v. Dering* (2 DeGex, Macnaghten, and Gordon, 145). Their Lordships are of opinion that no estate of inheritance other than the void estate in tail male can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded, namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life estate to the first taker is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death except Suteendurmohun Tagore, and the validity of his claim to a life-interest in succession stands upon the same ground as that of Sourendromohun Tagore and his son, whose position must next be discussed.

Upon this the question arises whether Sourendromohun Tagore, Promodecoomar Tagore, and Suteendurmohun Tagore take life interests successively after that of Jotendromohun Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to Sourendromohun Tagore, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations except Jotendromohun Tagore, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect,

and that the interest for life after the death of Jotendromohun Tagore then became vested in Sourendromohun Tagore. The answer is that this argument proceeds upon the assumption that "failure or determination" means failure or determination in law, as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.

If Jotendromohun Tagore should beget or adopt a son, and die leaving the son and Sourendromohun Tagore both surviving, either Sourendromohun Tagore (and after him his son) must take at once and enjoy, to the exclusion of the son of Jotendromohun Tagore, in spite of the will ; or the heir-at-law (who though in terms excluded from benefit "under the will," cannot be excluded from his general right of inheritance, without a valid devise to some other person) must enter and enjoy during the life of Jotendro's son, and of his issue male, actual or adopted, and Sourendromohun Tagore (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law whose intervention was not contemplated by the testator.

If Jotendromohun Tagore were to die leaving power to adopt a son who was afterwards, in fact, adopted, Sourendromohun Tagore would either enjoy absolutely to the exclusion of the son in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed in which the rights of Sourendromohun and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate and handing it on from one to another whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean "failure or determination" in fact of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance and must fall therewith.

Their Lordships are thus of opinion that a life-interest has been created in Jotendromohun Tagore, and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the question how far the personalty not settled with the realty, but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with ;—whether the bequest of the corpus is void, or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High

Court (Appellate Jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only one person could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the corpus to an uncertain person who might be one of those who for failure of the estate in tail male cannot take the realty. Mr. Justice Norman declined to reject the words "or persons," and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction, but he leaned to the alternative that it was uncertain whether the testator meant to make an absolute gift or only to give the interest in succession, *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives Jotendromohun Tagore the surplus of the interest remaining in the hands of the trustees, after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows, viz., that the surplus in the hands of the trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty in the same manner as the rents of the realty. The words "or persons" instead of being rejected as inconsistent with the gift of the corpus, ought rather to be taken as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The word "person" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the trustees, not to convey, but to stand "possessed of and interested in the trust moneys and securities, and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take, and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is that after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the corpus remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of Jotendromohun Tagore, not only to the surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the plaintiff's claim to maintenance their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testamentary power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The plaintiff admits a marriage gift of his father of real property, producing at

the time Rs. 7,000 per year, which *prima facie* is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prosonocoomar Tagore's property."

The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally and not of the particular claimant), may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and than children living as part of his family must be content with. The only question raised, therefore, is whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *prima facie* adequate income, and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the plaintiff has laid no foundation for further enquiry, either in law or fact.

The plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact until he comes into its enjoyment. He has averred upon information and belief that the trustees "against the directions contained in the will" sold securities for money consisting of Government paper, "out of the corpus of the estate of the said testator and have improperly applied the proceeds thereof." Issue was taken by the trustees upon this averment. In the High Court (Original Ordinary Civil Jurisdiction) Mr. Justice Phear considered this statement of the plaintiff insufficient, because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty, and the selling of the Government paper, of which the plaintiff complains, may, as far as anything goes which is stated by the plaintiff, have been effected for that purpose." The High Court (Appellate Jurisdiction), however, directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the defendant's knowledge, and not within the plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was inconsistent with a due performance of the trust. In this latter view their Lordships concur, and hold that the plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after the life-interest of Jotendromohun Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdale v. Briggs* (8 DeGex Macnaghten and Gordon, 391), where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible, in the judgment of the Lord Justice Turner, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose or may dispose of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen

from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between attorney and client of all parties in the Lower Court upon appeal to the High Court (Appellate Jurisdiction) and of the appeals to Her Majesty in Council ought to be paid out of the estate, taking first the corpus of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account; and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (Appellate Jurisdiction) be in part affirmed and in part varied, and that additional declarations of the rights of the parties should be made as follows, that is to say, that the said decree be affirmed so far as it orders that the decree of the Lower Court in its ordinary civil jurisdiction be reversed, and that the plaint in this suit does show a cause of action, and that the testator died intestate as to certain portions of his property, and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will, and that the plaintiff is not entitled to any maintenance from the estate of the testator, and that the plaintiff is entitled to an account as directed by the decree of the High Court (Appellate Jurisdiction), and that as to the residue of the said decree that the same be varied, and the following order and decree substituted for the same, that is to say, that the defendant Jotendromohun Tagore is beneficially entitled to a life-interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made, and to the provisions of the will not hereby declared to be void, and also until the legacies and annuities fall in and are satisfied to receive Rs. 2,500 per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout, and also that subject to the trusts for payment of the legacies and annuities, the said Jotendromohun Tagore is beneficially entitled for his life to use and enjoy the library, carriages, horses, farmyard, furniture, jewels, gold and silver plates, and other articles belonging to the said testator, except the jewels, household furniture, and other articles which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not to be collected, or got in, or sold by the said trustees and executors, and that the limitations in tail male and subsequent limitations in the said will respectively have failed and are void, and that, upon the failure or determination of the life-interest of the said Jotendromohun Tagore, the plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life-interest is declared, and that upon the expiration of the said life-interest and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the plaintiff as such heir-at-law; and that the case be remitted to the Lower Court, with a direction that it shall try the seventh issue,* and return its finding thereon, with the evidence to the High Court (Appellate Jurisdiction), and that the costs of the parties respectively in the Lower Court, of the appeal to the High Court (Appellate Jurisdiction) and the costs of the several appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the corpus of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (Appellate Jurisdiction) upon the taking of the account by that Court directed.

* In the decree, as printed, erroneously called the sixth issue.

The 6th July 1872.

Present:

Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Jurisdiction (of Principal Sudder Ameen)—Act V of 1836—Execution of
Decree—"Striking off" the File.*

*On Appeal from the High Court at Calcutta.**

Gourmonee Dossee

versus

Jogutindronarain.

The jurisdiction of a Principal Sudder Ameen to deal with a decree referred to him for execution by the Zillah Judge under Act V of 1836 does not cease by his striking the case off his file after partial execution, so as to render necessary a subsequent reference by the Judge to enable the Principal Sudder Ameen, upon a fresh application being made for execution, to restore the case to the file.

In this case the sole question was whether an execution of a judgment taken out in January 1862 was or was not barred by the statutes of limitations applicable to India. Those limitations depend, in the first place, upon the third Bengal Regulation of 1793 s. 14, whereby the Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced," which Regulation has by subsequent constructions been applied to decrees. The Construction of April 1802 is to the effect "that a decree not carried into execution at the time of its being passed, or within a year from that time, may be executed on application being made for that purpose within twelve years from its date, after the opposite party has been called upon to show cause, and so on." Twelve years from its date has been further construed to mean twelve years from the date of the last application made to a proper Court to enforce it. Again, by Construction 136 of the 28th October 1813, it was laid down by analogy to the twelve years' rule of limitation that, "If the application be not made within twelve years, it cannot be entertained unless the applicant satisfies the Court that there has been good and sufficient cause for the delay."

By a statute passed in the year 1859, No. 14, it was enacted that, "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution."

S. 21 is:—"Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire." The application in January 1862 was within three years of the passing of the Act, and the only question is whether it was within twelve years of the application to a Court having jurisdiction to enforce the decree.

The facts material to the decision of this case may be very shortly stated. The decree in the original suit was obtained on the 26th June 1837, in the

* From the judgment of Loch and Seton-Karr, *J.J.*, dated 9th January 1865, 2 W. R., Misc., Rul. 20.

Court of the Judge of the Zillah Rungpore. On the 10th November 1838 this decree was referred by the Judge of Rungpore to the Principal Sudder Ameen of the Zillah Rungpore, to be executed in pursuance of Act V of 1836, which is in these terms:—"It is hereby enacted that it shall be competent to the Zillah and City Judges, within the presidency of Fort William in Bengal, to refer to the Principal Sudder Ameen subordinate to them, applications for the enforcement of decrees, to be executed by the said Principal Sudder Ameens, under the rules prescribed in the general regulations applicable to such cases."

It appears that an order was made in pursuance of this section directing the Principal Sudder Ameen to execute this decree. The order is not before their Lordships; but it must be assumed, in the absence of any impeachment of it on the part of the appellants, to have been regularly and properly made upon the proper petition and proper application, whatever that may have been, to the Judge of the Zillah Court.

It appears that various applications have been made to the Principal Sudder Ameen in pursuance of this order for execution of this decree. One appears to have been made in 1839, another appears to have been made in 1849, one in 1853, and another in 1861, and, possibly, there may have been others. Their Lordships infer, though it is not very clearly stated, that some of these executions have been partially successful in levying the goods of the defendants, but to what extent does not very distinctly appear.

It would seem that the Principal Sudder Ameen has, as it is called, struck this case off his file on several occasions. He struck the case off the file in the year 1839, after the application for execution at that time; and it appears from the copy of his order on the 2nd June 1864 that he struck it off on several occasions, for he says it was "executed and struck off" consecutively on the 2nd June 1849, 7th January 1853, 2nd May 1861, 2nd January 1862, and so on. As far as their Lordships are able to infer, in the absence of any information on this subject, which the appellants were bound to furnish if they relied upon it, the Principal Sudder Ameen appears from time to time when an application has been made for execution of this decree and that execution has been issued and whatever was leviable has been levied, to have struck the case off the list of the current business before him, and on a fresh application being made for execution to have restored it.

The contention of the appellants, and their sole contention, is this, that when he first struck off this proceeding from his file (as it is called) in 1839, thereupon his jurisdiction to deal with the decree altogether ceased, and that he could not deal with it again until a subsequent order had been made by the Judge of the Zillah Court, sending it back to him again. On that ground they say that these applications were made to a Court altogether without jurisdiction.

The appellants have not shown what this striking off the file amounts to. They have not shown the grounds on which the case was struck off the file, whether for non-prosecution, whether for some default on the part of the decree-holders, whether from inadvertence, or whether from the business of the Court being so conducted that causes which are not immediately before it are not kept upon the paper. Without affording any information on these subjects they have called upon their Lordships to infer that by the proceeding of the Principal Sudder Ameen in 1839, striking off the case from the file, without any explanation of the meaning of this proceeding or the cause of it, the order of the Court referring the decree to the Principal Sudder Ameen for execution was got rid of.

The order having been in force, it is for the appellants to satisfy their Lordships that for some good reason it has ceased to be so. Their Lordships are not disposed to infer that a valid order has ceased to be valid, or that a Court of competent jurisdiction having jurisdiction over this subject-matter has ceased to have it unless some clear proof is given of those propositions.

In the absence of such proof, their Lordships have come to the conclusion that the applications to the Principal Sudder Ameen, including that of 1862, were to a Court of competent jurisdiction, and, therefore, that the execution was valid.

Taking this view it becomes unnecessary to determine another question which was raised, viz. whether assuming the Principal Sudder Ameen not to have jurisdiction in 1862, that jurisdiction could be conferred on him by the retrospective effect of an order made by the Judge in 1864.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal be dismissed with costs.

The 18th July 1872.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Construction of sunnud—Jagheer—Service tenure—Resumption—Evidence.

*On Appeal from the High Court at Calcutta.**

Rajah Nilmoney Singh Deo

versus

The Government and Beer Singh.

Where a sunnud granted to the holder of a jagheer was only a confirmation by the Government and the Rajah of the tenure under which the jagheer was held, and authorized the jagheerdar to remain in possession and in the performance of the services with his brothers, without describing the kind of service, HELD that the Rajah could not resume the land without proof that the services to be performed by the jagheerdar were personal services only to the Rajah.

The questions of fact in this case on which the right to resume depends were found against the appellants by two Courts below, and the High Court, on special appeal, were bound by these concurrent judgments. Their Lordships, no special leave to appeal having been applied for, have also felt themselves bound by these findings. But it was suggested that the Courts below had erred in the construction of a sunnud, and therefore it was competent to this tribunal, on that ground, to hear the appeal. This sunnud appears to be granted to Mohogur Singh, who, at the time it was granted, held the jagheer, and it professes to be only a confirmatory sunnud. It appears really to emanate from the Government of India. It was issued with the sanction of the Rajah, which is proved by his signature, but it does not appear to be a grant by the Rajah, and his seal is not affixed to it. A grant from him was necessary. The effect of it appears to be no more than a confirmation by the governing powers, that is the superior governing power which was then the East India Company, and the Rajah, of the tenure under which Mohogur Singh then held the jagheer. It does not prove what it is necessary for the appellant to prove in this case before he has any ground upon which the claim to resume this land can rest, namely that the tenure was a tenure of service, by which personal services only to the Rajah were to be performed by the jagheerdar. This sunnud, purporting to be granted by those who had power over the land at that time, is merely this, that the jagheerdar shall remain in possession and in the performance of the service with his brothers. The kind of service is not de-

* From the judgment of Peacock, C.J., and L. S. Jackson, J., dated 31st July 1866,—6 W. R. 121.

scribed, and what it really was must, therefore, depend on the extrinsic evidence. A great deal of evidence appears to have been given in the Courts below on that subject, and the two Courts have found on that evidence that the services were of a public nature, and not solely private or personal. It must be admitted, that, if the former was the nature of the services, the Rajah cannot resume the land.

Their Lordships think they are bound, as the High Court felt itself bound, by the findings in fact of the two Courts before whom the case first came; and therefore, acting on the ordinary rule, their Lordships have no other course but to recommend Her Majesty to affirm the judgment under appeal, and to declare that this appeal must be dismissed with costs.

The 19th July 1872.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Evidence—Witness in other cases (credibility of).

On Appeal from the Sudder Court at Agra.

Lall Beharee Lall

versus

Mussamut Gopee Beebee and others.

The Privy Council, referring to the generality of the Principal Sudder Ameen's observations as to certain witnesses having given evidence in other cases, observed that, though it was a legitimate objection to a man's credit that he was a professional witness, yet to state broadly and generally that a witness had given evidence in other cases, and therefore became unworthy of credit, could only tend to increase the indisposition of respectable persons to come into Court as witnesses, which was one of the social evils of India.

Their Lordships are of opinion that no special ground has been shown on which this case ought to be excepted from the general rule against disturbing the concurrent judgments of two Indian Courts upon a pure question of fact; that if this were treated as an exceptional one it would be difficult to apply the rule to any future case.

The appellant brought his suit to oust the parties in possession on the ground that he became entitled to the property, as next heir, on the death of one Bowanee Pershad, who died in August 1855. To make out his title he had to establish two facts: first, that he stood to Bowanee Pershad in the relationship that he alleged; and, secondly, that being joint in estate with Bowanee Pershad his title as nearest male heir overrode the rights of the respondents, the widows of Bowanee Pershad, and of his two brothers who pre-deceased him.

The first issue has alone been tried, and both Courts have found that upon it the appellant failed to prove his title, which was founded on the allegation that he and Bowanee Pershad were descended from a common ancestor, one Lalloo Mull, the former being the grandson, the latter the great-grandson of that person.

It may be observed that the appellant came into Court with a considerable presumption against him, arising from the fact that he had slept on his alleged rights, and failed to bring his suit for twelve years after the decision of the Collector in the proceeding for the mutation of names, wherein this question of heirship was raised.

Both Courts have concurred in treating the oral testimony adduced by him

as untrustworthy. They have weighed the effect of the proceeding before the Magistrate in 1844, and of the circumstances proved concerning the dwelling-houses of the parties, and have come to the conclusion that these ought not to turn the scale in the appellant's favor. It is obvious that the weight to be given to the latter circumstances is a question which Judges in India are far more competent than their Lordships can be, to determine.

Their Lordships, moreover, are prepared to say that, if they were trying the case as a Court of first instance, they would have thought, upon the evidence before them, that the appellant had failed to prove his title as alleged, though they might have hesitated to assert that there was no relationship between the parties, or that the case of the defendants on that point was wholly true.

In these circumstances they can only humbly advise Her Majesty to dismiss this appeal with costs.

They wish further to observe, with reference to the elaborate and ingenious criticism to which the judgment of the Principal Sudder Ameen has been subjected in this case, that the only objection to that judgment which they would be inclined to take, is to the generality of his observations as to certain witnesses having given evidence in other cases.

It is no doubt a legitimate objection to a man's credit that he is a professional witness; but to state broadly and generally that a witness has given evidence in other cases, and therefore becomes unworthy of credit, can only tend to increase that indisposition of respectable persons to come into Court as witnesses, which is one of the social evils of India.

The 27th July 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Partnership—Participation in profits—Principal and agent.

*On Appeal from the High Court at Calcutta.**

Mollwo, March, and Co.

versus

The Court of Wards on behalf of the Estate of Rajah Pertab Chunder Singh.

Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where from such participation alone partnership may, as a presumption, not of law, but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common.

The relation of principal and agent ought not to be implied, any more than that of partnership from the fact of a commission on profits and powers of control being given when such relation is opposed to the real agreement and intention of the parties.

The action which gives occasion to this appeal was brought by the plaintiffs (the appellants), merchants of London, against the late Rajah Pertab Chunder Singh, to recover a balance of nearly three lacs of rupees claimed to be due to them from the firm of W. N. Watson and Co., of Calcutta.

* From the judgment of L. S. Jackson and Markby, J.J., in Regular Appeals, Nos. 260 and 262 of 1868, dated 18th June 1869,—12 W. R., Civil, 56.

The Rajah having died during the pendency of the suit, the defence was continued by the respondents, the Court of Wards, on behalf of his minor heirs.

The plaintiff alleged that the firm of W. N. Watson and Co. consisted of William Noel Watson, Thomas Ogilvie Watson, and the Rajah, and sought to make the Rajah liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the firm to the plaintiffs during the time when it is contended that the Rajah was in partnership with the two Watsons.

The questions in the appeal depend, in the main, on the construction and effect of a written agreement entered into between the Watsons and the Rajah; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two Watsons commenced business in partnership as merchants at Calcutta in 1862 under the firm of W. N. Watson and Co. Their transactions consisted principally of making consignments of goods to merchants in England, and receiving consignments from them.

In January 1863 they entered into an agreement with the plaintiffs, regulating the terms on which consignments were to be made between them, and under which W. N. Watson and Co. were authorized, within certain limits, to draw on the plaintiffs in London against consignments.

The Watsons had little or no capital. The Rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the Watsons obtained discount, and which the Rajah met at maturity. In the middle of 1863 the total amount of these advances was considerable, and the Rajah desired to have security for his debt and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the Watsons.

Accordingly, an agreement was entered into on the 27th August 1863 between the Rajah of the one part, and "Messrs. W. N. Watson and Co." of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the Rajah to them, the Watsons agreed to carry on their business subject to the control of the Rajah in several important particulars which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title-deeds of certain tea-plantations, and they also agreed that "as further security" all their other property, landed or otherwise, including their stock-in-trade, should be answerable for the debt due to him.

The 10th and 13th clauses of the agreement were as follows:—

"10th.—In consideration of the said advances made, and the liability incurred as aforesaid by the Rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st May 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished.

"13th.—The firm shall, in addition to the said commission, pay to the Rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now or hereafter payable on the said acceptances."

This agreement is not signed by the Rajah, but he was undoubtedly an assenting party to it.

Subsequently to the agreement, the Rajah made further advances, and the amount due to him ultimately exceeded three lacs of rupees.

In 1864 and 1865 the firm of W. N. Watson and Co. fell into difficulties. An

arrangement was then made, under which the Rajah, upon the Watsons executing to him a formal mortgage of the tea-plantations to secure the amount of his advances, released to them, by a deed bearing date the 3rd March 1865, all right to commission and interest under the agreement of August 1863, and all other claims against them.

In point of fact, the Rajah up to this time had never received possession of any of the property or moneys of the firm nor any of the proceeds of the business, and did not in fact receive any commission. A sum of Rs. 27,000 on this account was, indeed, on the 30th September 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the Watsons.

Some evidence was given as to the extent of the interference of the Rajah in the control of the business. It seems the Rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the Rajah availed himself only in a slight degree of the powers of control conferred upon him by the agreement; in fact, that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the Rajah do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the Rajah on the ground that he was an ostensible partner, and therefore liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the Watsons to the plaintiffs to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the Rajah.

The liability, therefore, of the Rajah for the debts contracted by W. N. Watson and Co. must depend on his real relation to that firm under the agreement.

It was contended for the appellants that he was so liable—

1. Because he became by the agreement, at least as regards third persons, a partner with the Watsons; and

2. Because, if not "a true partner" (the phrase used by Mr. Lindley in his argument), the Watsons were the agents of the Rajah in carrying on the business; and the debt to the plaintiffs was contracted within the scope of their agency.

The case has been argued in the Courts of India and at their Lordships' bar, on the basis that the law of England relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that, in applying them, the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which the Rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm.

It was contended at the Bar that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances.

It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it:—whereas, the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. See this pointedly stated by Mr. Justice Blackburn in *Bullen v. Sharpe* (L. R., 1 C. B., 109). The rule had been laid down with distinctness by Eyre, C.J., in *Waugh v. Carver* (2 H. Bl. 285) and the reason of the rule the Chief Justice thus states:—"Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace v. Smith*, and I think it stands upon fair grounds of reason."

The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the words of Lord Eldon) "to a given quantum of the profits."

This distinction was stated to be "clearly settled," and was acted upon by Lord Eldon in *ex parte Hamper* (17 Ves. 412), and in other cases. It was also affirmed and acted on in *Pett v. Eyton* (3 C. B. 32), where Tindal, C.J., in giving the judgment of the Court, adopts the rule as laid down by Lord Eldon, and says:—"Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales."

The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such;" he had no specific property or interest in them *quod* profits, for, subject to the powers given to the Rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the agreement. The Rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount.

This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox v. Hickman* (8 H. L. 268), and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh v. Carver*, and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox v. Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law, but of fact, be inferred, yet that whether that relation does or does not exist must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man, who is neither a real nor ostensible partner, can be held liable to a creditor of the firm. The reason given in *Grace v. Smith* that, by taking part of the profits, he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner.

Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the face of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel.

Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text-writers of what constitutes a partnership are collected at the end of the Introduction to Mr. Lindley's excellent treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say that, to constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common.

It was strongly urged that the large powers of control, and the provisions for empowering the Rajah to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the Rajah was constituted, in fact, the managing partner.

The contract undoubtedly confers on the Rajah large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments, or order consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt.

On the other hand the Rajah had no initiative power: he could not direct what shipments should be made, or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt, he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt.

Their Lordships are of opinion that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The Watsons evidently wished to induce the Rajah to continue his advances, and for that purpose were willing to give him the largest security they could offer; but a partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests.

It may well be that, where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated: but that is not the present case, where another and different contract is shown to have been intended, viz., one of loan and security.

Some reliance was placed on the Statute 28 and 29 Vict., c. 86, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of

itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in cl. 5 of the Act, so far as regards England, it is not necessary for their Lordships to consider. The Indian Act, XV of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the appellants that if "a true partnership" had not been created under the agreement, the Watsons were constituted by it the agents of the Rajah to carry on the business, and that the debt of the plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must on some other ground be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that, if it exists, it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the Watsons and the Rajah, so as to create a partnership; and they think there is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The Watsons were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire; his powers were confined to those of control and security, and, subject to those powers, the Watsons remained owners of the business and of the common property of the firm. The agreement in terms, and, as their Lordships think, in substance, is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, viz., one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the Rajah was not liable for the debts of the firm of W. N. Watson and Co., took a correct view of the case; and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

The 31st July 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Divorce a vinculo—Limitation (XIV of 1859)—Affidavit—Examination
by Commission—Evidence.*

On Appeal from the Chief Court of the Punjaub.

Lord William Hay
versus
Gordon.

In an appeal brought by the co-respondent against a judgment of the Chief Court of the Punjaub, confirming a judgment of the Additional Commissioner at Umballa, whereby the petitioner had obtained a dissolution of his marriage with his wife, on the ground of her adultery with co-respondent, who had been ordered to pay the costs of the suit :

HELD that the provisions of the Statute of Limitations (XIV of 1859) did not apply to suits for divorce *a vinculo*.

HELD that it would have been desirable and proper for the Chief Court to have acceded to co-respondent's application for a commission to examine him, and that his general denial in his affidavit was not equivalent to what might have been a circumstantial denial or explanation of the facts alleged against him.

HELD that the statements of the respondent were not evidence against the co-respondent.

HELD that there was no sufficient evidence on which the decree could be supported, and the Privy Council reversed so much of it as was appealed against.

This is an appeal brought by Lord William Hay, the co-respondent, against a judgment of the Chief Court of the Punjaub, confirming a judgment of the Additional Commissioner at Umballa, whereby Colonel Gordon obtained a dissolution of his marriage with his wife, on the ground of her adultery with Lord William Hay, and Lord William Hay was ordered to pay the costs of the suit.

Before the year 1869, the Indian Courts had only power to decree divorces *a mensâ et thoro*. The power of the Court of Divorce in this country of granting divorces *a vinculo* was first introduced into India by Act IV of 1869, which enacts that, subject to its provisions, "the High and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief." There is a power to make rules and regulations not inconsistent with the Act and the Code of Civil Procedure in India. But it would appear that no rules have been made, and therefore the principles and rules which obtain in the Divorce Court in this country are as nearly as may be to be applied in India. Power is given to District Judges in the first instance to hear divorce causes, but their decrees are not final, or indeed operative at all, until confirmed by the decree of the High Court, which is empowered to direct further enquiry to be made, or additional evidence to be taken.

In this case the High Court was the Chief Court of the Punjaub.

The first question which has been raised is whether or not the Statute of Limitations is a bar to this suit? It is argued that the cause of action arose in 1859 or 1860 when the acts of adultery are said to have been committed, or at all events in the year 1862, when Colonel Gordon says that the misconduct of his wife came to his knowledge. Act XIV of 1859, after prescribing particular terms of limitation for certain actions, enacts that, with respect to all suits and

actions not before specifically provided for, the term of six years shall apply, that is, six years from the time when the cause of action accrued. Their Lordships are of opinion that the provisions of that Act do not apply to suits for divorce *a vinculo*, which at the time when it passed were unknown in India. They are confirmed in the view which they have taken of the intention of the Legislature by the Limitation Act which was passed last year (Act IX of 1871), which expressly enacts that its provisions shall not apply to suits under the Indian Divorce Act.

The appellant further relied upon substantially two grounds: the first was that justice had not been done him in this suit, inasmuch as he ought to have an opportunity of being examined in this country by a commission; and, secondly, that, upon the general merits of the case, the decree was wrong.

With respect to the first question, the material facts appear to be these. The alleged adultery was in the years 1859 and 1860. The petitioner does not aver with any particularity at what time in those years the acts of adultery were committed. Lord William Hay left India in 1862, and has resided in England ever since. In 1862 Colonel Gordon says he became aware of his wife's adultery by what he regarded as a confession by her in a certain letter which will be subsequently referred to, and that at that time he endeavored to establish a case by the examination of witnesses in India; but it would appear that those very witnesses, who have been now called for him, at that time either could not or would not give evidence sufficient to establish his case. This suit was instituted in June 1869. Lord William Hay for the first time heard of it on receiving the summons in the beginning of August in that year. Upon that he immediately took, what undoubtedly was, the proper proceeding, of applying to an able Counsel for his opinion, and that Counsel advised in substance that application should be made to the Court in India for further particulars, and upon these particulars being obtained for a commission for the examination of Lord William Hay.

Lord William Hay, upon the 13th August, wrote to Mr. Chisholm at Simla, who held a power of attorney from him, enclosing a copy of his Counsel's opinion, and requesting that an advocate might be retained for him to act upon the instructions therein contained. It appears that Mr. Cunningham was so retained, but it does not appear that this gentleman acted in conformity with those instructions: the reasons for his not so acting do not appear.

The cause was heard before the Commissioner of Umballa on the 18th and 19th November 1869. The Commissioner pronounced against Lord William Hay, decreeing a dissolution of the marriage on the ground of adultery with him, and condemning him in costs. Lord William Hay states in his affidavit that he was not aware of this decision until January of the next year, 1870, when he received a short report of the case in the *Mofussilite* newspaper; that he then sent out an affidavit (which appears in the record) denying his guilt, stating a variety of circumstances, and among other things setting out the opinion of Counsel above referred to. In pursuance of that affidavit, and a petition which he also sent to India, it appears that his Counsel before the Chief Court of the Punjaub, Mr. Plowden, upon the 19th May, presented a petition to that Court containing various grounds of defence, and stating this among other things:—"The co-respondent is and always has been willing to tender himself as a witness in the case, and prays that, if the petition be not otherwise dismissed as against him, his evidence may be taken by commission." Upon the hearing of the cause before the Chief Court of the Punjaub in July 1870, the Court declined to comply with this request on these grounds; they say:—"We see no likelihood of any sort of advantageous result from the issue of a commission. We have Lord William Hay's positive denial on oath on the record, and though we should be anxious to offer a litigant so circumstanced every possible facility and indulgence in the

hearing of the case, it is not, we think, necessary, and would not therefore be expedient now, at the last moment, to re-open the proceedings by the grant of a commission which could scarcely bring any new fact before us, would place Lord William Hay's disavowal in no stronger a light, and would postpone the relief prayed for;" and the Court subsequently make this observation:—"With regard to the co-respondent, we have further to remark that his explanation of his proceedings is not, in our opinion, satisfactory, and that we cannot regard the course which he has pursued as in any degree adequate to the gravity of the occasion, or as indicating a serious intention to resist the present proceedings."

Their Lordships are not able to agree with the Chief Court that Lord William Hay's general denial in the affidavit is at all equivalent to what would or might have been a circumstantial denial by him of the facts stated by the witnesses, or an explanation of these facts, upon an examination by a commission; and they are also unable to agree with the Chief Court in the remark that they cannot regard the course pursued by him as adequate to the gravity of the occasion, or as indicating a serious intention to resist the proceedings. Their Lordships see no reason to doubt that Lord William Hay has all along seriously and earnestly desired to resist these proceedings to the best of his ability.

Upon this part of the case, their Lordships have come to the conclusion that it would have been desirable and proper, under all the circumstances, to accede to Lord William Hay's application for a commission to examine him.

But their Lordships do not rest their decision upon this ground. After giving the whole case their best consideration, they have come to the conclusion that there is no sufficient evidence upon which this decree against Lord William Hay can be supported.

In their Lordships' opinion, the evidence against Lord William Hay is entirely that of the native witnesses. Before coming to this, however, it is well to make an observation upon other evidence which was admitted in the case, and which undoubtedly was admissible as against the respondent Mrs. Gordon, viz., her own confessions, or what are contended to have been her own confessions. As far as the correspondence is concerned, the only passage which in any way bears upon her relations with Lord William Hay is the following in letter H, which must have been written somewhere about April 1862 from England to her husband then in India:—"I have your letters as to what occurred at Simla. Herbert always told me that *you knew of it, and did not care*. Lord William Hay told me the same thing. Herbert always told me that Emily knew of it, and I firmly believe that both *you and she did*." What she is writing about here is clearly misconduct of her own, and it may be assumed to be adultery with a gentleman at Simla, referred to by the name of Herbert. It appears that the person here designated as "Herbert," told her that her husband knew of this adultery, and did not care. She also says, "Lord William Hay told me the same thing." It appears to their Lordships that the view taken of this expression in her letter by the Court above, is more correct than that taken by the Court below, viz., that it does not amount to a confession on her part of any adulterous intercourse with Lord William Hay, but merely to a statement of a conversation with him on the subject of her misconduct with another person, and her husband's supposed sentiments regarding it.

On this part of the case—the lady's confessions—a Mrs. Byrne is called, who lives at Simla, and whose house Mrs. Gordon rented. This lady is the grandmother of a Mr. Johnson, who was retained in this case to get up the evidence on the part of Colonel Gordon, and she does speak to a communication from Mrs. Gordon which would undoubtedly lead to the inference that she had committed adultery with Lord William Hay. It is certainly somewhat remarkable, as has been forcibly remarked by Dr. Deane, that this lady should, if the statement be correct, not have communicated it in 1862 to Colonel Gordon, who was then

attempting to procure sufficient evidence to obtain a divorce, as Mrs. Byrne must probably have well known.

Their Lordships have thought it necessary to say a word upon this part of the case, although no statements of Mrs. Gordon, written or verbal, are, according to well-known principles of law, admissible against Lord William Hay ; and they now refer to the only evidence against him, which is that of the native witnesses. Without going through that evidence in detail, it may be enough to say that part of it is simply hearsay, and of an extremely unsatisfactory and loose character, to say the least of it, such as that of "Boonah," who speaks of having seen a horse tied up near Mrs. Gordon's house at 12 o'clock at night, which she heard from some grooms was the horse of Lord William Hay, those grooms not being called. There is evidence of Lord William Hay coming to the house on a good many occasions and dining there very frequently, but that is not evidence which, if taken alone, would at all lead to the inference of adultery. There is the evidence of a jampan bearer to the effect that, on three occasions, he, together with other bearers (it appears there would be four bearers of the jampan), took Mrs. Gordon to Lord William Hay's house about 8 or 9 o'clock at night, it does not appear at what time in the year. According to his account the jampan bearers and the jampan remained outside, visible to all persons who might be passing, which would not point to the conclusion that the visits were of an adulterous, or even of a clandestine character. Further, there is the evidence of a man of the name of Torab, who had been in the service of Colonel Gordon from the year 1856 down to the present time, and this is the only witness who speaks of any familiarities between Lord William and Mrs. Gordon. His statement is to the effect that Lord William Hay frequently came to Mrs. Gordon's when her husband was absent (indeed her husband does not seem to have been much at Simla) ; that Lord William came to dinner two or three times a week, sometimes in company, sometimes alone, and the witness goes on to say that when he would take away the coffee, Mrs. Gordon and Lord William Hay would be sitting on a sofa together, he with his arm round her waist. This witness appeals in confirmation of his statements to the evidence of an ayah of the name of Peerun, who, if not supposed to have witnessed the same familiarity, still was constantly in the house, and would of course perfectly well know whether Lord William Hay was there frequently or not. Torab says that the ayah was aware of the frequency of Lord William Hay's visits, and of the familiarity between Lord William Hay and Mrs. Gordon, and that he and the ayah were in the habit of discussing it together, and both of them discussing it with Mrs. Byrne. He also states that in the year 1862, when he was in Colonel Gordon's service, upon Colonel Gordon questioning him concerning the facts to which he was then deposing, he denied all knowledge of them ; he adds :—"Last year Colonel Gordon gave me great encouragement" (*dilasa* is the native word) "to speak the truth, and promised to forgive me everything if I would ; then I told the sahib."

The ayah Peerun, upon being called, contradicts the evidence of Torab ; and is, in fact, a witness in favor of Lord William Hay. She, instead of confirming the account which Torab had given as to Lord William Hay's frequent visits and his intimacy with Mrs. Gordon, says this :—"I was in Mrs. Gordon's service about nine years ago. Know of nothing between her and Lord William Hay. He only called on her twice to my knowledge ;" this entirely agrees with Lord William Hay's own account in his affidavit, where he says that he only called twice upon Mrs. Gordon ; one of his visits being to a certain extent on a matter of business, and that he dined once in the house of Colonel Gordon. She does speak, and so does one other witness, to an occurrence, certainly somewhat extraordinary, viz., Mrs. Gordon going to Lord William Hay's house at night, or late in the evening, breaking some of his windows, and cutting some creepers outside the house. Pursoo, the other witness who speaks to this transaction, represents that Lord

William Hay declined to have anything to say to her. He says:—"I told the sahib; he said, if she won't go, send for the guard, as she was drunk and might strike me with the knife. I persuaded her to go home." That is all we know of that transaction, which certainly appears to their Lordships to be no evidence of adultery.

It has been already said that their Lordships are of opinion that the only evidence against Lord William Hay was that of the native witnesses. It is true that the Chief Court does speak of that evidence as being corroborated in one highly important particular by Mr. Johnson, the gentleman who was employed to get up the case. But their Lordships do not take the same view of the evidence of Mr. Johnson. The passage to which the Chief Court refers would appear to be this:—"One morning I was taking my early ride about 7 or 7.30. I saw Mrs. Gordon coming down the steps which lead out of Littlewood; the ayah was with her. I passed close to her, but did not speak; her hair was hanging down." It does not appear to their Lordships that the fact of Mr. Johnson meeting this lady between 7 and 8 o'clock in the morning in company with a maid walking down steps, which would seem to be public ones, leading, it is true, to Lord William Hay's house, but also to other places, does afford any corroborative evidence which can be relied on of the statements of the native witnesses.

The case, therefore, in their Lordships' view, as far as Lord William Hay is concerned, resolves itself into this: the only part of the evidence of any importance is that a native servant who in 1862 denied all knowledge of what he asserted in 1869, and this servant is contradicted by a fellow servant whom he vouches.

Lord William Hay must be taken, as the Chief Court of the Punjaub properly assumes, to have given a general denial of the truth of this evidence; if that denial has not been specific, and has not been tested by cross-examination, the fault, having regard to his desire to be examined on commission, cannot be regarded as his.

Under these circumstances, their Lordships have come to the conclusion that this decree cannot be maintained.

Their Lordships are not unmindful that they have, on more than one occasion, laid it down as a general rule, subject to possible exceptions, that they would not reverse the current findings of two Courts on a question of fact. But they consider that the circumstances of this case are of so peculiar a character as to take it out of the scope of that general rule. They are dealing with a jurisdiction of an important and delicate character, new to the Courts of India. This is certainly the first case which has come before their Lordships, and probably not many suits of this description have been tried in India. It is to be observed that in this case it can scarcely be said that there have been two separate judgments, inasmuch as the Legislature has not thought it safe to entrust the Court below with the power of pronouncing decisions which would be binding if not appealed against, but have made these decisions operative only on confirmation by the High Court, whose confirmatory judgment is practically the judgment in the suit. It is further to be observed that the Court below was clearly wrong in accepting as evidence against Lord William Hay the statements of Mrs. Gordon, and regarding those statements as confirming the credibility of the evidence of the native witnesses against him. It is true that the Chief Court distinguishes between the evidence which was admissible as against the respondent and that which was admissible as against the co-respondent. At the same time they attach a good deal of importance to the finding of the Judge below upon the credibility of the native witnesses, based as that finding was in a great measure upon evidence not admissible.

For these reasons their Lordships have come to the conclusion that it is not one of the cases to which the ordinary rule above mentioned should be applied.

Their Lordships will, therefore, humbly advise Her Majesty to allow this appeal, and to reverse so much of the decree of the Chief Court of the Punjaub as is appealed against, and that in lieu thereof the suit be dismissed as against Lord William Hay, with the costs in the Courts below and the costs of this appeal.

The 2nd August 1872.

Present :

Sir James W. Colville, Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Jurisdiction—Municipal Courts—Ex-King of Delhi—Mortgage.

On Appeal from the High Court in the Punjaub.

Rajah Salig Ram and others

versus

The Secretary of State for India.

Plaintiffs, appellants, sued defendant, respondent (the Secretary of State), to recover a sum alleged to be due for principal and interest on certain bonds called mortgage bonds, executed by the late King of Delhi. The claim was made on the ground that the defendant, owing to the late mutiny, confiscated all the landed estate of the said king; but that by a circular of the Judicial Commissioner, under the order of the Supreme Government, all mortgages effected by the king on those estates which the defendant had confiscated were to be paid.

HELD, that Municipal Courts have no jurisdiction to enforce engagements between Sovereigns founded upon treaties. The Government, when they deposed the king, and confiscated his property as between them and him, did not affect to do so under any legal right, and their acts can be judged of only by the law of nations.

The estates which had been given to the king had been assigned for the support of his royal dignity and the due maintenance of himself and family in their high position. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

The Circular Order does not amount to a law, and does not fall within the meaning of the 24 and 25 Vict., c. 67.

The appellants in this case are the heirs and representatives of Rajah Salig Ram, and Rajah Davee Sing, the plaintiffs in the suit. The respondent, the Secretary of State for India in Council, is the defendant. The suit was commenced on the 28th November 1864, in the Court of the Deputy Commissioner of Delhi, to recover the sum of Rs. 68,853 odd, alleged to be due for principal and interest on certain bonds, which in the plaint are called mortgage bonds, executed by the late King of Delhi.

It was correctly stated by Mr. Justice Boulnois, in delivering his judgment in the Chief Court of the Punjaub, that the bonds all acknowledged debts, but that all did not mention the property by which the debts were secured.

The plaint, after stating that the claim is on four mortgage bonds, of which the dates and amounts are specified, proceeds to describe the grounds of the defendant's liability in the following words:—

“The defendant, owing to the late mutiny, confiscated all the landed estate of the late king, but by a Circular No. 112 of the Judicial Commissioner of these provinces, under the orders of the Supreme Government, all mortgages effected by the late king on those estates which the defendant has confiscated are to be paid. The plaintiffs having failed in their application to be reimbursed, as will be seen by the proceedings regarding their claim, and referred to law to obtain their remedy, are necessitated to file this suit, and pray that a summons may issue against the

defendant, and he be declared to pay the amount claimed with interest at the rate specified in the bonds up to realization of decree with costs."

The plaint, as pointed out by Mr. Forsyth, the learned Counsel for the defendant, is not a suit for ejectment or foreclosure, nor does it pray that the defendant may be declared a trustee for the plaintiffs of the revenues collected from the hypothecated villages. It does not even allege that the defendant, at the time of the commencement of the suit, was in possession of the property. The claim appears in its terms to be founded entirely on a right alleged to have been created by the Circular No. 112 of the Judicial Commissioner. It is to be remarked that the plaintiffs do not claim merely the value of the property mortgaged, for, in the 7th Article of their written statement, they say "the defendant is liable to the full amount of claim, though it may exceed the value of the property mortgaged, or return the same to them."

It was in consequence contended by the respondent's Counsel, with great force, that the claimant must be held to the claims actually made by him; and that unless he could succeed in showing that the Circular had given him the right alleged, his claim must necessarily be dismissed. Having regard, however, to the written statement of the defendant, to the issues raised, and the mode in which those issues were disposed of in the Courts in India, their Lordships have in this case thought it right to consider the whole matter as it was presented to those Courts and at their Lordships' Bar.

It must be taken upon the evidence that the late king was, at the time of the confiscation, indebted to the plaintiffs upon the bonds set forth in the plaint, and that either by the terms of the bonds or by his letters to Sir Thomas Theophilus Metcalfe, the Resident at the Court of Delhi, the king had, so far as he lawfully could, assigned and appropriated to the discharge of the bond debts certain amounts which the Resident was requested to pay yearly out of the revenues of certain of the royal Targool villages. It is admitted, in the 1st and 2nd Articles of the defendant's written statement, that the property so alleged to have been mortgaged to the plaintiffs was, together with all rights and interests in and in respect of it, seized and appropriated on behalf of the British Crown.

Several defences were set up in the written statement of the defendant, but for the purpose of this appeal it is not necessary to consider any of them, except the 1st, 2nd, 5th, and 6th. The 3rd, which relied upon s. 20 Act IX of 1859, and the 4th, which set up that the defendant was by Act XXXIV of 1860 indemnified from all liability of every kind in respect of seizure and appropriation of the property alleged to have been mortgaged, were abandoned by the learned Counsel for the defendant upon the argument of this appeal.

The first ground of defence was that the property alleged to have been mortgaged to the plaintiffs was, together with all rights and interest in and in respect of it, seized and appropriated by the defendant on behalf of the British Crown, on political grounds, as an act of State, and that consequently no claim against the defendant, as having thus taken possession of the said property, was cognizable in the Court in which the suit was instituted, or in any other Municipal Court.

The 2nd was similar to the 1st, with the addition that the seizure was "during the continuance and in the prosecution of war."

The 5th and 6th were as follows:—

"5. That the Circular No. 112, on which the plaintiffs grounded their right to demand from defendant the debts they sued for, was simply a private order addressed by one officer of Government in his executive capacity to others, directing them, as a matter of mere grace and favor, to relax in certain cases, where they would have operated hardly, the laws under which Government was free from legal liability in respect of debts secured on the Delhi Crown property, and certain other property, which had come into its possession as a consequence

of the rebellion and war of 1857, and that the issuing of such an order could be of no effect whatever to bind the Government as defendant in a Municipal Court.

" 6. That the said Circular did not authorize the exercise of this grace and favor in respect of the debts claimed by the plaintiffs, as was clear from the wording of the said Circular, and as was further clear from the Circular V of 1861."

Several issues were raised. Of these the only important ones to be considered are the 1st, 4th, 5th, and 6th.

They are as follows:—

" 1. Was the seizure of these properties by Government such an act of State or act of war as is not cognizable by a Municipal Court ?

" 4. Has the Circular in question the force of a legislative enactment ?

" 5. Do the Circulars issued by the Judicial Commissioner of the Punjaub, in his executive capacity, bind the Courts of the Punjaub or not ?

" 6. Does Circular 112 apply to the debts claimed by the plaintiff ? "

The case was tried by Mr. Coldstream, the Deputy Commissioner of Delhi, who, in a very elaborate and well-considered judgment, found those issues for the defendant, and gave judgment in his favor. A regular appeal was preferred from that judgment to the Commissioner of Delhi, who upheld the decision of the Assistant Commissioner.

A special appeal was then presented to the Chief Court of the Punjaub. That appeal was dismissed upon the ground that the suit was not cognizable in a Municipal Court. The appeal to Her Majesty in Council is expressed to be against the judgment of the Chief Court of the Punjaub and the several judgments of the Commissioner and Deputy Commissioner of Delhi. There is no dispute, however, as to the facts, and the questions now to be considered are whether the seizure or confiscation of the property of the late king was an act in respect of which the Municipal Courts have jurisdiction; whether the Circular Order of the Judicial Commissioner, No. 112, vested a right of action in the plaintiffs which can be enforced against the Government by a Court of Law; and whether the plaintiffs had a right or interest in the property which was not affected by the confiscation of the king's domains. The last was the proposition mainly relied on by the appellant's Counsel before their Lordships.

The Commissioner of Delhi remarked in his judgment "that in the use of the words 'confiscation' and 'seizure' and 'appropriation,' the Court did not perceive any material distinction or difference, and one of the grounds of appeal to the Chief Court was that the ruling of the Commissioner as to the meanings of those words was erroneous. The appellants say, in the second ground of their appeal, 'the king of Delhi's property was confiscated,' and the appellants do not dispute the right of Government to confiscate it; but the king had only a right to that which remained after satisfying the appellant's claim, and to this alone is the defendant entitled by virtue of confiscation. The appellant's property was not confiscated."

Mr. Kay, in his argument, treated the word "confiscated" as if it were used in the sense of forfeited for a crime, and he cited cases to show the distinction between "forfeiture" and "escheat."

The former, he urged, did not affect *bond fide* incumbrances created by the offender before forfeiture. He admitted that the confiscation was an act of State, but he denied that it affected the rights which the plaintiffs had derived from the king by virtue of the mortgages.

His argument as regards the effect of a forfeiture upon a regular conviction for a crime would have been correct if he could have shown that the confiscation of the king's property was an act in the assertion of a right conferred by the law of forfeiture.

But such was not the case. Neither was the law of forfeiture in force in the case of natives of India convicted of crimes beyond the limits of the Supreme

Court, whatever might have been the case within those limits (as to which it is not necessary to express an opinion), nor did the Government affect or purport to act under any such law.

The word "confiscation," as used by the Commissioner of Delhi, in his proceeding of the 3rd October 1857, does not import that the appropriation to the public use was for a crime. He says, the confiscation of all the Crown villages, &c., *having been deemed proper*, &c., it is ordered, &c., that perwannahs be issued to the Tehseeldahs, &c., to confiscate all the villages, &c. In other words, the revenues were to be brought into the public treasury. The word "confiscation" does not *per se* necessarily import that the appropriation is to be made as a penalty for a crime; and even when used in that sense, it does not necessarily imply that the forfeiture has accrued upon conviction, but may also be properly used as applicable to appropriations by Government as an act of State of the property of a public enemy, or of a subdued or deposed ruler.

The Deputy Commissioner found as a fact that which is well known as a matter of history, that the king was not tried by a regular Court and that his trial by a Court under a special commission did not take place for some months after the attachment had taken place.

Mr. Justice Boulnois in his judgment (p. 80) says:—"After the mutiny in 1857, on the 18th September in that year, the king of Delhi was captured by the British Government, and made a prisoner of war, having been for some time the nominal head of the insurgents in Delhi. On the 3rd October in that year, the Commissioner of Delhi, on behalf of the Government, attached and took possession of the ex-king's lands. This appropriation accompanied the extinction of the political existence of the representative of the Delhi line of kings. It did not affect to justify itself on any ground of Municipal law; and it seems to have been (considering the person who had owned the property seized) an act of power on the part of the British Government exercised in a matter of State. There is, however, additional evidence to show that the authority of Government in that character, which renders it superior to positive law, was brought to bear in this act, for the seizure of the king's lands was an appropriation of an enemy's property, *flagrante bello*."

It is not necessary to express an opinion as to what is the effect of the seizure of property of a subject by a Government in the exercise of the powers of war in putting down an insurrection, especially in those cases in which the subject has not joined in the insurrection: nor is it necessary to deal with the cases which have been cited from the American reports in regard to acts which took place during the late war in that country. The case of the plaintiffs, who claim under grants from the king, is very different from that of a subject deriving title under an ordinary tenure.

It is necessary to consider under what circumstances the late king of Delhi acquired a title to the property charged with the payment of the bond debts, if, indeed, he can be held to have had any legal title whatever to the same, beyond the mere will of the British Government. As to this point, it appears that, after the Emperor Shah Aulum, the grandfather of the late king, had been rescued from the power of Dowlut Rao Scindia and placed under the protection of the British Government, it became a matter of political expediency to determine the nature and extent of the provision to be assigned for the support of His Majesty and of the royal household.

The subject was fully discussed in the notes of instructions transmitted by Mr. Edmonstone, the Secretary to Government, to Colonel Ochterlony, the Resident at Delhi, in a letter dated the 17th November 1804 (4 Wellesley Despatches, 237), of which notes a copy was also despatched to His Excellency the Commander-in-Chief. Subsequently, on the 23rd May 1805, the final determination of the Governor-General in Council upon the subject was communicated to the Resident

at Delhi, by letter from the Secretary to Government of that date (see same vol., p. 542).

That arrangement was as much an act of State as if it had been carried into effect by formal treaty signed by the British Government.

Municipal Courts have no jurisdiction to enforce engagements between sovereigns founded upon treaties. (*East India Company v. Syud Ally*, 7 Moore's Indian Appeals, c. 555; * the Nabob of the Carnatic, 2 Ves., Junr. Repts., p. 56.) The Government, when they deposed and confiscated the property of the late king, as between them and the king, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations: nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the king's property.

If, shortly after the arrangement had been made, the British Government had found it necessary, as a matter of political expediency, to alter, without the consent of Shah Aulum, the arrangements introduced into the assigned territory, it is impossible to conceive that a Court of Law would have had jurisdiction to enforce the arrangement in a suit brought by His Majesty, either by granting a specific performance or by awarding damages for the breach of it.

The king of Delhi having joined in hostilities against the British Government, having renounced their protection, and having endeavoured to regain his former absolute rights of sovereignty, the British power over those territories which had been assigned for his support was for a time suspended. Delhi fell before the British arms, the territories were recaptured, the power of the British Government was restored, and the king of Delhi was taken as a prisoner of war. The revenues and territories which in 1804 were by an act of State assigned for the maintenance of Shah Aulum and his household, were in 1857 also by an act of State resumed and confiscated.

The seizure and confiscation were acts of absolute power, and were not acts done under color of any legal right, of which a Municipal Court could take cognizance.

The *status* of Shah Aulum was that of a king. He was treated and recognized by the British Government as a king, and not merely as a jagheerdar holding under an ordinary grant from the British Government. He was the grandson of Shah Aulum, and neither he nor any of his ancestors had ever been deposed by his own subjects or by the British Government or by any other power. Shah Aulum was described by Lord Wellesley in his Despatches sometimes as the "unfortunate representative of the house of Timour," sometimes as "the Moghul," and again as "the Emperor." It is unnecessary here to refer more particularly to the extracts from the Despatches which have been pointed out in the exhaustive arguments in the Lower Courts. If further arguments were necessary, with reference to the *status* of the late king and of his grandfather Shah Aulum, the despatch of Lord Wellesley to the Secret Committee of the Court of Directors of the East India Company of the 13th July 1804 (4 Wellesley Despatches, p. 132) might be referred to.

The *status* of the king of Delhi and that of the Begum Sumroo were very different. The latter was held not to be a Sovereign Princess, but a mere jaidadar under Scindia; and this fact distinguishes the present case from that of Forester and others *v.* The Secretary of State for India,† in which the judgment of the Judicial Committee was pronounced on the 13th May last. In that case it was also held that the act of Government was not the seizure by arbitrary power of territories, which up to that time had belonged to another sovereign State; but that it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. It was said:—

* Cited in 4 W. R. P. C. 43; 1 Suth. P. C. R. 374.

† 18 W. R. 349; and p. 628 *ante*.

“The possession was taken under color of a legal title, that title being the undoubted right of the sovereign power to resume and retain or assess to the public revenue all lands within its territories upon the determination of the tenure under which they may have been exceptionally held free. If by means of the continuance of the tenure or for other cause a right be claimed in derogation of this title of the Government, that claim, like any arising between the Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India.”

The seizure of the royal Targool villages for the reasons above given does not fall within the ruling of *Forester and others v. The Secretary of State for India*, but is governed by the principles laid down in *The Secretary of State in Council v. Kamachee Boye Sahiba** (7 Moore's Indian Appeals, 476, &c.); *The East India Company v. Syud Ally* (*id.*, 555,) and in other cases in which the same principle is affirmed. But it is contended that these considerations do not necessarily determine the right of the mortgagees, who are British subjects, to what they claim. It is argued that the British authorities had given Shah Aulum estates in British territory to be dealt with at his free will and pleasure, so that the charges *bond fide* created by him while in possession, *de facto* and *de jure*, as owner, survived his deposition. But their Lordships are clearly of opinion that no such ownership or power of disposition was conferred upon Shah Aulum or his successors. The territories were assigned to him for the support of his royal dignity and the due maintenance of himself and family in their high position. If he had died or abdicated, his successor would have taken the property in the same way, free from all charges. It was a tenure (so far as it was a tenure at all) *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself.

Their Lordships are further clearly of opinion that the Circular Order No. 112 does not amount to a law. It was not enacted as a law, nor did it purport to be a law; and it does not fall within the meaning of the 24th and 25th Vic., c. 67.

The Circular was merely a Circular from the Judicial Commissioner, forwarding, for the information and guidance of the Commissioners of the several divisions of the Punjaub, a copy of correspondence between the Government of the Punjaub and the Government of India on the question of the liability of Government for the debts of rebels whose estates had been confiscated for rebellion.

It is clear from the whole tenor of the correspondence which originated out of certain questions referred by the Judicial Commissioner of the Punjaub for the decision of the Lieutenant-Governor of the Province, that the Government did not intend to lay down any rule of law for the breach of which redress might be obtained in a Court of Law, or to use the words of Lord Kingsdown, in 7 Moore's Indian Appeals, 538, “to submit the conduct of its officers, in the execution of a political measure, to the judgment of a legal tribunal.” They intended only to declare the course which a sense of justice and equity would induce them, in their discretion and as an act of favor, to adopt. The correspondence in Circular No. 112 did not apply to the appellants' case. That was treated of in the Circular of the 12th January 1861, *in continuation* of Circular No. 112. In that Circular of the 12th January 1861, the correspondence on the subject of the appellants' claim was forwarded, and amongst other letters one from the Officiating Secretary to the Government of India, to the Secretary of the Government of the Punjaub, dated 28th December 1860. In that letter, paragraph 6, it is written:—

“6. The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of deceased grantees. The exception is in the case of such estates which have been confiscated, and this exception is based on the consideration that ‘the interests of justice require the protection of creditors from the effects of a political catastrophe which they could not have foreseen.’

* 4 W. R. P. C. 42; 1 Suth. P. C. R. 373.

But creditors who, like Salig Ram and Davee Singh, joined the rebellion voluntarily, accepted such security for their claims as the rebel cause might offer. They not only foresaw, but assisted to produce the catastrophe, and therefore the interests of justice do not require that they should be protected from its effects. *They may have all that they are entitled to by the letter of the law; but the Governor-General would deny them that which can be claimed only as a favor, for it is in the essence of a concession by favor that it should be withheld where favor is not due.*

"7. The Governor-General is of opinion that neither Salig Ram and Davee Singh's claim, nor that of any other creditor of the ex-king, who has been convicted of rebellion, to the liquidation of their debts from the revenues of the Crown lands, should be admitted."

Even if the prior Circular, on which the appellants rely, could, on any fair principles of legal construction, be held to be a legislative recognition of the rights of the creditors of the deposed sovereign to be paid out of the revenues of the deposing Government (the only way in which it could avail the plaintiffs), the last Circular is an act of like character, of equal validity, and equally binding on the Courts of Law.

Their Lordships think it desirable to make a few observations on the case of *Narain Doss v. The estate of the late King of Delhi*,* in which this Board came to a conclusion in favor of a claimant under the Circulars in question. The title of the cause itself, in which the estate was named as a party, shows how it came to be a matter of judicial cognizance. The plaintiff there was admitted to claim against the estate. But he was put to prove that he was such a creditor as he alleged himself to be—that he was one of the creditors intended to be protected by the Circulars. That issue having been raised, and having been, by the act of the Government itself, put in a train of judicial investigation by the legal tribunals, had to be determined in the same manner and on the same principles as any other issue legally raised in any ordinary litigation, and the determination was that the plaintiff had established his claims under the Circular, as alleged, and that the objections to it had failed. That case has no application to the present, in which the appellants were peremptorily excluded from the benefit of the Circular.

Their Lordships are of opinion that the judgments from which this appeal was preferred were correct, and they will humbly report to Her Majesty that, in their opinion, those judgments ought to be affirmed, and this appeal dismissed with costs.

The 5th November 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Witnesses—Credibility—False Case—Real Issue.

On Appeal from the High Court at Calcutta.†

* 10 W. R. P. C. 55 ; and p. 76 *ante*.

† From the judgment of Loch and Seton-Karr, *J.J.*, in Regular Appeal No. 401 of 1864, decided 16th January 1865, 2 W. R. 52.

Khajah Habeeb Oollah and others

versus

Khajah Gouhur Ally Khan.

Where witnesses who were not merely giving an opinion upon an isolated fact in the cause, but came into Court to prove the whole case made by the plaintiffs, and that a very special case, are shown to have come to prove a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the cause.

Where, in the last stage of appeal, a case is made which is hardly consistent with the false case originally set up, and which was never made the real issue between the parties in any previous stage of the litigation, it cannot be relied on in any degree so far as it affects the case made by the other side.

The single question raised by this appeal is whether the respondent was the son of Wazeer Jan, by which their Lordships understand, either his legitimate son in the strictest sense of the term, or a son capable of inheriting from him under the Mahomedan law.

The case made by the appellants, who were plaintiffs in the suit, was that he was not in any sense the son of Wazeer Jan, who, they alleged, was incapable of procreating children, that he was a stranger brought in by means of a conspiracy to defeat their rights to the succession of Mahomed Ibrahim, the elder brother of Wazeer Jan, and in fact the original plaintiff appears to have gone so far as to allege who the real and natural father of the respondent was.

Now it is admitted that that case has entirely broken down. The effect of the findings of the two Courts upon the remand appears to be what is thus stated in the judgment of the High Court now under appeal:—"The case has again been tried by the present Judge, Mr. Ainslie, who has arrived at the conclusion that Gouhur Ally is really the son of Wazeer Jan and Allahrukkee, but that he is not legitimate, and that though his father and mother did cohabit, the cohabitation was not that of man and wife."

The only qualification which their Lordships think might be put upon this summary of the Judge's finding is this that the Judge has rather found, after ascertaining the paternity of Wazeer Jan, that the respondent was not *proved* to be legitimate, and that although his father and mother did cohabit, the cohabitation was not *proved* to be that of man and wife.

Upon appeal from the decision of the Zillah Judge, the High Court came to the conclusion that, upon the evidence, the respondent must be taken to have been legitimate, and that conclusion their Lordships are disposed to think was the only correct conclusion which they could draw from the evidence, considering the manner in which the case was presented before them.

It has been very fairly admitted at the Bar that it is hardly open for the appellants here, both Courts having concurred in the finding upon that fact, to dispute any longer the paternity of the respondent. It is admitted that he must be taken to be the natural son, at all events, of Wazeer Jan. It will have no doubt to be considered what is the effect of that conclusive finding as to the paternity, not only in reference to the consequences immediately to be deduced from it, but also in reference to the credibility of the witnesses for the appellants, in so far as they attempt to prove, not merely that the respondent was in no sense the son of Wazeer Jan, but that in fact there never was a marriage between Wazeer Jan and the mother of the respondent.

It was argued by the learned Counsel for the appellants, particularly by Mr. Doyne, that it did not by any means follow that, because many of those witnesses had expressed an opinion as to the incapacity of Wazeer Jan for the procreation of children, a fact which is now conclusively found against him, they were not to be believed on the other part of the case. Their Lordships, however, deem it right to observe that those witnesses were not merely giving an opinion upon an isolated fact in the cause, but they came into Court to prove a case—the whole case made by the plaintiffs; and that that case was, as I have before stated, a very special case, referring to the introduction of this boy into the family to a

conspiracy, and undertaking to prove that it was impossible that he should be the son of Wazeer Jan, and that he was the son of somebody else. It, therefore, seems to their Lordships very difficult to say that, if those witnesses have been conclusively shown to have come to prove a false case—a case false in its material features—much reliance can be placed upon their evidence as to any particular questions in the cause.

Another consequence of the manner in which the appellants have presented their case in the Courts below, is, that the question which has been chiefly argued to-day at the Bar seems never to have been fairly put into a course of trial. They say:—"True, we must admit now that the respondent was the natural son of Wazeer Jan; but the evidence for the respondent,—the direct evidence as to the marriage between Wazeer Jan and Allahrukkee,—is not to be believed, and all the other facts proved in the case, the continuous cohabitation between them—including the birth of other children—are all consistent with the supposition that the respondent was an illegitimate son, and was never recognized by his father, and was at last put forward, as we say, in consequence of this conspiracy to defeat the rights of the claimants."

Upon the case thus made, it is to be observed that, if it were the true case, the plaintiffs would hardly have set up that which must now be taken to have been a false case; and further, that the case now relied upon not having been made the real issue between the parties either when the case was first launched or at any time during the long period through which this litigation has lasted, we have not that evidence which might have been given as to the state of the family, as to the manner in which the child was treated in the family, as to the circumstances of the birth, and possibly as to the recognition, by Wazeer Jan, of the respondent as his son.

It appears, therefore, to their Lordships that it is extremely difficult to place any reliance upon the case made by the appellants, so far as it affects the case made by the other side; and the only remaining question is whether there was sufficient evidence on the part of the respondent, from which the High Court was justified in inferring that the legitimacy was made out. And in considering this question, their Lordships will assume that the appellants had made a case sufficient to cast upon the respondent the burden of giving some proof of the marriage between his parents.

Their Lordships think it is a very strong circumstance that, upon or immediately after the death of Nawab Jan, *alias* Mahomed Ibrahim, this boy was produced and placed upon the *guddee* by Fatima. That is a fact which, as the High Court has observed, admits of no doubt. Fatima seems then to have been the head of the family. She was an old lady, and, as the event proved, near the end of her life. It is difficult to see what interest she could have had in putting a spurious child, or even an illegitimate child of her son, in that position, and treating him as the heir of the family; because the effect of recognizing him as a legitimate grandson was to introduce him as one of her own heirs, and therefore to affect the interests of her own brothers and sisters, her own relations for whom she might be supposed to care more than for the illegitimate child of her son.

But however that may be, the fact is sought to be met by the suggestion that this was not the act of Fatima, but the act of Ismael Khan (a person who certainly does not appear upon this record in a manner which entitles him to any respect or credit, since he seems to have sided first with one party, and then with the other); and that it was a contrivance on his part to avoid being called upon to render his accounts as manager of the estate. But there is really no evidence to show that Fatima in what she did was not a free agent. The suggestion seems to be mere speculation, founded upon the proved bad character of this man, and the circumstance that he was steward of the estate.

It is supported by no evidence to which a Court of Justice can give credit.

Then, how does the case stand? There is a considerable body of direct evidence as to the fact of the marriage, though it may not be of the highest character. There is the evidence of the barber who had performed the rite of circumcision when the child was treated as a child born in the house of Wazeer Jan and the Begum. There is the evidence of various persons, the respectability of some of whom is admitted, as to the fact of this boy having been seen in the house, and having been recognized, not only by Wazeer Jan as his son, but by Mahomed Ibrahim as his nephew.

It is said that all these witnesses were not credited by Mr. Ainslie, the Judge in the Court below. They appear to have been credited by the Court above, and to some extent, no doubt, they were credited by the Court below. That being so, the evidence, if not so strong as one could desire upon such a question, is at least fortified by those presumptions which the Mahomedan law draws in favor of legitimacy and against bastardy.

The law is stated, and very strongly stated, by Dr. Lushington in the case which has been cited from the 3rd Vol. of Moore's Indian Appeals;* and although in the case in 8 Moore,† the Court did not think the legitimacy of the claimant was made out, yet the language of their Lordships shows that their Lordships were careful to avoid throwing any doubt upon the doctrine as to the principles of the Mahomedan law which had been laid down in the former case.

Under these circumstances, considering that the case originally made by the appellants must be taken to have entirely broken down, and considering that there is evidence as to the legitimacy of this child, credible in itself, and fortified by the presumptions of Mahomedan law, their Lordships are of opinion that they would not be justified in disturbing the judgment of the High Court.

They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

The 20th November 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Suit for confirmation of possession—Declaratory decree—Evidence—Concurrent judgments of Indian Courts.

On Appeal from the High Court at Calcutta.‡

Sheik Torab Ally

versus

Sheik Mahomed Tukkee and others.

Mr. J. D. Bell for Appellant.

Mr. John Cutler for Respondents.

When a plaintiff sues for confirmation of possession and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Court.

This was an appeal from a decree of the High Court of Calcutta dated the

* Khajah Idayut-oollah v. Rai Jan Khanum; see 6 W. R. P. C. 52; 1 Suth. P. C. R. 157.

† 3 W. R. P. C. 37; 1 Suth. P. C. R. 400.

‡ From the judgment of Kemp and Glover, J.J., in Regular Appeal No. 574 of 1863, decided 2nd June 1864.

2nd June 1864, affirming a decree of the Judges of Behar dated the 3rd October 1863.

The plaint stated that the plaintiff (the appellant) sued for relief from injury and for confirmation of possession of 10 annas and a fraction being his property, and one anna and a fraction being the right of lease and sub-lease of a certain mouzah, and that some of the respondents had instituted proceedings under Act IV of 1840 as mentioned in the judgment of the Judicial Committee. As to the 10 annas and a fraction, the appellant claimed to have bought them with other property for Rs. 15,000 from Bebee Jan, who, on the 29th Bysack 1258, executed a deed of sale to him, and, on the same day, a deed of remission of the balances of the purchase-money remaining after the appellant had paid off a mortgage of about Rs. 1,500. The deeds of sale and remission were not produced in the suit, but were alleged to have been filed by a pleader on behalf of the appellant in some previous proceedings in the Moonsiff's Court at Behar, and burnt there during the mutinies in 1857.

Of the respondents, the two first (two of the appellant's brothers) admitted his title. The third, fourth, fifth, sixth, and seventh (his other brothers and sisters), and some of the others claiming under them, alleged that the 10 annas and a fraction had been purchased benamee in the name of Bebee Jan by her husband Mahomed Afzul, and therefore was not hers in absolute right; on the contrary, they alleged that she executed an ikrarnamah (which was not produced) to the effect that on her death the property should go to her husband's heirs. The remaining respondents claimed the proprietary right in the 1 anna and a fraction.

Among the depositions of the appellant's witnesses were those of the writer of the alleged deeds, of eight attesting witnesses, of the pleader who alleged that he filed both deeds in the Moonsiff's Court, and of six other witnesses who deposed to the existence of the deeds and to their destruction as above. The Zillah Judge on the 3rd October 1863 dismissed the suit with costs. The High Court on appeal upheld the decision of the Zillah Judge. In the judgment of the High Court dated the 2nd June 1864, the points for consideration were thus stated:— (1) Did the property belong to Bebee Jan in sole right? (2) Is the sale by her to the appellant proved? (3) This appellant being undoubtedly a shareholder in the estate, was the Civil Judge right in dismissing his claim entirely? On the first question, after laying down that secondary evidence could not be given of the contents of the ikrarnamah, the judgment proceeded as follows:—

“Taking, however, all the circumstances into consideration, we think that there is sufficient proof that the property in question did not really belong to Bebee Jan, but to her husband Sheik Afzul. But were it otherwise, we think there is no proof of the appellant's allegation in the second issue. Sheik Torab Ally bases his claim on purchase from Bebee Jan. He must prove this before he can recover. Now his statement is that Bebee Jan sold the property to him, and executed a deed of sale on the 29th Bysack 1258 Fusalce. The kobala is not produced, nor have any of its attesting witnesses been examined. It is said to have been burnt during the mutinies in 1857, whilst in the Moonsiff's record-room at Gya; and a witness, Sheik Meher Ally, formerly employed as a pleader by Torab Ally, deposes that he filed it in a case before the Moonsiff in which the said Torab Ally appeared as intervenor. This witness, an old man of seventy-five, remembered exactly the date of this kobala, the names of the parties, and the precise thing sold; but though he put in on this occasion no less than seven other deeds of sale on the part of his client, he could not call to mind a single particular about any one of them. This is the only direct evidence of the existence of the kobala, and it is, we think, open to suspicion for various reasons. There is no satisfactory evidence that the deed in question was ever filed in the Moonsiff's Court,—equally none that it was ever destroyed in the mutinies. The only thing

in support of it is the testimony of a single witness, whose statements are irreconcilable with the circumstances of the case and with each other. It appears moreover from the list of documents said to have been filed by Meher Ally, and for which he states that he gave a receipt, that amongst them was a mafeenamah executed by Bebee Jan on the same day as the kobala, by which she excused her vendor from payment of the consideration-money on account of the sale. This, next to the deed of sale, was the most important document entrusted to Meher Ally, but, strange to say, he does not even mention it in his deposition. Under such circumstances, we think that the secondary evidence of the existence of the kobala adduced by the appellant is inadmissible. But were it not so, what are the circumstances of this case? The date of the alleged kobala is the 29th Bysack 1258 Fuslee, the very day we observe on which Bebee Jan died. The mafeenamah, granting for the sake of argument that there was such a document, is dated the same day; so that admitting for the moment that Bebee Jan on the day of her death executed these documents in favor of Torab Ally, there would still be a difficulty in the latter's way on the well-established rule of Mahomedan law, which restricts death-bed gifts to certain narrow limits: the whole matter must stand, or fall together. If, that is, Bebee Jan sold the property to the appellant, she likewise forgave him the purchase-money, her conveyance therefore was an ordinary gift; and as the donor died on the very same day, the gift became a death-bed gift, and consequently illegal to the extent claimed. So much for the only direct evidence adduced in support of the kobala. On the other hand, there is very respectable testimony to show that Bebee Jan, although the nominal owner of the property, was not the real one; and that after her death, Torab Ally was in possession merely as manager and trustee for the younger members of the family: none of the documents filed proved her sole or absolute possession any more than Bebee Jan's before him. Taking, therefore, all the circumstances into consideration, we think that the appellant has not proved either Bebee Jan's absolute ownership in the disputed property, or her conveyance under a kobala to himself; and that as this forms the basis of his claim, he cannot recover."

On the third question the High Court held that, as the respondent admitted the appellant's right to a share of his father's property and that he had always been in possession of it, and as the amount of such share is settled by the principles of Mahomedan law, there was no need for the Court to declare it.

Mr. Bell for the appellant contended (1) that the evidence was not sufficient to justify the finding of the High Court, that the property did not belong to Bebee Jan in absolute right; (2) that the High Court were totally wrong in saying that there was only one witness to the existence of the deed of sale, and that none of the attesting witnesses had been examined, inasmuch as the writer of the deed and all the attesting witnesses had been examined, and there was a mass of respectable testimony to the existence of the deed; (3) that Bebee Jan died in the month of Jeit, as deposed to by appellant's witnessess, and not on the 29th Bysack; (4) that there was no issue raising the invalidity of the deed of sale, and remission looked at as a death-bed gift.

Mr. J. Cutler for the principal respondents, after stating that he did not appear for the respondents claiming the proprietary right in the 1 anna and a fraction (as to which nothing had been said in argument on behalf of appellant), contended (1) that nothing had been shown to induce their Lordships to overrule the finding of the High Court, negating the absolute ownership of Bebee Jan, founded as it was upon the testimony of thirteen witnesses that she was a benameedar; (2) that even if the High Court had overlooked the depositions of some of the witnesses, there was sufficient other evidence to justify them in finding that the existence of the alleged deed of sale was not proved; (3) that as both Courts had found the 29th Bysack as the date of Bebee Jan's death, the deeds of

sale and remission were void as a device to defeat the Mahomedan law of death-bed gifts, and that this contention was tenable upon the first issue in the suit; (4) that the appellant being, as he alleged, in possession, was not entitled to a declaratory decree, because he could not ask for any consequential relief (*Rooke v Lord Kensington*, 2 Kay & Johnson, 761); (5) that to entitle the appellant to a declaratory decree, he must establish his title affirmatively, the *onus probandi* being on him (*Rossonada Rya v. Sitharame Pillai*, 2 Mad. H. C. Rep., 171), and that he had not done so in this case. The improbabilities of his story must be looked to, and regard had to the fact that Bebee Jan was a *purdanasheen* (*Grish Chunder Lahoree v. Bhuggobuttee Debia*, * 13 Moore I. A., 431); that she was alleged to have executed these deeds on the day of her death when she could not be supposed to be in possession of her full faculties (*Kermaroonissa Begum v. Mirza Syfoolah Khan*, 5 W. R., C. R., 198); and that the inadequacy of the consideration showed that, if anything, it was a gift (*Doe v. Routledge, Cooper*, 705.)

Mr. Bell in reply admitted that the appeal must be dismissed as regarded the respondents claiming the 1 anna and a fraction, but urged the importance to his client of a declaratory decree; and that if the appeal were dismissed at all, it should be without prejudice to any future proceedings.

Sir Barnes Peacock delivered the following judgment:—

This is a suit brought for confirmation of possession.

It appears that Sheik Mahomed Afzul had three wives. By his wife Mussumat Wujjeeha he had several children, namely, the appellant and the respondents in this suit. His wife Bebee Jan had no issue. Sheik Torab Ally, the appellant in this suit, claims to be entitled to certain property which he says belonged to Bebee Jan, who he says conveyed it to him by a bill of sale, and afterwards remitted to him the whole of the purchase-money, with the exception of a small portion which he paid off to a mortgagee. The respondents, his brothers and sisters, say that the property did not belong to Bebee Jan in her own right, but that it was purchased by Mahomed Afzul, her husband, in her name benamee for him; and consequently that upon his death, it became vested in the respondents and the plaintiff, as his heirs.

The two main questions in the suit were—first, whether Bebee Jan bought the property for her own benefit, or whether it was purchased by her husband in her name benamee for himself; and, secondly, whether assuming that the property belonged to Bebee Jan in her own right, and that she did not hold it benamee for her husband, she conveyed it by bill of sale to Sheik Torab Ally.

Now this is a suit not for relief, but for confirmation of possession. The plaintiff says that he sues on a claim for relief from injury and for the confirmation of his possession. He then states that the defendants commenced a proceeding against him under Act IV of 1840, claiming that he was about to injure them, and that if the Magistrate did not interfere, a riot would take place; that the Magistrate did interfere and decided in favor of the plaintiff. The Magistrate had no right whatever to enter into any question of title. He was simply to decide as to who was the person in possession. The plaintiff says:—"He decided that I was in possession, and that I was to be retained in possession;" but, subsequently, that decision of the Magistrate was reversed by the Sessions Judge. Then he says:—"From that date the defendants have been practising various frauds and raising disputes against my possession. The cause of action arose from the passing of the said decision of the Court of Circuit. I pray that by issuing summons to the defendants, and making investigations required by the Court, my possession of the property claimed may be ordered to be confirmed," that is, he asked not merely that he should be retained in possession, but that the Court should declare affirmatively that his possession was accompanied by title.

* 14 W. R. P. C. 7; and p. 339 *ante*.

This involves the necessity of determining the two questions to which I have referred.

Now the evidence upon both those points was exceedingly unsatisfactory. If the plaintiff meant that the Court should declare that the property belonged to Bebee Jan, it was necessary for him in a suit of this nature, in which he asked for an affirmation of his title, to show affirmatively how the property became vested in Bebee Jan, and out of whose money the property was purchased. But he has failed to do that, and their Lordships are of opinion that he has not proved affirmatively that the property did belong to Bebee Jan in her own right.

Then, with regard to the bill of sale, some of the witnesses prove that a bill of sale was executed by Bebee Jan on the 29th Bysack 1258. Both the Judge in the Court below, and the Judges of the High Court, have found as a fact that Bebee Jan died on that very day; and it certainly is very inconsistent with the whole of the evidence that, if she died on the 29th Bysack 1258, she should have executed a deed on that very day in the manner in which the witnesses depose that it was executed.

The deed is not forthcoming, and the excuse for not producing it is that the plaintiff intervened in a suit in the Moonsiff's Court between other parties; that he gave this deed and another deed, to which we shall presently advert, to his pleader; that that pleader gave him a receipt for the two deeds and filed them in the Moonsiff's Court; and that during the mutiny, the records of the Moonsiff's Court having been destroyed by the mutineers, those two deeds are not forthcoming.

It is a very important fact that there being two deeds, namely, the deed of sale and the deed of remission, and the pleader having given his receipt for those two deeds, the only deed which in the record of the Moonsiff is stated to have been lodged in his Court is the deed of sale. There is nothing on the records of the Moonsiff's Court to show that the deed of remission was lodged. We have, therefore, only the evidence of the pleader that he lodged that deed as against the fact that, in the record of the proceedings of the Moonsiff as to the documents which were lodged in his Court, no notice whatever is taken of the deed of remission.

If that deed of remission existed and was not lodged in the Moonsiff's Court, it would not have been destroyed with the other records of the Moonsiff, and it ought to be forthcoming. If it existed, and was not destroyed, it would have been very important that it should be produced to the Court, because in all probability that deed would have recited the bill of sale. The remission is said to have been executed under these circumstances:—The plaintiff was to pay to Bebee Jan Rs. 15,000 as the purchase-money of the property; he says that he paid out of the purchase-money to the holder of a zur-i-peshgee lease about Rs. 1,400, and that then Bebee Jan excused him by this deed from paying the remainder of the purchase-money. It is most extraordinary that all this should have taken place on the day of the lady's death; that, in the first place, she should have executed to him an absolute bill of sale, treating Rs. 15,000 as the purchase-money; that on the same day she should have executed to him a remission of the remainder of the purchase-money, giving him credit only for that portion which he had paid off to the holder of the zur-i-peshgee. If he did pay off the zur-i-peshgee or mortgage, there is no reason given why the zur-i-peshgee holder has not been called as a witness. His evidence would have been most important. If the case is true, he would have said, "I was the holder of a zur-i-peshgee lease. I was paid off the amount of my mortgage by the appellant, and I delivered up my zur-i-peshgee lease to him;" but neither the holder of the zur-i-peshgee lease, nor the lease itself which was paid off, is produced.

Under these circumstances the Court cannot say that they are so satisfied affirmatively of the plaintiff's title that they can declare, not only that he has

possession, as he says he has, but that he has that possession in consequence of a valid and good title. The Court cannot make such an affirmative declaration of title upon the evidence which has been given in the cause.

Their Lordships are therefore of opinion that the decision of the Court below is substantially correct, and that the suit ought to be dismissed. But they cannot help remarking that, as regards the deed of sale, the learned Judges of the High Court, in expressing their opinion regarding the bill of sale, do not appear to have had before their minds the whole of the evidence in the cause.

Looking, then, to the case as it stands, the nature of the suit, and the nature of the evidence that has been given, their Lordships think that the appeal ought to be dismissed, and the judgment of the High Court affirmed, which dismisses the suit; but that the dismissal of the suit ought not to be treated as a binding adjudication of title between the parties.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be dismissed, and the judgment of the High Court affirmed, with costs, but with a declaration that the judgment and decree in this suit do stand without prejudice to any question of title between the parties in any future suit or proceeding.

There was one point I should have mentioned that the suit proceeds for 10 annas odd as the plaintiff's property, and 1 anna odd as his right of lease and sub-lease. Mr. Bell has admitted that he cannot maintain the decision as to that 1 anna odd: consequently as to that there will be a simple dismissal, without any declaration as to its being without prejudice.

The 26th November 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation in Rent Suits—Act X of 1859, s. 32—Act XIV of 1859.

*On Appeal from the High Court at Calcutta.**

Unnoda Persaud Mookerjee and others

versus

Kristo Coomar Moitro and others.

Mr. Leith and Mr. Doyne for Appellants.

The Respondents were not represented in the appeal.

The bar of limitation applicable to an action for rent brought in the Collector's Court under Act X of 1859 is that provided by s. 32 of the same Act, and not that provided by Act XIV of 1859; the special legislation contained in the Rent Law not being repealed by the general law of limitation, either by express words or necessary implication.

Sir Montague Smith.—The single question to be decided in this appeal is whether to an action for rent brought in the Collector's Court under Act X of 1859 (The Rent Act), the bar of limitation applicable to it is that provided by s. 32 of the same Act, or that provided by Act XIV of 1859, passed six days later.

* From the judgment of Morgan and Seton-Karr, *J.J.*, in Regular Appeal No. 437 of 1864, decided 21st April 1865.

If the limitation of s. 32 of Act X is still in force, the action is barred ; but if, as the appellant contends, that Section has been repealed, and the limitation of Act XIV is applicable to the case, then it is not.

S. 32 Act X enacts that suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fuslee or Willayuttee year, in which the arrear shall have become due.

By Act XIV s. 1 cl. 8, the limitation applicable to suits for the rent of any buildings or lands is the period of three years from the time the cause of action arose.

The present suit would be barred even under Act XIV, but for the operation of s. 14 of that Act which provides that, in computing the period of limitation prescribed by that Act, the time occupied in prosecuting an abortive suit, shall, under certain conditions, be excluded. There has been litigation which would bring the present case within this Section and prevent the suit being barred if Act XIV is applicable to it. There is no analogous provision in Act X, and it is admitted by the appellant that, if that Act governs, the suit is barred.

Act X is not expressly and specially repealed ; but the enactments of the later Act are no doubt in their terms large enough to include the limitation contained in it ; for s. 1 Act XIV enacts that " no suit shall be maintained unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or regulation to the contrary notwithstanding," and among the suits to which it is enacted that " the same shall be applicable " are " all suits for the rents of any buildings or lands (other than summary suits before the Revenue authorities under Reg. V of 1822, of the Madras Code)." Section 18 of the same Act also enacts that " all suits to which the provisions of this Act are applicable shall be governed by this Act, and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding."

The question, however, arises whether the special legislation contained in Act X is not of such a special kind that, according to a well-established rule for the construction of statutes, it should be presumed that the Legislature did not intend by the general enactment to interfere with it. The reason for this rule of construction is well expressed by Lord Hatherley, when Vice-Chancellor, in *Fitzgerald v. Champneys* (30 L. J. 782), and in terms which appear to be very applicable to the legislation their Lordships have to consider in the present appeal:—

" The reason is that the Legislature having had its attention directed to a special subject, and observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards to derogate from its own act, where it makes no special mention of its intention to do so."

Act X established a Rent Law for the Bengal mofussil only ; it was intended to form a special and complete Code of Procedure with regard to the trial of questions relating to rent and the occupancy of land in the mofussil, and by which all the proceedings before the Collectors were to be regulated and governed. The preamble shows an intention to deal with questions regarding the rights of ryots in relation to the occupancy of lands. One of the objects was to prevent oppression. It recites that it was expedient to extend the jurisdiction of the Collectors, and to prescribe rules for the trial of the above questions, as well as of suits for the recovery of arrears of rent ; and s. 23 (cl. 4) enacts that " all suits for arrears of rent due on account of land either kherajee or lakheraj, or on account of any rights of pasturage, forest rights, fisheries, or the like," shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of the Act, and shall not be cognizable by any other Court or in any other manner.

This enactment gives exclusive jurisdiction to the Collectors, and clearly indicates the intention of the Legislature to be that the special questions which

are thus made the subject of peculiar legislation, shall be tried according to the procedure established by the Act, and in no other manner.

The provision for the limitation of suits is a part of the procedure thus established.

The period prescribed by Act X, as already stated, is "three years from the last day of the Bengal year, or from the last day of the month of Jeyt, of the Fuslee or Willayuttee year in which the arrears became due." A proviso is added that, if the suit is for enhanced rent, not confirmed by a competent Court, the suit must be brought within three months from the end of the year, as above defined, on account of which the enhanced rent is claimed. The period thus defined and prescribed, and the provision as to enhanced rent, show that these rules were framed with especial reference to the case of ryots and other tenants in the mofussil, and to their times and modes of paying rents.

Act XIV has no provision as regards enhanced rent, and it could hardly have been intended that part of the limitation, as regards the rents of ryots, should be found in one Act, and part in another.

Reading together ss. 23 and 24 Act X, it will be found that the Act prescribes the same period of limitation for rent of land, and of rights of pasturage, forest rights, fisheries, or the like. Act XIV, by the enactment relied on as superseding this limitation, relates to rents "of buildings, or lands" only. These words, clearly, would not comprehend rent of rights of pasturage, forest, and the like. It is plain also that the longer periods mentioned in Act XIV would not be applicable to suits for these rents, in consequence of the 3rd Clause of that Act. Such suits would still be governed only by the limitation in Act X; and the consequence therefore of holding that the limitation as regards suits for rents of land in Act X is repealed by the later statute, would be to establish different periods for suits for rents of land, and those for rents of pasturage and the like.

It cannot reasonably be presumed that, when the Legislature, in the particular legislation specially devised to meet the case of all these rents, had put them in the same category; it intended by the subsequent general Act to separate and assign different periods to them. No reason can be suggested for such a separation, or for supposing that the Legislature meant that the provisions to be found in ss. 11 to 14 Act XIV, suspending or prolonging the periods of limitation when certain disabilities exist, should extend to one set of these rents, and not to the others. It should be observed that none of these provisions are introduced into Act X, and it may well be that the Legislature thought they were not adapted to the cases for which the simple procedure established by that Act was intended to provide.

Another point arises on a comparison of the Acts which is material to be regarded in construing them. Act X was to come into operation at once, Act XIV only after an interval of two years; and different provisions were made in the two Acts as to suits for arrears due at the time of the passing of the Acts. It does not seem a violent presumption to suppose that the Legislature in framing the two Acts with these distinctive provisions, intended that both should have independent force.

The fact that the Acts were virtually contemporaneous, appears strongly to support the presumption arising from the above considerations, viz., that it was not meant that the harmony of the system of the special Act, which had been designed for special objects, should be disturbed by the general Act.

The words "rent of any buildings or lands" which occur in Act XIV are, no doubt, sufficiently large in themselves to comprehend all lands; and their Lordships cannot assent to one of the reasons given by Chief Justice Norman for his judgment in the case of *Poulson, junr., v. Chowdry* (2 Weekly Reporter, 21), viz., that the words "rent of lands" might be construed to be confined to lands appurtenant to buildings. They think the words cannot be so limited, for Act XIV was a

general law intended to have force throughout the British territories in India. But these comprehensive words will have effect and operation, without holding them to apply to the special legislation of Act X, which is confined to the Bengal mofussil.

It should be observed that, although Act XIV proposes to consolidate the laws relating to the limitation of suits, it clearly was not intended to be of universal application. It is confined by s. 18 to suits "to which the provisions of the Act are applicable." The Legislature, therefore, contemplated some cases of limitation which would remain unaffected by the general legislation. It would certainly be an unfortunate result of the attempt to consolidate the law, if the effect of the legislation was that, as to suits for rents triable by the Collectors under Act X, the limitation of them was to be found partly in that Act, and partly in Act XIV. It would seem to conform more to the spirit of the legislation so to construe the Acts as to prevent this result.

The exception in Act X of summary suits before the Revenue authorities under Reg. V of 1822 of the Madras Code, has been strongly relied on by the appellants as indicating an intention not to except suits before the Collector under Act X. Undoubtedly, this exception adds to the difficulty of construction. But the Madras Regulation related to summary suits. Suits of that kind were abolished in Bengal by Act X, and a Code of special procedure with special rules, including one of limitation, substituted for them. It may not have occurred to the framers of Act XIV when referring to these summary suits in Madras, that it was necessary to except by express words suits of another kind regulated in their entirety by special legislation.

Difficulties have frequently been imposed on Courts of Justice in construing statutes, arising from the apparent conflict between special and general legislation; and the rule of construction that special legislation is not repealed by general enactments, unless a clear implication of that intention can be found, was adopted in early times to meet these difficulties, and has been acted on in numerous modern instances. (*See Thorpe v. Adams*, L. R. 6, C. B., 125; *The Queen v. Champneys*, *Id.*, 384.) In the latter case, Bovill, C.J., says:—"It is a fundamental rule, in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication."

Their Lordships, upon a comparison of the two statutes in question, with reference to their objects, and considering that they were virtually contemporaneous Acts, have come to the conclusion that the intention to repeal the particular law is not made distinctly to appear, either by express words or necessary implication, and, consequently, that the limitation of Act X remains in force.

They are not dealing with the question as *res integra*, for the same construction was given to the Acts by the Full Bench of the High Court of Bengal, in the case of *Poulson v. Chowdry** already referred to, which was decided in the year 1865. It is true that this decision preceded, by a short time only, the judgment now under appeal; but it has probably been acted upon in the numerous suits which must since have arisen in the Bengal Presidency under Act X. Unless, in this condition of things, their Lordships found that the above decision of the Full Court was manifestly wrong, they ought not to disturb it. They have not arrived at this conclusion, and it will, therefore, be their duty in the present case to advise Her Majesty to dismiss this appeal, and to affirm the judgment of the High Court.

The 26th November 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Family usage—Law of succession—Lex loci.

*On Appeal from the High Court at Calcutta.**

Rajah Raj Kishen Singh

versus

Ramjoy Surma Mozoomdar and others.

A settlement of an estate made at the time of the perpetual settlement would not, of itself, operate to destroy a family usage regulating the manner of descent, either in the case of a well-established raj or even where the origin could not be shown.

In point of law, a manner of usage of descent of an ordinary estate may be discontinued so as to let in the ordinary law of succession ; such family usages being in their nature different from a territorial custom which is the *lex loci* binding all persons within which it prevails.

It is of the essence of family usages that they should be certain, invariable, and continuous ; and well-established discontinuance must be held to destroy them.

This suit was originally brought by Rajah Prankishen Singh against Hurrosoondree Dabee, widow of one of his brothers, Gopeenath Singh, and some purchasers from her, to recover possession, "by right of family custom," of one-third of 14 annas of Pergunnah Soosung.

Rajah Prankishen died during the progress of the suit, and the present appellant is his eldest son. Hurrosoondree is also dead ; the respondents, Buroda Debia and Pranoda Debia, are daughters of Gopeenath and Hurrosoondree ; the respondent Gour Kishore Lahoree is their grandson, being a son of Buroda Debia.

The plaintiff states that, "according to family custom prevalent in the raj or estate, the right of the plaintiff, as proprietor, accrued to the estate since the death of his father, Rajah Bishonath Singh."

The claim is rested entirely on the ground of family custom, under which it is alleged that the estate was descendible on the eldest son, to the exclusion of the other sons.

It appears that the entire 16 annas of the pergunnah were at one time enjoyed by the ancestors of the family, but 2 annas were afterwards alienated, and it appears to be assumed on both sides that these 2 annas were a long time ago given as dower on the marriage of a daughter of one of the possessors.

Rajah Raj Singh, the grandfather of the plaintiff Prankishen, died in 1822, leaving three sons, Bishonath (the father of the plaintiff Prankishen), Gopeenath, and Juggernath ; and it is undisputed that on his death the three sons presented a joint petition to the Collector, describing themselves as the heirs of their father, and proprietors of the pergunnah, and praying to be registered ; and that they were so registered for the 14 annas.

Gopeenath held the one-third of the estate until his death ; his widow Hurrosoondree succeeded to the possession ; and when the present suit was commenced against her in 1861, Gopeenath, and she as his widow, had been in possession for nearly forty years, viz., from 1822 to 1861.

The appellant contends not only that the estate is descendible on a single heir male, but also that it is impartible and inalienable.

The High Court came to the conclusion that the plaintiff had failed to

* From the judgment of Loch and Seton-Karr, *J.J.*, in Regular Appeal Nos. 407, 495, and 515 of 1862, decided 24th January 1865;—2 W. R., *Civil*, 80.

establish by evidence the exceptional family custom on which he relied, and reversed the contrary decision of the Principal Sudder Ameen.

The two main questions argued at the Bar were, 1st, whether the family custom had been proved? and, 2nd, if so, what was the effect upon it of the acts and conduct of the family on Rajah Singh's death in 1822, and subsequently?

There is, undoubtedly, evidence which leads reasonably to the belief that formerly, the estate was held, from time to time, by individual male members of the family; but the evidence leaves in obscurity the character and nature of the estate and the tenure by which it was held under Mahomedan rule. Some firmans and other documents, filed in a former suit, and which were sought to be made evidence in the present to show the early title, are referred to by the Principal Sudder Ameen and the High Court in the following manner:—

The Principal Sudder Ameen says:—

"It appears by a decision of the Sudder Court of the 12th May 1856, filed by the answering defendants, that the zemindary abovenamed was formerly acquired as a jagheer by Rajah Ramjibon, by a firman of the year 1650 A.D., granted by the Emperor Shah Jehan, and at his death that jagheer was conferred upon his son Rajah Ram Singh by a firman of the year 1680, granted by the Emperor Shah Alum Ghir; and after his death it was conferred as a jagheer upon Rajah Kisshore Singh, son of Rajah Run Singh, by a firman of the year 1749, granted by the Emperor Ahmed Shah."

The High Court, referring to these documents, say:—

"It may be admitted, as held by the Judges who disposed of the case on the 12th May 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the plaintiff, a jageer for military services, and as such held by one of the members of the family, usually the eldest son or brother, and that women were excluded from the succession as being incapable of performing the duties required from the jagheerdar. This succession, however, was not regulated by any family custom, but by the will of the sovereign power, and on referring to the judgment of 1856 we find mention made of three firmans from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded not by right of primogeniture, but by the will of the sovereign."

And again:—

"The copies of the firman, bearing date 29th Shaban (1st Juloss), of Ahmed Shah, and of the hibahnamah from Ram Singh to Run Singh, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of Kisshore Singh to Raj Singh, dated 25th Maugh 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and even if genuine it proves nothing, so we are thrown back upon one single document, bearing date the 22nd year of the reign of Mahomed Shah, which is denounced by the opposite party to be a forgery. This document purports to be a firman from the Emperor Mahomed Shah to Run Singh, confirming the jagheer of Soosung to him, and requiring him to keep up a certain body of troops, consisting of cavalry and infantry. Admitting, for the moment, that this document is genuine, it really proves nothing in support of plaintiff's allegation. It does not prove the property to be raj, for no such name is used. It is termed a jagheer, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee, also, is not styled or in anywise recognized as a Rajah, but simply as a zemindar, so that this document establishes nothing which the plaintiff seeks to prove. But, looking at the document, we have little doubt that it never came out of the royal office, either at Delhi or elsewhere. It is written on common paper, and stamped with an oval seal, which could be

prepared in any bazaar of India, and nothing is shown by which we might test the genuineness of the seal."

Their Lordships find great difficulty, upon these judgments pronounced by Judges who had greater opportunities than they possess of testing the genuineness of the documents, in drawing any safe conclusion from them; and the learned Counsel for the appellant felt the same difficulty, and did not press them, contending they were not material to his case.

If these documents could at all be relied on, their Lordships agree with the High Court in thinking that they point to the conclusion that the estate was held under the Mahomedan rulers as a military jagheer on the tenure of military service, by virtue of grants made from time to time to individual members of the family, and was not strictly an inheritable estate. If, on the other hand, reliance cannot be placed on these documents, then it is left altogether in doubt what was the original character of the estate, and the nature and conditions of its tenure.

Although much of what appears in the record, including the elaborate pedigree, must be rejected, there is still evidence that the manner of succession relied on by the appellant, however originating, did in fact prevail for some time in the family.

On the death of Rajah Kisshore Singh in 1784, a perwannah was issued to his younger brother, Rajah Raj Singh, by the East India Company, who then held the grant of the Dewanny. It was addressed to him as "zemindar of 14 annas share of Pergunnah Soosung," and states the death of the late Rajah; and goes on thus:—"The zemindary of kismut, 14 annas of Pergunnah Soosung, which were fixed on your brother, has, according to custom, been confirmed to you."

It thus appears that Rajah Kisshore Singh had a living brother, and this perwannah was properly relied on as affording evidence that the deceased Rajah Kisshore Singh had, notwithstanding, held the zemindary as sole possessor. Rajah Kisshore had no sons, but left a widow, and the fact that she did not succeed to the zemindary, and that his brother Rajah Raj Singh was confirmed in it on his death, also points to the conclusion that the custom was supposed to prevail at the time of Rajah Raj Singh's accession in 1784.

Rajah Raj Singh continued to hold the zemindary until his death in 1822. He was recognized as zemindar by the British Government at the time of the perpetual settlement, and the settlement of the 14 annas share of Pergunnah Soosung then was made with him at the old peshkush (tribute), and not on a newly calculated jumma. It should, however, be observed that it appears from the accounts of the collectorate that the other 2 anna shares, formerly severed and alienated, were settled with the zemindars who owned them, precisely in the same manner.

In the present case the estate was held directly from the Government, there being no intermediate lord. And it appears to their Lordships that, upon this settlement, any incidents of the old tenure, as a military jagheer, requiring the render of services, if any such ever existed, were as conditions of tenure implicitly at an end; and that the zemindary, so far as relates to tenure, was thenceforth held under the Government as an ordinary zemindary free from any such conditions.

The settlement would not, however, of itself, have operated to destroy a family usage regulating the manner of descent. It would not have had this effect in the case of a well-established raj (see *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*,* 12 Moore's I. A., 1), and even in the case where the origin could not be shown, it may be assumed that it would not, of itself, affect an existing family custom.

* 9 W. R. P. C. 15; and p. 114 *ante*.

Reg. XI of 1793 was passed soon after this settlement. That Regulation has been held not to be applicable to the succession of a well-established raj (see 12 Moore, 1,* and 6 Moore, 161-7).† But the respondents contend that, notwithstanding the qualification placed upon it by Reg. X of 1800, it does govern a case like the present, where the claim rests only on a continuing family usage, and not on the peculiar character of the zemindary itself or on a local or district custom (see *Rajah Deedar Hossein v. Ranee Tuhooroon Nissa*, 2 Moore L. A., 441).‡

Their Lordships do not think it necessary to give any opinion on the positive effect of Reg. XI of 1793; for they think that, in the present case, there is sufficient ground for the presumption that, after the settlement and this Regulation, the family were induced to regard the former state of things, and the ancient tenures, whatever they were, as at an end, and to consider and treat the property as an ordinary estate held under the British Government; and their acts show that, in fact, they did so consider and treat it.

Their Lordships propose to refer to the most important of these acts. It has been already stated that, upon the death of Rajah Raj Singh in 1822, his eldest son Bishonath, and his two younger brothers, Gopeenath and Juggernath, presented a joint petition to the Collector. It was a public act, and the document is distinct and unequivocal in its terms. The three petitioners, who are each described as Rajah, and sons of Rajah Raj Singh, state that the raj of 14-anna shares of Pergunnah Soosung was recorded in *serishta* in their father's name, and that he being dead, "they are the heirs and proprietors" of the property, and they pray to be so registered, and were registered accordingly as joint proprietors.

It is plain that this was not a merely nominal petition; for there is clear evidence that the three brothers took and enjoyed in equal shares the profits of the estate. The three brothers also agreed by a document, in which they are described as "in possession and proprietors," to pay the Government revenue of Rs. 17,240.

In 1829, Juggernath died, and thereupon his widow, Ranee Indromonee, was registered as joint owner with Rajahs Bishonath and Gopeenath.

In April 1832, Rajahs Bishonath and Gopeenath and the Ranee Indromonee presented a joint petition praying for time to pay the amount of a decree obtained against them. The petition describes them as "zemindars of the pergunnah."

Afterwards, Rajah Gopeenath died, and his widow, Ranee Hurrosoondree, was also registered as owner for his share.

In 1839, and again in 1841, suits were brought against tenants by the Rajah and the two Ranees for rents due, and in 1842 a joint suit was instituted by the three for possession of part of the estate.

The transactions above enumerated show a series of important acts in dealing with the estate as joint family property, extending over a period of twenty years, all founded upon the footing that the ordinary rules of succession governed the descent.

It is now necessary to advert to some subsequent litigation.

It is alleged that, in 1843, Hurrosoondree and a son she had adopted brought a suit against Rajah Bishonath and Indromonee for a partition of the zemindary, in which the Rajah set up as a defence that the raj was impartible, and descended on the eldest male heir. It is said that this defence was successful. But the proceedings in this suit were not satisfactorily proved, and the attempt to rely on it as an estoppel failed.

Other litigation followed, raising the same question, but with a different result.

* See *supra*.

† See p. 20 *ante*.

‡ See Appendix No. 3.

Indromonee, the widow of Juggernath, died, leaving an alleged adopted son, whose guardian claimed the possession for him. This was opposed by Bishonath on the ground of the family custom, but, in the end, possession was awarded to the guardian. In 1847, Bishonath commenced a regular suit to obtain the one-third share of Juggernath, on the ground that the alleged adoption was invalid; and also again setting up the family custom of primogeniture. In this suit, which went on appeal to the High Court, a full Bench decided against the existence of the custom.

Rajah Bishonath died in August 1853. After his death, his son, Rajah Prankishen (the plaintiff in the present suit), did not prosecute an appeal to Her Majesty in Council, which had been commenced against the above decision of the High Court, but brought another suit against the guardian of this adopted son of his uncle Juggernath on the ground that the adoption was not *bonâ fide* and claimed one-third of the estate as heir to his uncle. This suit is founded on the assumption that the custom had been negatived in the former one, for Prankishen now claimed, not on the footing of the custom, but as heir to his uncle, according to the ordinary rule of succession; and upon the ground that the adoption was not *bonâ fide*, he succeeded in the suit.

Various considerations were put forward by the learned Counsel for the appellants to destroy or diminish the effect of the facts which have just been adverted to. It was suggested that Bishonath may have allowed his brothers to take, each, one-third share for maintenance, but their Lordships are of opinion that the evidence points very clearly to the conclusion that the brothers were admitted to the possession as co-heirs and co-sharers, not on sufferance merely, but as of right. The learned Solicitor-General, indeed, admitted that the acts of Bishonath amounted virtually to a grant to his brothers of one-third shares during their lives, but he denied that they amounted to more. In their Lordships' view, however, Bishonath admitted his brothers to the succession, intending them to have full, complete, and equal ownership of the estate with himself.

It was then contended for the appellant that if this were so, it was an attempt to do what the Hindoo law would not allow.

It has already been stated that the acts of Bishonath and his brothers, on his father's death, afford strong ground for the belief that they did not regard the manner of succession, if it ever prevailed, in the light of a family custom, but as an incident or condition of tenure which had been determined by the settlement, and consequently assumed that thenceforth the succession would conform to the ordinary law. Their conduct, indeed, goes far to disprove that a family custom, properly so called, ever existed; but assuming it to have once existed, their Lordships think it was of a nature which could, without any violation of law, be put an end to, and that it was, in fact, discontinued.

It was urged that this could not be done without the consent of the sovereign power, viz., the British Government. There is no question, in the present case, of the maintenance of a raj or principality, or of a tenure differing in its general qualities from an ordinary estate under the British Government. Their Lordships are certainly not prepared to hold that descent on single male heirs was, after the settlement, a condition of the tenure on which this estate was held, requiring the assent of the sovereign power to a change in the manner of succession, and giving to the Government the right to resume the estate upon its violation. Their Lordships consider that, at the highest, no more has been alleged and proved in this case, than a family custom regulating the descent *inter se*, and which, if existing, the settlement, of itself, did not disturb.

It was also urged that the effect of the custom was to create successive life estates in the heirs male of this family, analogous to a feudal entail, which could not be barred, and which prevented alienation, or any change in the manner of descent, which it was contended would be a virtual alienation. It will be

collected from what has been already said, that their Lordships do not consider that such is, as a question of tenure, the nature of the estate, and in their view the family custom alleged in this case has not this effect.

Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued; as so to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well-established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind, after they had been clearly abandoned and the abandonment had been, as in this case, long acted upon.

Their Lordships can have no doubt that in this case the special custom of descent, if it ever existed, was designedly discontinued after Raj Singh's death by Bishonath and his brothers—and that in fact the estate was enjoyed by the brothers and by their widows according to the ordinary law of succession, and on the footing that the custom was at an end—and not only that there was this enjoyment in fact, but that the parties were registered in the public registers, and suits were brought against third persons by the brothers and the widows, on the assumption that they were co-heirs and co-sharers of a joint family estate.

Prankishen, the plaintiff in this suit, appears at one time to have been disposed to dispute what had been done, and to set up the special mode of descent; but in the suit brought by himself against the alleged adopted son of his uncle Juggernath, already referred to, he claimed the one-third of the estate which Juggernath held, as his heir, and succeeded in setting aside the alleged adoption, and established his own right as heir to his uncle. He thus abandoned in that suit the custom which, in the present, he asserts to be still in existence. Supposing, therefore, that Prankishen had any inchoate right to the customary succession as the eldest son of Bishonath, their Lordships consider that the suit referred to affords proof of his ultimate adoption of what his father had done; and the presumption of acquiescence is strengthened by the fact that he did not prosecute the appeal in the suit brought by his father Bishonath, in which the custom had been negatived.

Their Lordships are glad to be able to uphold the judgment of the High Court, since by doing so, they confirm the possession and enjoyment of this estate as it has existed since the death of Raj Singh, and maintain the order of succession which has in fact prevailed since the settlement in 1790.

In the view which their Lordships have taken of the case it becomes unnecessary to consider the point that the suit was barred by the law of limitation of suits.

Their Lordships being of opinion, for the reasons above given, that the decree of the High Court ought to be upheld, will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

The 28th November 1872.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Cause of action—Limitation.

*On Appeal from the High Court at Calcutta.**

Gunga Gobind Mundul and others

versus

Bhoopal Chunder Biswas.

Mr. Leith and Mr. Arathoon for Appellants.

Mr. Cowie and Mr. J. Cutler for Respondent.

Of an estate left by *H M*, his son's widow, *R D*, became the rightful owner of a moiety, and his daughter's husband, *S C H*, to the remaining moiety. *S* conveyed to plaintiff (*B C B*) by a deed of gift two annas out of his eight annas share. *S*, within the period of limitation, commenced a suit against the *M*s for the whole of *H M*'s estate; but pending the suit, *J* was substituted as plaintiff under a deed of sale from *S* to him, and obtained a decree for an eight annas share. One of the defendants (*R D*) appealed against the decree, and had it modified against her to a five annas share. The *M*s did not appeal, and the decree remained against them for eight annas. *J* executed the decree for five annas. In another suit, *B C B*'s title to two annas under the deed of gift from *S* was established against *J*, who afterwards sold to the *M*s the five annas which he had obtained and all his right, title, and interest under the decree. The *M*s thus got possession of the two annas share which *J* ought to have held in trust for plaintiff.

HELD that plaintiff's cause of action for the recovery of his two annas share arose at a period subsequent to the execution of the decree by *J*, which was within the period of limitation.

Sir Barnes Peacock.—The appellants in this case, the Munduls, were the defendants in the suit below. The respondent, Bhoopal Chunder Biswas, was the plaintiff. The suit was brought to recover possession of a two annas share of a moiety of the estate left by the late Hurnarain Mundul. The defendants in answer to the plaintiff's suit set up the plea of limitation. The Court of first instance, as well as the High Court, held that the suit was not barred, and hence the present appeal.

The plaintiff in his plaint stated "that of the estate left by the late Hurnarain Mundul, Ramonee Dossee, widow of his son Digambur Mundul, became the rightful owner of, and entitled to, a moiety, and Shumbhoo Chunder Haldar, father of Protap Chunder Haldar, his daughter's son, to the remaining moiety." That was the moiety which had belonged to Digambur's brother, Rajkristo Mundul. He then states:—"On the 27th Maugh 1252 B.S., the said Haldar conveyed to your petitioner by gift two annas out of his eight annas share, and gave him in writing a deed of gift duly registered." It was stated in the deed of gift that, whenever any of the real and personal properties of the said estate, which were in the possession and hands of Pearyloll Mundul and others, should come to hand, whether by possession taken personally or by amicable settlement, or by suit in Court, the plaintiff should get a two annas share, Nobin Seekaree a one anna share, and Shumbhoo five annas, out of the eight annas share thereof, and that whatever expenses should be incurred by suit in Court in respect of any claim to any of the properties, or in recovering possession of any of the properties, the same should be defrayed by the plaintiff and Shumbhoo in the ratio of the aforesaid shares; that if any amicable settlement should be made regarding any property, the plaintiff and Shumbhoo should do the same with the consent of all; that if there

* From the judgment of Couch, *C.J.*, and L. S. Jackson and Glover, *J.J.*, in Regular Appeal No. 231 of 1869, decided 5th July 1870.

should be occasion to institute any suit in Shumbhoo's sole name, or in the joint names of him and Ramonee Dossee as plaintiffs for any property, the plaintiff should pay the expenses thereof according to the aforesaid shares; and that after decree Shumbhoo and the plaintiff should get the property with mesne profits and interest according to their shares. Shumbhoo within the period of limitation commenced a suit against the Munduls, No. 76 of 1854, for the whole of Hurnarain's estate; but pending that suit Joykristo was substituted as the plaintiff under a deed of sale from Shumbhoo to him. It was said that Joykristo held benamee for the Munduls, but whether he did so or not is not material. Joykristo proceeded with the suit commenced by Shumbhoo, and obtained a decree for an eight annas share of the estate. Ramonee was a defendant in the suit against the Munduls. She appealed against that portion of the decree which affected her. The High Court modified the decree against her by limiting it to a five annas share. The Munduls not having appealed, the decree remained binding upon them for the eight annas share. Joykristo executed the decree under which a five annas share was delivered to him in the manner in which delivery is made under executions of decrees for land in the possession of ryots, viz., by beat of drum and the affixing of bamboos, and he filed a receipt for the same in the Court of the Principal Sudder Ameen. The decree and execution put an end altogether to limitation. It is immaterial whether Joykristo obtained actual possession or not. In the suit No. 79 of 1861, the plaintiff's title under the deed of gift from Shumbhoo was established against Joykristo. Joykristo afterwards sold to the Munduls the five annas share of which he had obtained possession under the execution, and all his right, title, and interest under the decree. Neither the Munduls who purchased from Joykristo, nor Joykristo who purchased from Shumbhoo, could have any better title than Shumbhoo himself. According to the deed of gift, the plaintiff was entitled to a two annas share of all the property which should come to hand. A five annas share came to hand under the execution, and the Munduls retained possession of the other three annas included in the decree under the deed of sale from Joykristo. The Munduls being in possession of that three annas share, the plaintiff was entitled to two annas of the property of which Joykristo obtained possession under the execution. The Munduls having obtained possession of that two annas share, the plaintiff is entitled to recover it from them. They obtained that possession after the execution of the decree and within the period of limitation.

It appears then that the Munduls got possession of the two annas share of which Joykristo ought to have remained in possession in trust for the plaintiff. The plaintiff therefore has a right to say,—“These two annas belong to me. You, the Munduls, are in possession of my two annas share, and I bring an action against you to recover that share.” Then, when was it that this cause of action arose? Why, it accrued, at any rate, at a period subsequent to the execution of the decree by Joykristo. That was within the period of limitation.

The High Court certainly do say, “The present suit is brought to carry into execution the decree in that suit,” speaking of Joykristo's suit, “in which the plaintiff has an interest.” Their Lordships do not understand that the High Court in using the words “to carry into execution,” meant “to get the decree executed by process of execution according to law,” but merely that the present suit is brought to give effect to that decree.

It appears to their Lordships that the suit is not barred, inasmuch as the defendants have obtained that possession which is wrongful as against the plaintiff subsequently to the execution of the decree by Joykristo.

Without, therefore, entering into the reasons of the High Court, their Lordships are of opinion that the decision to which they came was the correct one, and they will therefore humbly advise Her Majesty that the decree of the High Court be affirmed with costs.

The 30th November 1872.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo law—Adoption—Misrepresentation—Estoppel—Pleading—New case.

On Appeal from the High Court at Allahabad.

Gopee Lall

versus

Mussamut Sree Chundraolec Buhoojee.

As a man cannot, while he has an adopted son living, adopt another son ; so neither can his widow, after his death, by virtue of any authority delegated from him, adopt a son while an adopted son is still living.

Defendants who have represented the fact of an adoption which they erroneously conclude to be an adoption valid in law, cannot be charged with misrepresentation so far as the fact is concerned, and are not estopped from setting up the true facts of the case.

Even if a plaintiff has been misled, by various representations of the defendant, into framing his suit in a particular way, still he can only recover according to his allegations and proofs, and cannot be allowed to set up an entirely new case not set up or hinted at in the plaint.

This was a suit brought to recover possession of a temple and certain jewels and valuables held therewith. The plaintiff claimed as heir of one Luchmunjee. He endeavored to prove his heirship in this way. He asserted that his grandfather Damodurjee had two wives, Luchmee and Charmuttee; that, shortly before his death, he gave a power to his wives to adopt two sons; that after his death his first widow Luchmee adopted Gobindjee, the father of the plaintiff; that some four years afterwards, the second widow Charmuttee adopted Luchmunjee, through whom the plaintiff claims. The plaintiff asserts that on the death of Luchmunjee, who according to his case was his uncle, he became the heir to Luchmunjee, who was in possession of the property. He admits that the defendant, the widow of Luchmunjee, had a life-interest in the property, but he alleges that she had forfeited that life interest by committing waste.

The Principal Sudder Ameen found in effect that the plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal Sudder Ameen: they expressed themselves by no means satisfied that the defendant had forfeited the property by committing waste; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the plaintiff had failed to prove his heirship to Luchmunjee. They were by no means satisfied that the plaintiff proved all the facts on which he relied; but they came to the conclusion that, assuming all those facts to be proved, as the plaintiff alleged them, still in point of law his case failed for this reason, that, according to Hindoo law, there cannot be two valid successive adoptions, and that the first widow having adopted a son, Gobindjee, the second widow could not, while Gobindjee was alive, make another valid adoption.

The question of successive adoptions was argued very elaborately and very carefully considered in the case of *Rungama v. Atchama and others*,* reported in the 4th volume of Moore's Privy Council Appeals, p. 1; and since the decision of that case, whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordships' opinion, it follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his lifetime; and that inasmuch as he,

* 7 W. R. P. C. 57; 1 Suth. P. C. R. 197.

Damodurjee, could not, one adopted son being living, adopt another, his second widow Charmuttee could not, by virtue of any authority delegated from him, adopt a son while an adopted son was still living.

Their Lordships therefore concur with the judgment of the High Court, which amounts to this, that, assuming all the plaintiff's facts as he alleges them in his own favor, still that in point of law the second adoption was invalid, and that consequently there was no relationship between him and the second adopted son Luchmunjee, under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts on which the plaintiff relies have been substantiated or not. Assuming them to have been substantiated, his case in point of law fails.

It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favor, inasmuch as they have represented in former suits and in various ways, by letters and by their actions, that Luchmunjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact. They are alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties.

It may further be observed that, if Luchmunjee's statement is to be taken, it must be taken as a whole; and what he asserts is that he was validly adopted. But if he was validly adopted, it follows that the plaintiff was invalidly adopted; and therefore in this view of the case, it appears to their Lordships that no reliance can be placed upon this question of estoppel.

It has indeed been further argued that, even putting it not so high as estoppel, still the plaintiff has been misled, by various representations made by the defendant, into framing his suit as it is now framed. If that were so, it would not empower their Lordships to depart from the rule which has always prevailed, that a man must recover according to his allegations and his proofs. It would not enable their Lordships to allow (as the appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of Luchmunjee, and treating Luchmunjee as a mere trespasser, still the plaintiff could recover by proof of his title from Damodurjee. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought therefore to be reversed, and the suit dismissed with costs. But inasmuch as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think

that the formal decree should be varied by ordering that the decision of the Principal Sudder Ameen be reversed, and the suit dismissed with costs in both Courts ; and their Lordships will humbly advise Her Majesty to this effect. The appellants must pay the costs of this appeal.

The 10th December 1872.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Construction—Interest—Order nunc pro tunc.

*On Appeal from the High Court at Calcutta.**

Gopee Kissen Gossamee

versus

Brindabun Chunder Sircar and another.

Mr. Leith and Mr. Merivale for Appellant.

Mr. Doyne and Mr. J. Cutler for Respondents.

On a question of construction of an order of Her Majesty, the words "the plaintiff is to have judgment for his moiety, with interest at the full legal rate, and the costs of the proceedings in the Court below" were held as intended to give plaintiff the moiety claimed by him of the sum which he alleged to be due for principal and arrears of interest (at 12 per cent.) equal to the principal upon a certain kurarnamah and bond, and to allow the interest from the date of the institution of the suit up to realization.

HELD further that, in the account taken by appellant as the foundation for his proceeding in execution, he was not warranted in making a rest at the date of the order of the Principal Sudder Ameen dismissing the suit and assuming that interest should run upon the consolidated sum from that date; as in the absence of special directions it could not be presumed that the Appellate Court intended to make an order *nunc pro tunc* which would give compound interest from the date of the decree of the Court of first instance.

Sir James Colville.—Their Lordships cannot but regret that the litigation to which the former order of Her Majesty might reasonably have been expected to put an end, has been prolonged by the proceedings which have led to the present appeals.

Their Lordships are first called upon to construe the order of Her Majesty of the 7th August 1869 in respect of what may be termed the principal sum thereby awarded. The words of the order are that the plaintiff is to have judgment for his moiety, with interest at the full legal rate, and the costs of the proceedings in the Court below. The first question is, what is meant by his moiety? Upon that point their Lordships entertain no doubt that the order intended to give to the plaintiff the moiety claimed by him of the large sum of Rs. 69,000 odd, which he alleged to be due for principal and arrears of interest equal to the principal upon the kurarnamah and bond. That that was what the plaintiff was suing for is shown by his plaint and by the account in the nature of particulars of demand which is annexed to the plaint. We therefore start with a decretal order awarding to the plaintiff Rs. 34,865-6-7 as the principal sum recoverable in the suit.

Their Lordships may observe with reference to the question whether the kurarnamah carried interest, which the respondents have tried to raise on the

* From the judgment of Kemp and E. Jackson, *J.J.*, in Miscellaneous Appeal No. 80 of 1870, dated 7th July 1870.

present occasion, that it would be impossible for their Lordships, whatever view they might entertain, to go behind the former order, and to allow any matter concluded by that order to be re-argued on this appeal. Nor does there seem to be any reason to doubt but that it was properly decided on the former appeal that the *kurarnamah* did bear interest.

Her Majesty's order, then, awards Rs. 34,865-6-7 with legal interest, that is, interest at the Court rate of 12 per cent. And looking to the course of the Courts in India, their Lordships are of opinion that it was the intention of the order to give that sum with interest at that rate from the date of the institution of the suit up to realization.

The question then arises whether, in the account which was taken by the appellant as the foundation for his proceeding in execution, and which is embodied in the petition for execution, he was warranted in making a rest at the date of the order of the Principal Sudder Ameen which originally dismissed the suit, and in assuming that inasmuch as that sum with interest ought then to have been awarded to him with costs, interest should run upon the consolidated sum, from that date. Their Lordships are of opinion that, notwithstanding the passage which has been cited from Mr. Macpherson's book, they are not warranted in giving that interpretation to the present order, considering the terms in which it is expressed. They have the benefit of being assisted on this occasion by Sir Barnes Peacock, who has had so much experience in the High Court in administering the present code of procedure. And although the Appellate Court might have the power, if it thought fit, to make such an order as it is suggested would have been made according to the former practice, it is now, we understand, quite as common to give, on appeal, merely a decree for the principal sum awarded, with interest from the commencement of the suit to the realization of the sum. And, in the absence of any special directions, it cannot be presumed that there was an intention to make an order *nunc pro tunc*, which would have the effect of making a rest at the date of the decree of the Court of first instance and of giving compound interest awarded from that date.

Their Lordships therefore think that upon that point the petition of the appellant sought for too much. In other respects they are with him, and they are with him upon the principal question which has led to these appeals.

The order which their Lordships propose humbly to recommend Her Majesty to make will be the following: "Declare that the appellant, under the order of Her Majesty of 7th August 1869, was entitled to the sum of Rs. 34,865-6-7 with interest at 12 per cent. from the commencement of the suit to the date of Her Majesty's order, with the costs in the Courts below. Also declare that he is entitled to interest at the rate of 12 per cent. on that consolidated sum from the date of the order to the date of realization; and declare that he is further entitled to the sum of Rs. 3,289-2-4 for the costs of the former appeal, and also to the costs in the Indian Courts incurred in the proceedings for execution, and to the costs of this appeal. And let the cause be remanded to the High Court, with directions to cause execution to issue accordingly." Their Lordships have not thought fit to recommend that the appellant should be allowed interest on the costs of the former appeal, since they understand that, according to practice, costs given here do not carry interest unless the contrary is expressed in the order.

With regard to the cross-appeal of the respondents Brindabun Chunder Chowdry and Sreesh Chunder Sircar Chowdry, their Lordships will humbly report to Her Majesty that their appeal ought to be dismissed with costs.

The 12th December 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Agency—Indigo—Purchase in a rising market.

*On Appeal from the High Court at Calcutta.**

Betts and others

versus

Arbuthnot and Co.

Agents buying indigo seed in a rising market under an order to purchase on the most favorable terms cannot experiment by sowing a sample and waiting before they purchase to see whether it will germinate. They are only bound to act to the best of their judgment, and to use proper care and skill as agents in purchasing what they are ordered to purchase, and their action cannot be repudiated unless they are shown to have been guilty of negligence.

This is a suit brought by Messrs. Arbuthnot and Company, who are merchants and agents at Madras, against Mr. Betts and his partners, who are indigo planters in Bengal. The suit is brought to recover the price of certain indigo seed which Messrs. Arbuthnot and Company purchased as agents for Mr. Betts and his partners, under instructions received from them. In one of the earliest letters from Messrs. Arbuthnot and Company, they say:—"At the request of Mr. Herklots, of Coonoor" (Mr. Herklots was a friend of Mr. Betts) "we write to inform you that indigo seed of this year's growth is now available here, and that supplies will continue to come in for the next two or three months. The present price is Rs. 6-4 to 6-8 per maund, but the demand is so great that we expect to see shortly a considerable rise. If you send us an order, we will endeavor to execute it to the best of your interests." It appears that, at first, Mr. Herklots enquired of Messrs. Arbuthnot and Company whether they could buy 2,000 maunds, which was a much larger quantity than the defendants wanted to sow in the following October. The probability is that when Mr. Betts instructed Messrs. Arbuthnot and Company to purchase, they were purchasing upon speculation, intending to pay the price of the seed out of the money to be obtained by re-selling it. There is no doubt that the defendants were not prepared to pay for the seed, and it was unlikely that they would be buying seed in February to sow in October, when they had not the means to pay for it. Mr. Betts, by a letter of the 13th February, instructed Messrs. Arbuthnot and Company to purchase for him 1,000 maunds upon the most favorable terms. He says, "best fresh indigo seed;" but he sent them a telegram afterwards, instructing them to buy, not the "best," as requested in the letter, but "fresh, good." According to the evidence of Mr. Betts himself, what he instructed Messrs. Arbuthnot and Company to purchase was "one thousand maunds indigo seed, fresh, good, on most favorable terms." Having received a letter of the 25th February, informing him that Messrs. Arbuthnot and Company had purchased at the rate of Rs. 10 per maund, Mr. Betts writes on the 6th March the following letter:—"Yesterday I despatched a telegram to you to the effect that the seed I ordered must be fresh and good." That "yesterday" was the 5th March. He had received Messrs. Arbuthnot and Company's letter on the 2nd, stating that they had actually purchased. Then why should he immediately send off a telegram to say that he hoped the seed would be fresh and good? He had instructed Messrs. Arbuthnot and Company to buy fresh and good; why

* From the judgment of Couch, C.J., and L. S. Jackson and Glover, J.J., in Regular Appeal No. 51 of 1870, decided 26th July 1870.

should he suppose that they had not bought fresh and good? And yet he thinks it necessary, on the 5th March, to send a telegram to them to say that the seed which he ordered must be fresh and good, as he needs it for his October sowings. "And I now beg to advise you that if the seed is not of this description,"—why should he suppose that it was not of that description?—"that is, *fresh*, and such as I sent you an order for, you must be aware that it would be ruinous to sow it. Pray, therefore, kindly exercise your judgment in this matter." How were they to exercise their judgment? They were instructed to purchase, and they had purchased. Mr. Betts must have supposed that they had purchased according to their instructions, and he must have known that if they had not purchased according to their instructions or used due diligence in carrying out his order, he was not bound to take it. There was, therefore, no necessity to write that letter if the transaction really was such as Mr. Betts would have it supposed. It appears that when Mr. Betts found that the price had risen from Rs. 6-4 to 10 he was anxious to get out of his contract. It is clear that he was not able to pay. He afterwards asks Messrs. Schoene and Company whether they can sell the indigo for him, and when they tell him that Madras indigo is not saleable in Bengal, then, for the second time, he asks for a sample. He had originally asked for a sample; but Messrs. Arbuthnot and Company had informed him that the indigo had been sent to Messrs. Thomas and Company as his agents, and that they would give him a sample. He was satisfied with that answer, and did not ask again for a sample until he was informed by Messrs. Schoene and Company that they could not sell the indigo for him to advantage; then he asks for a sample, and a sample is given to him, and then he commences his experiments to see if the seed will germinate.

Three of the Judges of the High Court have found that Messrs. Arbuthnot and Company properly discharged their duty as agents. Messrs. Arbuthnot and Company, although they did state in their plaint that they were acting as sellers, were really only agents for Mr. Betts. Having purchased in Madras they had paid or would have to pay the person from whom they purchased; they were, therefore, in the nature of sellers, although they were really only *del credere* agents. It was necessary for Mr. Betts, before he could repudiate what his agents had done for him and refuse to take the indigo and to pay for it, to show affirmatively that Messrs. Arbuthnot and Company had been guilty of negligence in executing the order which he had given them. He deals with the sample when he gets it by sowing it and testing it. Whether that test was or was not a good one it is not necessary to enquire, for Messrs. Arbuthnot and Company, when they were buying indigo seed at Madras in a rising market, under an order to purchase on the most favorable terms, could not have experimented by sowing a sample of the seed and waiting eight or ten days before they purchased to see whether it would germinate. They were only bound to act to the best of their judgment and to use proper care and skill as agents in purchasing what they were ordered to purchase, viz., good, fresh indigo seed.

Now, did Mr. Betts prove that Messrs. Arbuthnot and Company had not fairly and properly executed his order? It appears to their Lordships that there is no evidence to that effect, and they agree with the views which the learned Judges of the Court below have taken that Messrs. Arbuthnot and Company did fairly and properly execute the order. The Chief Justice says,—“Looking at the evidence, I can see no reason for distrusting the plaintiff's case, and thinking that they did not perform that which they undertook to do for the defendants, namely, to purchase good, fresh seed.” Mr. Justice Louis S. Jackson says—“I have no doubt that Messrs. Arbuthnot and Company, as agents of the defendant, honestly fulfilled the commission intrusted to them, and that the plaintiffs are entitled to recover the whole of the amount they claim in this suit,” with the exception of a small amount for excess. The learned Judge of the first Court did not try the

case upon the evidence. He decided against the plaintiff on the ground of variance. That ground has, very properly, been given up to-day, and it has been admitted that the Judge ought not to have dismissed the plaintiff's claim on the ground of the variance. There were three Judges of the High Court, and they were unanimous in coming to the conclusion that Messrs. Arbutnot and Company did properly and honestly fulfil the commission which had been entrusted to them.

Their Lordships, therefore, see no reason for interfering with the judgment of the Court below, and they therefore will humbly advise Her Majesty that the decision of the High Court be affirmed with costs.

The 18th December 1872.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Alluvial land—Possession—Issues—Onus probandi.

*On Appeal from the High Court at Calcutta.**

Grija Kant Lahory Chowdry

versus

Hurriah Chunder Chowdry.

Appellant sued to recover a tract of chur land as parcel of his Mouzah of Jogdash; defendant alleging the said land to be a parcel of his Mouzah Ghoogoomaree. About the year 1830 a large tract of land was diluviated by the river Chutol within the mouzahs belonging respectively to plaintiff and defendant; and after re-formation in 1837, a proceeding was taken by the plaintiff before the Magistrate under which he was ordered to be put in possession of a considerable tract of such newly-formed land, the Magistrate laying down the boundaries. After nearly 12 years (*i.e.*, in 1849), respondent's father brought a civil suit to set aside the Magistrate's decision, and the ultimate finding was that appellant had been in possession of the land described in the Magistrate's order from and since the date of that order :

HELD, that that decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had continued in such possession; the question in the present suit being whether the lands now claimed are identical with those so described :

HELD, that that issue lay upon the plaintiff because the foundation of his suit was that, having been in possession, he was dispossessed as a consequence of certain measurements made by Government officers :

HELD, that plaintiff had failed to sustain the burden of proof. He relied principally on the boundaries given by the Magistrate and certain maps prepared then and later as compared with the Government map of 1853; but their Lordships were unable to place firm reliance upon any inference drawn from these maps. Their Lordships were also of opinion that, in questions of this kind where the natural boundaries and landmarks have disappeared, evidence of possession was very important and satisfactory, and that there was no reason to distrust the witnesses of the respondent proving such possession.

In this case the appellant brought his suit to recover a large tract of chur land, which he claimed as parcel of his Mouzah of Jogdash. The defendant is the zemindar of a zemindary which includes a mouzah called Ghoogoomaree; and he asserts that the piece of chur land claimed by the plaintiff is parcel of his Mouzah Ghoogoomaree. The single question in the case is,—parcel or no parcel, whether this land belongs to the plaintiff's Mouzah Jogdash, or the defendant's Mouzah Ghoogoomaree?

The opening of this appeal by the learned Counsel, Mr. Leith, presented a simple and apparently consistent case in favor of the appellant. It seems that

* From the judgment of Bayley and E. Jackson, *J.J.*, in Regular Appeal No. 392 of 1864, decided 5th December 1865.

about the year 1830, a large tract of land was diluviated by the river Chutol within the mouzahs belonging to the plaintiff and the mouzahs belonging to the defendant,—and that after a re-formation of some part of it, in 1837, a proceeding was taken under Reg. XV of 1824 by the plaintiff before the Magistrate, under which he was ordered to be put in possession of a considerable tract of such newly-formed land. It was declared by the decision of the Magistrate that he was to have possession of that land ; and the Magistrate laid down the boundaries in this way :—“ By the papers of the nutthee, the boundaries of Mouzahs Jogdash, Singhessur, and Besh-Maluncha are found to be situated as follows :—A canal to the east of Mouzah Jogdash running from east to west ; Daokobo, *i.e.*—the river Chutol, to the south,” and it may be observed here that this has turned out to be a doubtful boundary, because there were two channels of the river Chutol,—“ the house of Mothura Moody to the east, and a dry branch to the west ; and the culturable lands of Murad Numdul are situate to the west of Mouzah Singhessur.”

That decision having been given, there is some evidence that the appellant was put into possession of the land so described. After a period of nearly twelve years, viz., in 1849, the respondent's father brought a suit in the Civil Court to set aside the order of the Magistrate. The reason of the suit was, as stated in the plaint, a fear that that decision of the Magistrate might be used to disturb the respondent's father in the possession of land which clearly belonged to him. The result of that suit, in which final judgment was given in 1852, was in favor of the appellant. An issue was raised in it as to the fact of the actual possession of the land from the time of the Magistrate's order ; and upon that issue the ultimate finding was that the appellant had been in possession of the land described in the Magistrate's order from and since the date of that order in 1837. The issue as to possession was distinctly raised, and a distinct and explicit judgment given upon it. Their Lordships are of opinion that the parties are precluded by that judgment from now averring that the appellant was not in possession of the land described in that decree from the time when the Magistrate's order was passed in 1837 up to the time of the suit of 1849. So far the plaintiff's case is clear. That decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had remained in such possession. The question in the present suit is whether or not the lands which are now claimed by the plaintiff are identical with the lands so described.

Now, undoubtedly, that issue lies upon the plaintiff, because the foundation of his suit is that he, having been in possession of the land, was shortly after the decree of 1852 dispossessed of it by the respondent, as a sequel or a consequence of certain measurements which had been made by the surveying officers of the Government, which resulted in the lands being measured into the respondent's Mouzah of Ghoogoomaree. The proceedings on that survey appear to their Lordships to be entitled to considerable weight. The Government officers, of course, went on the ground, and, when on the ground, endeavored to ascertain the boundaries as they had been laid down in the Magistrate's order. It appears that the appellant had first obtained from the surveying and measuring officers a measurement of the land now in dispute into his Mouzah of Jogdash. There was then a complaint made by the respondent to the superior officer of that measurement, and other officers were sent down to ascertain whether the first measurement had been properly made or not ; and after conflicting reports from two officers successively sent upon the land, the appellate tribunals from them decided in favor of the report of the first officer, namely, that this land belonged to the respondent's Mouzah of Ghoogoomaree. The report of the surveying officer who decided in favor of the appellant is very explicit on the point of possession. He examined witnesses, and he came to the conclusion that the land then and now in dispute had been for many years in the possession of the respondent, and he declared himself to be unable, upon the ground, by a comparison of the maps with

any landmarks that he could find there, to ascertain that the land then and now in dispute formed a part of that described in the Magistrate's decision. Mr. Leith pointed out that that report was not entitled to great weight, inasmuch as the officer had mistaken the position of the river Chutol; and there is undoubtedly force in that observation; still their Lordships cannot but think that in a question of this kind, where so much must depend upon local investigation, the opinion of that officer, confirmed by his superior officers, is entitled to great weight. It must be remembered that the appellant had first obtained the measurement in his favor, and therefore that the officer was called upon to displace that which had been already done; and it certainly would appear from his report that he had, at all events, endeavored to execute his duty carefully, for he made a full and long report, going into the circumstances of the ground, the appearances which it exhibited, and giving reasons, and very full reasons, for the opinion at which he arrived. These measurements having been made, this land was assigned to the respondent's mouzah. This was in the year 1852. The appellant avers that at that time, or about that time, he was dispossessed by the respondent. If he were so dispossessed, he certainly did not take very prompt measures to obtain redress; for, although then, as he alleges, dispossessed of what he now contends he had been for many years in possession of, he takes no step to reverse what had been done by the measuring officers until the year 1859, when this suit is commenced.

In this suit, which has been brought by the appellant to annul the orders of the measurement officers, and for possession, the enquiry as to the identity of the lands has been fully gone into, with the result that the Principal Sudder Ameen found in favor of the appellant; but his judgment was reversed by the High Court.

Their Lordships have felt the extreme difficulty of arriving at a decision satisfactory to their own minds in this case. The appellant has relied, and principally relied, upon the boundaries which are given in the decision of the Magistrate and upon the map called the sketch map prepared at that time, and also upon a map which was prepared in the year 1851; and by comparing those maps with the Government map of 1853, he has endeavored to establish the identity of the boundaries described in the Magistrate's decision with the lands which are now in dispute. It was difficult for those who went on the ground to ascertain, by these means, the boundaries which the Magistrate's decision had pointed out. Indeed, they were unable to do so. The difficulty is certainly not less when the comparison has to be made, not upon the land itself, but with reference to a map which—assuming it to be a correct representation of the ground—is on a very small scale, and does not contain one of the important landmarks upon which the appellant relies, viz., the canal to the north, which forms the northern boundary. As far as their Lordships were able to conjecture from an examination of the maps, there was a great deal to support the contention that a portion of the chur in question was in the situation or near the situation which was contended for on the part of the appellant, and that it was not to the south of that which was asserted by the appellant to be the Chutol stream. But no firm conclusion can really be drawn from such an examination. The maps prepared in India by the native authorities are extremely unsatisfactory. The sketch map has straight boundaries which cannot exist naturally upon the ground; it marks a square block, and gives very few bearings beyond it. Their Lordships, therefore, have felt that they cannot place such firm reliance upon any inference to be drawn from these maps as to satisfy them that they would do justice between these parties by assenting to the conclusions which the appellant draws from them.

The great strength of the arguments on the part of the appellant has been drawn from the maps; and the important element on which the defendant mainly relies, viz., the evidence which was given as to the actual possession of this land, was not only not repelled by any anticipatory argument on the part of the appel-

lant, but in the opening of the case that evidence was not adverted to further than that the learned Counsel told us the number of witnesses, and pointed out the pages where the evidence might be found. On coming to the respondent's case, their Lordships must observe that this evidence came upon them with rather sudden force. There is a great body of it, and great consistency in it. It shows, if it is believed, that from the time when the chur land now in dispute was formed, the respondent and his father were in possession of it. The witnesses who were called were tenants who had paid rent, and other persons who knew the land; some of them, who knew it before it was submerged, say that it was the land which belonged to the village of Ghoogoomaree.

The evidence of possession on the other side is extremely slight. It was pointed out by Mr. Doyne that no witnesses were called who had ever lived upon this particular land, and those who were called came principally from Joneally, a place beyond the southern stream of the Chutol.

In questions of this kind, where the natural boundaries and landmarks have disappeared, where there are no fences to mark what is the extent of the property, evidence of possession is very important and very satisfactory. Their Lordships, on looking at this evidence, see no reason to discredit the witnesses for the respondent. The Principal Sudder Ameen has apparently disregarded the testimony altogether; but he has given no reason for so doing, and afforded no assistance to those who have to consider the weight to be attached to the witnesses. If the Principal Sudder Ameen had found that the witnesses were not entitled to credit, their evidence might be disregarded; but there is no intimation whatever that these witnesses are not speaking the truth; and if they are speaking the truth, then it is plain that the respondent has been in possession of this ground, or of parts of it, ever since it became habitable or culturable after the waters had subsided. Assuming then that there is evidence which can be relied upon that the respondent has been long in possession of the land now in dispute, the effect of it upon the judgment which ought to be given in this case appears to their Lordships to be very strong. An estoppel must be mutual, and both parties must be bound by the finding in the decree of 1852. Now, assume that the appellant was in possession from the date of the Magistrate's order of the ground described in it up to 1852, as conclusively found by the decree in that year, and also supposing the conclusion is right that the respondent has always been in possession of the land now in dispute, the consequence is inevitable that the land now in dispute, of which the respondent has been in possession, is not the land described in the suit of 1852, of which, on the hypothesis, the appellant has been in possession. The appellant has in truth given no satisfactory evidence that he was really in possession of the land now in question.

Again, if the appellant had been in possession of the land now in dispute, and had been dispossessed, the mode of dispossession might have been shown; and it is reasonable to expect that, if there had been an actual dispossession it could have been shown. Proof of actual dispossession would have greatly helped to establish the fact of a real possession capable of being so disturbed. But the manner of the alleged dispossession is left entirely unexplained. That there was a constructive dispossession, as the result of the action of the measuring officers, may be clear, but no actual dispossession is at all shown by the evidence.

There are other circumstances in the case which also weigh against the appellant. The quantity of land the appellant now claims is larger than that which was found for him by the judgment of the Court in 1852. The judgment finds that the Mouzah of Jogdash contained 50 or 60 khadas of land. The plaintiff now claims 71 khadas out of 250, of which he says his Mouzah Jogdash consisted. There has been a question whether the Judge, in saying that the Mouzah Jogdash was composed of 50 or 60 khadas, was not speaking of the cultivated land only, and whether there was not beyond the cultivated land a portion of chur land

But creditors who, like Salig Ram and Davee Singh, joined the rebellion voluntarily, accepted such security for their claims as the rebel cause might offer. They not only foresaw, but assisted to produce the catastrophe, and therefore the interests of justice do not require that they should be protected from its effects. *They may have all that they are entitled to by the letter of the law; but the Governor-General would deny them that which can be claimed only as a favor, for it is in the essence of a concession by favor that it should be withheld where favor is not due.*

"7. The Governor-General is of opinion that neither Salig Ram and Davee Singh's claim, nor that of any other creditor of the ex-king, who has been convicted of rebellion, to the liquidation of their debts from the revenues of the Crown lands, should be admitted."

Even if the prior Circular, on which the appellants rely, could, on any fair principles of legal construction, be held to be a legislative recognition of the rights of the creditors of the deposed sovereign to be paid out of the revenues of the deposing Government (the only way in which it could avail the plaintiffs), the last Circular is an act of like character, of equal validity, and equally binding on the Courts of Law.

Their Lordships think it desirable to make a few observations on the case of *Narain Doss v. The estate of the late King of Delhi*,* in which this Board came to a conclusion in favor of a claimant under the Circulars in question. The title of the cause itself, in which the estate was named as a party, shows how it came to be a matter of judicial cognizance. The plaintiff there was admitted to claim against the estate. But he was put to prove that he was such a creditor as he alleged himself to be—that he was one of the creditors intended to be protected by the Circulars. That issue having been raised, and having been, by the act of the Government itself, put in a train of judicial investigation by the legal tribunals, had to be determined in the same manner and on the same principles as any other issue legally raised in any ordinary litigation, and the determination was that the plaintiff had established his claims under the Circular, as alleged, and that the objections to it had failed. That case has no application to the present, in which the appellants were peremptorily excluded from the benefit of the Circular.

Their Lordships are of opinion that the judgments from which this appeal was preferred were correct, and they will humbly report to Her Majesty that, in their opinion, those judgments ought to be affirmed, and this appeal dismissed with costs.

The 5th November 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Witnesses—Credibility—False Case—Real Issue.

On Appeal from the High Court at Calcutta.†

* 10 W. R. P. C. 55 ; and p. 76 *ante*.

† From the judgment of Loch and Seton-Karr, *J.J.*, in Regular Appeal No. 401 of 1864, decided 16th January 1865, 2 W. R. 52.

Khajah Habeeb Oollah and others

versus

Khajah Gouhur Ally Khan.

Where witnesses who were not merely giving an opinion upon an isolated fact in the cause, but came into Court to prove the whole case made by the plaintiffs, and that a very special case, are shown to have come to prove a case false in its material features, much reliance cannot be placed on their evidence as to any particular questions in the cause.

Where, in the last stage of appeal, a case is made which is hardly consistent with the false case originally set up, and which was never made the real issue between the parties in any previous stage of the litigation, it cannot be relied on in any degree so far as it affects the case made by the other side.

The single question raised by this appeal is whether the respondent was the son of Wazeer Jan, by which their Lordships understand, either his legitimate son in the strictest sense of the term, or a son capable of inheriting from him under the Mahomedan law.

The case made by the appellants, who were plaintiffs in the suit, was that he was not in any sense the son of Wazeer Jan, who, they alleged, was incapable of procreating children, that he was a stranger brought in by means of a conspiracy to defeat their rights to the succession of Mahomed Ibrahim, the elder brother of Wazeer Jan, and in fact the original plaint appears to have gone so far as to allege who the real and natural father of the respondent was.

Now it is admitted that that case has entirely broken down. The effect of the findings of the two Courts upon the remand appears to be what is thus stated in the judgment of the High Court now under appeal:—"The case has again been tried by the present Judge, Mr. Ainslie, who has arrived at the conclusion that Gouhur Ally is really the son of Wazeer Jan and Allahrukkee, but that he is not legitimate, and that though his father and mother did cohabit, the cohabitation was not that of man and wife."

The only qualification which their Lordships think might be put upon this summary of the Judge's finding is this that the Judge has rather found, after ascertaining the paternity of Wazeer Jan, that the respondent was not *proved* to be legitimate, and that although his father and mother did cohabit, the cohabitation was not *proved* to be that of man and wife.

Upon appeal from the decision of the Zillah Judge, the High Court came to the conclusion that, upon the evidence, the respondent must be taken to have been legitimate, and that conclusion their Lordships are disposed to think was the only correct conclusion which they could draw from the evidence, considering the manner in which the case was presented before them.

It has been very fairly admitted at the Bar that it is hardly open for the appellants here, both Courts having concurred in the finding upon that fact, to dispute any longer the paternity of the respondent. It is admitted that he must be taken to be the natural son, at all events, of Wazeer Jan. It will have no doubt to be considered what is the effect of that conclusive finding as to the paternity, not only in reference to the consequences immediately to be deduced from it, but also in reference to the credibility of the witnesses for the appellants, in so far as they attempt to prove, not merely that the respondent was in no sense the son of Wazeer Jan, but that in fact there never was a marriage between Wazeer Jan and the mother of the respondent.

It was argued by the learned Counsel for the appellants, particularly by Mr. Doyne, that it did not by any means follow that, because many of those witnesses had expressed an opinion as to the incapacity of Wazeer Jan for the procreation of children, a fact which is now conclusively found against him, they were not to be believed on the other part of the case. Their Lordships, however, deem it right to observe that those witnesses were not merely giving an opinion upon an isolated fact in the cause, but they came into Court to prove a case—the whole case made by the plaintiffs; and that that case was, as I have before stated, a very special case, referring to the introduction of this boy into the family to a

conspiracy, and undertaking to prove that it was impossible that he should be the son of Wazeer Jan, and that he was the son of somebody else. It, therefore, seems to their Lordships very difficult to say that, if those witnesses have been conclusively shown to have come to prove a false case—a case false in its material features—much reliance can be placed upon their evidence as to any particular questions in the cause.

Another consequence of the manner in which the appellants have presented their case in the Courts below, is, that the question which has been chiefly argued to-day at the Bar seems never to have been fairly put into a course of trial. They say:—"True, we must admit now that the respondent was the natural son of Wazeer Jan; but the evidence for the respondent,—the direct evidence as to the marriage between Wazeer Jan and Allahrukkee,—is not to be believed, and all the other facts proved in the case, the continuous cohabitation between them—including the birth of other children—are all consistent with the supposition that the respondent was an illegitimate son, and was never recognized by his father, and was at last put forward, as we say, in consequence of this conspiracy to defeat the rights of the claimants."

Upon the case thus made, it is to be observed that, if it were the true case, the plaintiffs would hardly have set up that which must now be taken to have been a false case; and further, that the case now relied upon not having been made the real issue between the parties either when the case was first launched or at any time during the long period through which this litigation has lasted, we have not that evidence which might have been given as to the state of the family, as to the manner in which the child was treated in the family, as to the circumstances of the birth, and possibly as to the recognition, by Wazeer Jan, of the respondent as his son.

It appears, therefore, to their Lordships that it is extremely difficult to place any reliance upon the case made by the appellants, so far as it affects the case made by the other side; and the only remaining question is whether there was sufficient evidence on the part of the respondent, from which the High Court was justified in inferring that the legitimacy was made out. And in considering this question, their Lordships will assume that the appellants had made a case sufficient to cast upon the respondent the burden of giving some proof of the marriage between his parents.

Their Lordships think it is a very strong circumstance that, upon or immediately after the death of Nawab Jan, *alias* Mahomed Ibrahim, this boy was produced and placed upon the *guddee* by Fatima. That is a fact which, as the High Court has observed, admits of no doubt. Fatima seems then to have been the head of the family. She was an old lady, and, as the event proved, near the end of her life. It is difficult to see what interest she could have had in putting a spurious child, or even an illegitimate child of her son, in that position, and treating him as the heir of the family; because the effect of recognizing him as a legitimate grandson was to introduce him as one of her own heirs, and therefore to affect the interests of her own brothers and sisters, her own relations for whom she might be supposed to care more than for the illegitimate child of her son.

But however that may be, the fact is sought to be met by the suggestion that this was not the act of Fatima, but the act of Ismael Khan (a person who certainly does not appear upon this record in a manner which entitles him to any respect or credit, since he seems to have sided first with one party, and then with the other); and that it was a contrivance on his part to avoid being called upon to render his accounts as manager of the estate. But there is really no evidence to show that Fatima in what she did was not a free agent. The suggestion seems to be mere speculation, founded upon the proved bad character of this man, and the circumstance that he was steward of the estate.

It is supported by no evidence to which a Court of Justice can give credit.

Then, how does the case stand? There is a considerable body of direct evidence as to the fact of the marriage, though it may not be of the highest character. There is the evidence of the barber who had performed the rite of circumcision when the child was treated as a child born in the house of Wazeer Jan and the Begum. There is the evidence of various persons, the respectability of some of whom is admitted, as to the fact of this boy having been seen in the house, and having been recognized, not only by Wazeer Jan as his son, but by Mahomed Ibrahim as his nephew.

It is said that all these witnesses were not credited by Mr. Ainslie, the Judge in the Court below. They appear to have been credited by the Court above, and to some extent, no doubt, they were credited by the Court below. That being so, the evidence, if not so strong as one could desire upon such a question, is at least fortified by those presumptions which the Mahomedan law draws in favor of legitimacy and against bastardy.

The law is stated, and very strongly stated, by Dr. Lushington in the case which has been cited from the 3rd Vol. of Moore's Indian Appeals;* and although in the case in 8 Moore,† the Court did not think the legitimacy of the claimant was made out, yet the language of their Lordships shows that their Lordships were careful to avoid throwing any doubt upon the doctrine as to the principles of the Mahomedan law which had been laid down in the former case.

Under these circumstances, considering that the case originally made by the appellants must be taken to have entirely broken down, and considering that there is evidence as to the legitimacy of this child, credible in itself, and fortified by the presumptions of Mahomedan law, their Lordships are of opinion that they would not be justified in disturbing the judgment of the High Court.

They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

The 20th November 1872.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Suit for confirmation of possession—Declaratory decree—Evidence—Concurrent judgments of Indian Courts.

On Appeal from the High Court at Calcutta.‡

Sheik Torab Ally

versus

Sheik Mahomed Tukkee and others.

Mr. J. D. Bell for Appellant.

Mr. John Cutler for Respondents.

When a plaintiff sues for confirmation of possession and seeks a declaratory decree, he must make out his title affirmatively. If the Indian Courts agree in holding that he has not done so, even though the High Court may not have attended to the depositions of material witnesses, the Judicial Committee will not disturb the decision of the High Court.

This was an appeal from a decree of the High Court of Calcutta dated the

* *Khajah Idayut-oollah v. Rai Jan Khanum*; see 6 W. R. P. C. 52; 1 Suth. P. C. R. 157.

† 3 W. R. P. C. 37; 1 Suth. P. C. R. 400.

‡ From the judgment of Kemp and Glover, *J.J.*, in Regular Appeal No. 574 of 1863, decided 2nd June 1864.

2nd June 1864, affirming a decree of the Judges of Behar dated the 3rd October 1863.

The plaint stated that the plaintiff (the appellant) sued for relief from injury and for confirmation of possession of 10 annas and a fraction being his property, and one anna and a fraction being the right of lease and sub-lease of a certain mouzah, and that some of the respondents had instituted proceedings under Act IV of 1840 as mentioned in the judgment of the Judicial Committee. As to the 10 annas and a fraction, the appellant claimed to have bought them with other property for Rs. 15,000 from Bebee Jan, who, on the 29th Bysack 1258, executed a deed of sale to him, and, on the same day, a deed of remission of the balances of the purchase-money remaining after the appellant had paid off a mortgage of about Rs. 1,500. The deeds of sale and remission were not produced in the suit, but were alleged to have been filed by a pleader on behalf of the appellant in some previous proceedings in the Moonsiff's Court at Behar, and burnt there during the mutinies in 1857.

Of the respondents, the two first (two of the appellant's brothers) admitted his title. The third, fourth, fifth, sixth, and seventh (his other brothers and sisters), and some of the others claiming under them, alleged that the 10 annas and a fraction had been purchased benamee in the name of Bebee Jan by her husband Mahomed Afzul, and therefore was not hers in absolute right; on the contrary, they alleged that she executed an ikrarnamah (which was not produced) to the effect that on her death the property should go to her husband's heirs. The remaining respondents claimed the proprietary right in the 1 anna and a fraction.

Among the depositions of the appellant's witnesses were those of the writer of the alleged deeds, of eight attesting witnesses, of the pleader who alleged that he filed both deeds in the Moonsiff's Court, and of six other witnesses who deposed to the existence of the deeds and to their destruction as above. The Zillah Judge on the 3rd October 1863 dismissed the suit with costs. The High Court on appeal upheld the decision of the Zillah Judge. In the judgment of the High Court dated the 2nd June 1864, the points for consideration were thus stated:— (1) Did the property belong to Bebee Jan in sole right? (2) Is the sale by her to the appellant proved? (3) This appellant being undoubtedly a shareholder in the estate, was the Civil Judge right in dismissing his claim entirely? On the first question, after laying down that secondary evidence could not be given of the contents of the ikrarnamah, the judgment proceeded as follows:—

"Taking, however, all the circumstances into consideration, we think that there is sufficient proof that the property in question did not really belong to Bebee Jan, but to her husband Sheik Afzul. But were it otherwise, we think there is no proof of the appellant's allegation in the second issue. Sheik Torab Ally bases his claim on purchase from Bebee Jan. He must prove this before he can recover. Now his statement is that Bebee Jan sold the property to him, and executed a deed of sale on the 29th Bysack 1258 Fuslee. The kobala is not produced, nor have any of its attesting witnesses been examined. It is said to have been burnt during the mutinies in 1857, whilst in the Moonsiff's record-room at Gya; and a witness, Sheik Meher Ally, formerly employed as a pleader by Torab Ally, deposes that he filed it in a case before the Moonsiff in which the said Torab Ally appeared as intervenor. This witness, an old man of seventy-five, remembered exactly the date of this kobala, the names of the parties, and the precise thing sold; but though he put in on this occasion no less than seven other deeds of sale on the part of his client, he could not call to mind a single particular about any one of them. This is the only direct evidence of the existence of the kobala, and it is, we think, open to suspicion for various reasons. There is no satisfactory evidence that the deed in question was ever filed in the Moonsiff's Court,—equally none that it was ever destroyed in the mutinies. The only thing

in support of it is the testimony of a single witness, whose statements are irreconcilable with the circumstances of the case and with each other. It appears moreover from the list of documents said to have been filed by Meher Ally, and for which he states that he gave a receipt, that amongst them was a mafeenamah executed by Bebee Jan on the same day as the kobala, by which she excused her vendor from payment of the consideration-money on account of the sale. This, next to the deed of sale, was the most important document entrusted to Meher Ally, but, strange to say, he does not even mention it in his deposition. Under such circumstances, we think that the secondary evidence of the existence of the kobala adduced by the appellant is inadmissible. But were it not so, what are the circumstances of this case? The date of the alleged kobala is the 29th Bysack 1258 Fuslee, the very day we observe on which Bebee Jan died. The mafeenamah, granting for the sake of argument that there was such a document, is dated the same day; so that admitting for the moment that Bebee Jan on the day of her death executed these documents in favor of Torab Ally, there would still be a difficulty in the latter's way on the well-established rule of Mahomedan law, which restricts death-bed gifts to certain narrow limits: the whole matter must stand, or fall together. If, that is, Bebee Jan sold the property to the appellant, she likewise forgave him the purchase-money, her conveyance therefore was an ordinary gift; and as the donor died on the very same day, the gift became a death-bed gift, and consequently illegal to the extent claimed. So much for the only direct evidence adduced in support of the kobala. On the other hand, there is very respectable testimony to show that Bebee Jan, although the nominal owner of the property, was not the real one; and that after her death, Torab Ally was in possession merely as manager and trustee for the younger members of the family: none of the documents filed proved her sole or absolute possession any more than Bebee Jan's before him. Taking, therefore, all the circumstances into consideration, we think that the appellant has not proved either Bebee Jan's absolute ownership in the disputed property, or her conveyance under a kobala to himself; and that as this forms the basis of his claim, he cannot recover."

On the third question the High Court held that, as the respondent admitted the appellant's right to a share of his father's property and that he had always been in possession of it, and as the amount of such share is settled by the principles of Mahomedan law, there was no need for the Court to declare it.

Mr. Bell for the appellant contended (1) that the evidence was not sufficient to justify the finding of the High Court, that the property did not belong to Bebee Jan in absolute right; (2) that the High Court were totally wrong in saying that there was only one witness to the existence of the deed of sale, and that none of the attesting witnesses had been examined, inasmuch as the writer of the deed and all the attesting witnesses had been examined, and there was a mass of respectable testimony to the existence of the deed; (3) that Bebee Jan died in the month of Jeit, as deposed to by appellant's witnessess, and not on the 29th Bysack; (4) that there was no issue raising the invalidity of the deed of sale, and remission looked at as a death-bed gift.

Mr. J. Cutler for the principal respondents, after stating that he did not appear for the respondents claiming the proprietary right in the 1 anna and a fraction (as to which nothing had been said in argument on behalf of appellant), contended (1) that nothing had been shown to induce their Lordships to overrule the finding of the High Court, negating the absolute ownership of Bebee Jan, founded as it was upon the testimony of thirteen witnesses that she was a benameedar; (2) that even if the High Court had overlooked the depositions of some of the witnesses, there was sufficient other evidence to justify them in finding that the existence of the alleged deed of sale was not proved; (3) that as both Courts had found the 29th Bysack as the date of Bebee Jan's death, the deeds of

The defendants, on the 23rd June 1864, appealed to Her Majesty in Council against that decision.

The case having gone back upon remand under the decision of the High Court, the then Principal Sudder Ameen, a Mahomedan, proceeded to try what was the amount of the dower. Many witnesses were examined on both sides, and he found that the Den Mohur was settled at one lac and eighty thousand, one moiety rupees, and the other gold mohurs, and he gave a decree for the plaintiffs for the amount claimed, viz., Rs. 1,625,000, with costs and interest. He came to that conclusion not only upon the evidence of witnesses who spoke to what actually took place, but upon the evidence of other witnesses, to whom he gave credit that the custom prevailing in the plaintiff's family and also in most of the other respectable families in Bhaugulpore, was in accordance with the amount which the other witnesses proved to have been actually settled in their presence.

On the 13th February 1865, an appeal was preferred by the defendants to the High Court against that decision. The case was heard before a Division Bench of the High Court, and the appeal was dismissed with costs.*

The defendant Mussamut Mulleka alone, on the 5th July 1866, appealed to Her Majesty in Council against the last mentioned decree of the High Court, the other defendant having compromised the claim against him.

We have therefore, under the two appeals before us, to consider whether the judgment of the High Court over-ruling the plea of limitation, and remanding the case, and the decision as to amount of dower are correct or not. Their Lordships are of opinion that a divorce was not proved. In this respect they concur in the finding of the High Court upon a question of fact. They intimated that opinion in the course of the argument.

It is now to be considered whether the suit was barred by limitation. In the first place we will consider whether it was barred if the dower was prompt.

The Principal Sudder Ameen on the first trial held that as the dower was settled without any specification as to the time at which it was to be payable, it must according to the Mahomedan law be considered to be Den Mohur Mohijul, to be paid, to use his own words, "on demand or immediately on demand by the wife." The High Court upon the first appeal considered the Mahomedan law to be precise, that if nothing is said at the time, the dower is to be considered exigible; but they held upon the authority of Ameerionissa's case,† 6 Moore's Indian Appeals, 211, that although the dower was exigible, the plaintiff Jumeela was not bound to sue for it during the life of her husband.

Their Lordships are of opinion that the Principal Sudder Ameen, who first tried the case and who considered that the dower was payable on demand, was not correct in holding that the cause of action accrued to the wife before dissolution of the marriage without demand. There are no doubt conflicting decisions as to the period at which a cause of action accrues to a wife in respect of prompt dower. Prompt dower is said to be exigible immediately. Macnaghten in his Principles of Mahomedan law, p. 59, says, "Where it has not been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." The word "exigible" implies that it may, not that it must be exacted, and therefore it would seem that a cause of action in respect of it does not accrue so long as the marriage exists, until the wife does something to show that she requires it to be paid. According to the Mahomedan law a woman may refuse herself to her husband as a means of obtaining so much of her dower as is prompt. (Baillie, Dig. of Mahomedan law, p. 125.) That is a mode of exacting it. But she is not obliged to adopt it. It is optional with her either to insist upon the payment of her prompt dower during her husband's lifetime, or to wait until the dissolution of the marriage.

In Meer Nujib Ollah v. Mussamut Doordana Khatoon, Macnaghten's Select

* 5 W. R. 23.

† See Appendix No. 1.

Cases, vol. i. p. 103, it was held that the right to prompt dower was barred by limitation in consequence of the period which had elapsed since the date of the settlement, although at the time of the commencement of the suit, twelve years had not elapsed since the husband's death. That decision was followed in *Noorunnissa Begum v. Nawab Syud Mohsin Alli Khan*, 7 Macnaghten's Select Reports, p. 40. In the case of *Nawab Jung Bahadoor Khan v. Mussamut Uzeez Begum*, *Sudder Decisions N. W. P. for 1845*, p. 180, the Court pointed out the distinction between a contract to pay on a stipulated date, and a contract to pay on demand, and said that, in the former case, should the obligor fail to pay on the stipulated day, a cause of action would then accrue for the recovery of the sum due, but that in the case of an obligation to pay on demand (which they considered an obligation to pay exigible dower to be) there was no infraction of the obligation, and consequently, no legal cause of action before demand. From the case of *Ameeroonissa v. Moraadoonissa*,* 6 Moore's Indian Appeals, p. 229, it would seem that the Lords of the Judicial Committee were of opinion that limitation in respect of prompt dower did not run from the time of the marriage but from the death of the husband. In that case there was a settlement by which the husband agreed to pay a dower when demanded by his wife. The wife was not suing for her dower, but was in possession of her deceased husband's property, and set up her right of dower in answer to the husband's heir, who sued to recover possession of the estate. In that case the Lord Justice, Knight Bruce, expressed the opinion of the Judicial Committee, that a wife was not obliged to sue her husband immediately or in his lifetime; and that limitation did not apply as a bar to her claim for dower.

If the principle of that decision be followed in the present case, the plaintiff is not barred by limitation.

In the case of *Simpson and Routh*, 2 Barn. and Cress. Reports, p. 682, which was referred to in the last-mentioned case, Lord Tenterden said, "In this as in other cases where a demand is necessary to give a right of action, the commencement of the action is not of itself a demand."

In Macnaghten's "Precedents of Mahomedan Law," p. 275, it is said, "The dower becomes due on the consummation of the marriage, or the death of either of the parties, or on divorce. Should the wife not claim the payment of it during the lifetime of her husband, it must be paid to her out of the property left by him on his decease."

Their Lordships are of opinion that the case of *Nawab Jung Bahadoor Khan v. Mussamut Uzeez Begum*, above cited, was rightly decided, and that in respect of prompt dower payable under the Mahomedan law, limitation does not begin to run before the dower is demanded, or the marriage is dissolved by death or otherwise.

In the present case, as a divorce was not proved, it is unnecessary to consider whether, even in the case of a divorce, a cause of action accrues in respect of deferred dower before the repudiation has become irrevocable, or the dower has been demanded.

Their Lordships having determined that there was no divorce, and that the suit was not barred by limitation if the dower was prompt, it becomes unnecessary to determine whether it was prompt or deferred; for the suit having been commenced within twelve years from the time of the death of Syud Mahomed, it was clearly not barred if the dower was deferred.

The question as to the amount of dower was one of fact, as to which their Lordships see no reason to interfere with the decision of the Principal Sudder Ameen, which was affirmed on appeal by the High Court. Their Lordships concur in the remark of the High Court:† "It may be true that the sum claimed and deposed to as agreed upon and customary is a very large sum; but the

* See Appendix No. 1.

† 5 W. R. 26.

Mahomedan law-books, the decided cases, and the experience of the country, show that it is a fact that sums so apparently beyond the means of the parties are fixed as dower amongst Mahomedans from the highest to the lowest."

There is nothing in the Mahomedan law to limit the amount fixable for dower. See 1 Macnaghten's "Select Cases," 275, and *id.* 48, in which the amount fixed was 300,000 gold mohurs. See also the same vol. p. 266. The above cases, it should be remarked, were decided upon the authority of futwas obtained from the Mahomedan law officers. In Macnaghten's "Precedents of Mahomedan Law," page 131, there is the opinion of Mahomedan law officers that a dower exceeding 150,000 gold mohurs, which absorbed the whole estate of the husband, took precedence of claims by inheritance.

No defence was set up in the Court of Original Jurisdiction, upon the ground that the amount fixed was a mere sham, and that neither of the parties intended that it was to be acted upon, and it is not for a Court of Appeal to suggest or give effect to such a defence when it was never raised in the Court of Original Jurisdiction, which, if the question had been there raised, might have laid down a distinct issue, and taken evidence upon the subject. In Macnaghten's "Principles of Mahomedan Law," case 35, p. 288, a very large amount of dower was upheld on a question put to ascertain whether the deed of dower was a mere device to prevent divorce.

The judgment of the Principal Sudder Ameen upon the trial after the remand was, "That a decree should pass in favor of all the plaintiffs, viz., 'Mussamut Jumeela, Summunt Koonwarree, and Mr. King,' to this effect, that they the plaintiffs do recover *the amount in suit* with interest and costs from the defendants in possession of the property left by Syud Mahomed, *in proportion* to their appropriations, as well as from the property left by the said deceased." No decree appears to have been drawn up upon that judgment, as it ought to have been. The High Court dismissed the appeal from that decision with costs. The judgment accordingly stands.

It appears to their Lordships that the judgment was not correct. Mr. King not having appealed from the first decision, viz., that of the Principal Sudder Ameen of the 8th March 1862, was not entitled to the benefit of the reversal of that judgment (11 Moore's Indian Appeals, 207),* and the judgment under the remand ought not to have been in his favor, but ought to have been limited to the 12-anna share, to which alone the appeal related. Further, their Lordships are of opinion that the decree is erroneous in awarding the demand against the defendants in proportion to their appropriations, and in rendering them personally liable to that extent in addition to the charge upon the assets. The defendants were not liable except as representatives of the deceased. As representatives they were liable for the whole debt to the extent of the assets received, and not duly administered by them respectively. It is not because an executor or heir has only three-fourths of the assets that he is liable only to three-fourths of the debt. He is liable to pay the whole debt so far as the assets in his hands will go.

Whatever the amount of assets, the proper form of decree against the two defendants, sued jointly as representatives, is that the plaintiff do recover the whole amount against the defendants as representatives of the deceased to be paid out of the property of the deceased. Each of the defendants would then be liable for the whole debt to the extent of the assets received by him, and the decree would be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of both or either of the defendants; and if no such property could be found, and the defendants should fail to satisfy the Court that they had duly applied such property of the deceased as should be proved to have come into their several possessions, the decree might be executed against the defendants respectively to the extent of the property not duly applied

* See Appendix No. 2.

by them in the same manner as if the decree had been obtained against them personally, or, in other words, by the attachment and sale of their own private properties. (Act VIII of 1859 s. 203.) If, however, the decree were against one of the defendants for three-fourths of the debt and against the other defendant for one-fourth, and the defendant against whom the decree of one-fourth was given should prove, under the execution, that he had duly applied the whole of the one-fourth of the assets which had come to his hands in payment of other just debts due from the deceased, the decree-holders could not levy more than three-fourths of the debt upon the other defendant, notwithstanding the assets in his hands might be sufficient to pay the whole debt, and thus they would be deprived of one-fourth of their demand, notwithstanding the rule of Mahomedan law that all the assets must be applied in payment of debts in preference to claims by inheritance.

If matters had remained as they were when the Principal Sudder Ameen gave judgment upon the trial after the remand, the decree might be set right by declaring that the plaintiffs, Jumeela and Summunt Koonwarree, do recover three-fourths of the amount of dower from the defendants as representatives of the deceased, to be paid out of the assets of the deceased. But it appears that one of the defendants, viz., Syud Mahomed Hossein, after the decree of the Principal Sudder Ameen under the remand and before the decree of the High Court upon the appeal against that decree, compromised the claim against him.

The solehnamah or deed of compromise was made between the plaintiff, Jumeela and Kassim Ally Khan, described as purchaser of the share of Beebee Jumeela, the plaintiff Summunt Koonwarree, Loknath Misser, and the defendant Syud Mahomed Hossein. After reciting that certain suits were depending between them, each of the parties renounced and relinquished every sort of claim, and declared that there remained no claim one against another. By paragraph 1 it was declared that out of the 16 annas of the property of the late Syud Mahomed, 12 annas had come into the possession of the defendant Syud Mahomed Hossein, and of purchasers from him, of which 5 annas and 9 pies came to the defendant Mahomed Hossein as his share, and the remainder, 6 annas and 3 pies, came to the plaintiff Mussamut Jumeela and others as their share (meaning that, by the terms of the compromise, they were to have a 6 anna 3 pie share). By paragraph 2 it was declared that out of the 6 anna share (meaning no doubt the 6 anna 3 pie share), the plaintiff Jumeela, and at the then present moment Kassim Ally Khan, who was stated to be the purchaser of her share, had accepted 2 annas; the plaintiff Mussamut Summunt Koonwarree, in lieu of the entire properties (that is, the shares of Jumeela's dower purchased by her), accepted a 3 anna and 6 pie share; and Loknath Misser, in lieu of his purchase, accepted a 9 pie share. These shares constituted the whole of the 6 anna 3 pie share of the estate of the deceased, which was given by the defendant Mahomed Hossein in satisfaction of the claim against him.

By the 9th paragraph it was declared that all differences existing between the parties to the compromise having been cleared up, thereafter no manner of claim whatever remained to be instituted one against another either regarding the payment of Den Mohur or the expenses of the suits therein mentioned, or for the recovery of wasilat (mesne profits) and each of the declarants renounced and relinquished the total expenses of all suits from the beginning up to the then present moment.

By paragraph 10 the parties agreed to file petitions of agreement in the cases of appeal to England and to the High Court, and the Zillah Courts and Mahomed Hossein relinquished the security bond in the case in appeal to the Privy Council.

Paragraph 11 was as follows:—

Since the conditions of this solehnamah are in accordance with the aforementioned detail regarding the 12 annas share, and the 4 annas share of the property left by Syud Mahomed has come into the possession of Mussamut Mulleka, the same has no concern with Hajee Mahomed Hossein and

others. It has therefore been settled between Mussamut Jumeela, Kassim Ally Khan, Summunt Kooeree, and Loknath Misser, that the whole or any portion of the 4 annas which may be acquired by the compromise, or in execution of the decree for the "Den Mohur," or by means of the institution of a suit for Mussamut Mulleka shall be partitioned into sixteen shares out of which Mussamut Summunt Kooeree shall take ten shares, and five shares Mussamut Jumeela and Kassim Ally Khan, and one share Loknath Misser.

In pursuance of the agreement in paragraph 10, the solehnamah was sent up to the High Court and was recorded and forms part of the record before us. It is set out at page 187 of the record.

The suit ought, according to the provisions of s. 98 Act VIII of 1859, to have been disposed of in accordance with the terms of the compromise. The decree of the High Court, after referring in express terms to the compromise, dismissed the appeal, and thereby in substance upheld the decision of the Principal Sudder Ameen of the 28th September 1864. It was certainly not in accordance with the compromise, for the decree of the Principal Sudder Ameen ordered the defendant Mahomed Hossein to pay a proportion of the debt and costs, and the decree of the High Court ordered him to pay the costs of the appeal though the plaintiffs had expressly renounced all costs.

It is important to remark that the 6 anna 3 pie share of the estate which was given by the defendant Mahomed Hossein in satisfaction of the claim against him, consisted of immoveable estate. Their Lordships know nothing as regards the value of the whole of the estate of the 6 anna and 3 pie share accepted by the plaintiffs in satisfaction of their claim against the last-named defendant.

It appears to their Lordships that the effect of the compromise was to release the defendant, Mahomed Hossein, and the 12 anna share or three-fourths of the assets which came to his hands, and consequently to release the other heirs and the remaining one-fourth of the assets from that portion of the debt which, as between the several heirs, ought to be borne by the three-fourths of the assets released, or, in other words, from three-fourths of the amount claimed. That is the construction which the High Court, by their decree, appear to have put upon the compromise. If the whole debt should be decreed to be levied out of the remaining one-fourth of the assets, the plaintiffs, having received a 6 anna 3 pie share of the whole estate, might still levy the whole debt, and thus obtain more than they are entitled to; and if the debt should be levied out of the remaining one-fourth of the assets, the defendant, Mahomed Hossein, would, as between him and the other heirs, be liable to contribute three-fourths of the amount so levied, notwithstanding the compromise by which he gave a 6 anna 3 pie share of the estate in discharge of the liability of the 12 anna share of the assets which came into his possession, and to enable him to retain, as against the plaintiffs, the other 5 anna 9 pie share of the assets. Their Lordships therefore think that in consequence of the compromise, the remaining one-fourth of the assets is liable for only one-fourth of the debt.

The shares of heirs cannot be ascertained until all debts have been satisfied. It is only the balance after paying all debts that, according to the Mahomedan law, is divisible amongst them. A compromise operates for the benefit of all those amongst whom the estate is divisible, and the balance is divisible amongst them. (See Baillie on the Mahomedan Law of Inheritance, 108.) If the compromise made by Mahomed Hossein by giving up to the plaintiff a 6 anna 3 pie share of the estate operated for his benefit alone, and to release the three-quarter share of the assets which he took by inheritance, the result would be that he might retain a 5 anna 3 pie share of the estate out of the 12 anna share which came into his hands, whilst the other fourth of the estate in the hands of Mulleka might be seized and sold for payment of the remainder of the debt, and thus be wholly absorbed. By these means Mahomed Hossein, as one of the heirs, would obtain a 5 anna 9 pie share of the estate whilst the other heirs would get nothing, which would be contrary to the principles of the Mahomedan law of inheritance.

It may be, and probably is, the fact, that even one-fourth of the debt will absorb the whole of the remaining one-fourth of the assets, and, if that be the case, the heirs of Mahomed Hossein may be called upon by the other heirs for contribution out of the 5 anna 9 pie share, which he retained under the compromise. If such should be the effect of the decree against Mulleka for one-fourth of the debt, it will be because the compromise did not intend to release more than three-fourths of the assets. This is clear from the 11th paragraph of the compromise.

The defendant Mahomed Hossein jointly with defendant Mulleka appealed to the High Court, but having compromised the claim against him he has not joined in the appeal to Her Majesty in Council. The consequence is that the decree of the High Court will stand against him, and he must avail himself of the compromise in such manner as he may be advised, should the plaintiffs endeavor to execute the decree against him. If he had appealed, he would have been entitled to have the suit disposed of in accordance with the compromise according to the provisions of s. 98 of Act VIII of 1859. In that case the decree must have been modified as against the defendant, Mulleka, and she cannot be deprived of the benefit of the compromise in consequence of Mahomed Hossein's not having appealed.

The decree of the Principal Sudder Ameen, of the 28th September 1864, upon the trial after the remand, and the decree of the High Court, of the 10th January 1866,* by which that decree was upheld, ought to be reversed. Mr. King's share of the amount claimed has already been disposed of in consequence of his not having appealed against the first decision of the Principal Sudder Ameen, of the 8th March 1862. Their Lordships are of opinion that the plaintiffs, Jumeela and Summunt Koonwarree, are not entitled to recover from the defendant, Mulleka, more than three-fourths of the one-fourth of the demand which has not been satisfied by the compromise, or, in other words, three-sixteenths of the whole amount claimed, but they are entitled to a decree against her as representative of the said Syud Mahomed, deceased, for three-sixteenths of the amount sued for, and three-sixteenths of the costs incurred in the Lower Courts prior to the appeal to the High Court, of the 13th February 1865, to be paid out of the property of the said Syud Mahomed, deceased, other than the 12 anna share, or three-fourths thereof, to which the said compromise related, and that the decree of the High Court, of the 31st May 1864, ought to be affirmed, but that, in consequence of the compromise, it should be modified as to the costs.

Considering also the mode in which so large an amount of dower was settled by the deceased without any writing, and the uncertainty which existed as to whether payment of it would amount to a due administration of assets, we think that the defendant Mulleka was justified in resisting the suit and taking the opinion of the Court, and that she ought to be at liberty to retain her costs incurred in the several proceedings in this suit, and in the appeals to Her Majesty in Council, out of any assets of the said Syud Mahomed in her hands after satisfaction of the sums awarded against her in this suit; and that such costs take priority of all claims by inheritance to any portion of such assets.

Upon the whole their Lordships will humbly advise her Majesty that the decree of the High Court of the 31st May 1864 be affirmed, except so far as the defendant, Mulleka, is thereby ordered to pay costs and interest thereon, and that the plaintiffs, Jumeela and Summunt Koonwarree, do recover against the defendant, Mulleka, as representative of the late Syud Mahomed, deceased, three-sixteenths of the costs and interest awarded by the said last-mentioned decree, to be paid out of the assets of the late said Syud Mahomed, deceased, other than that portion thereof to which the said compromise relates; that the judgment of the the Principal Sudder Ameen, of the 28th September 1864, and the judgment and

* 5 W. R. 23.

decree of the High Court of the 10th January 1866, so far as they relate to the defendant Mulleka, be reversed, with costs of the appeal to the High Court of the 13th February 1865, and that it be decreed that the plaintiffs, Jumeela and Summunt Koonwarree, do recover against the defendant, Mulleka, as representative of the late Syud Mahomed, deceased, three-sixteenths of the whole amount claimed in the suit, and three-sixteenths of the costs incurred by the plaintiffs in the Lower Court prior to the appeal to the High Court of the 13th February 1865, the said portions of the amount claimed, and of the said costs, to be paid out of the property of the late Syud Mahomed, deceased, other than that portion thereof to which the said compromise relates, and that such decree be without prejudice to the rights, if any, which the defendant, Mulleka, or any of the heirs of the late Syud Mahomed may have against the said defendant, Mahomed Hossein, in consequence of the execution or satisfaction of the said decree, and that the defendant, Mulleka, be at liberty to retain her costs of all the proceedings in this suit, and also of the appeals to Her Majesty in Council, out of any assets of the said Syud Mahomed, deceased, in her hands, after satisfaction of the sums awarded against her in this suit in preference to all claims by inheritance to such assets.

And their Lordships order that each of the plaintiffs, Jumeela and Summunt Koonwarree, and the defendant, Mulleka, do bear her own costs of the above-mentioned appeals to Her Majesty in Council.

The 15th January 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo law—Deeds of gift and adoption—Special appeal—Issues—Contracts—Damages—Specific performance—Declaratory decree.

*On Appeal from the High Court at Calcutta.**

Noggendro Chundro Mittro

versus

Sreemutty Kishen Soondory Dasseo.

Plaintiff sued defendant for himself and as guardian of his minor son (N) to set aside two deeds relating to the adoption of the said minor and alleged to be, the one, an agreement to give, and the other, an agreement to take, the child into adoption.

HELD that the deeds in form were not mere agreements to *give and take*, but deeds of gift and adoption, and that interchange was not necessary or important.

HELD that, if the defendant gave, or was willing to give, the child, the plaintiff had no right to sue for a declaratory decree on the ground that the deeds were null and void because of the non-performance of certain religious ceremonies.

HELD that the most important issue in the cause was whether there was an actual delivery of the child; but that as the Lower Appellate Court did not try that issue, the High Court was in error in deciding the case in special appeal upon that issue.

HELD that the deeds were not actually necessary to render the adoption valid; and if they were set aside, it might be proved *aliunde*.

The breach of an agreement by one of the parties is a ground for an action for damages, or for specific performance, but not a ground for setting aside the contract or declaring it null and void.

A declaratory decree is not a matter of absolute right, but may be granted or not at the discretion of the Court.

* From the judgment of Norman and E. Jackson, *J.J.*, in Special Appeal No. 2153 of 1868, decided 5th March 1869.—11 W. R., *Civil*, 196.

The appellant was the defendant, and the respondent the plaintiff, in the suit below. The suit was brought against the defendant for himself, and as guardian of his minor son, called in the plaint Noggendro Chundro Mittro, to set aside two deeds dated 30th Joistee 1271, relating to the adoption of the minor abovementioned.

The plaintiff was the widow of Dwarkanath Ghose, deceased, who died childless. There was no dispute as to the fact of her having received permission from her deceased husband to adopt a son. The plaintiff, in her plaint, described the deeds: the one, as a deed by which the defendant *agreed to give* the said Noggendro Chundro Mittro, his minor son, to her for adoption in the dattaka form; and the other, as a deed by which she *agreed to take* the said child into adoption. The case of the plaintiff was that, notwithstanding the deeds, the defendant refused to give the child, and that therefore the form of adoption had not been complied with. The case of the defendant (see his written statement) was that the deeds were not mere agreements, but that the deed executed by the plaintiff was a deed of adoption, and the deed executed by the defendant a deed by which he actually gave his son in adoption, and that the plaintiff actually took the child, after the completion of the necessary rites and ceremonies. He stated that the plaintiff could not recede from the deed of adoption, and that he, the defendant, could not act contrary thereto. He proceeded—"Now, when the said son, by virtue of his having been adopted, has obtained for himself and his heirs the legal proprietorship of the immoveable and moveable property, and has become the undisputed Malik of the estate (referring to the estate of the plaintiff's deceased husband) for ever, according to the precepts of the Shastras, in that case the plaintiff has no power to ignore the adopted son's rights; for the giving and taking when completed cannot be revoked, and the plaintiff has no right to undo that which she has done in obedience to the command of her husband, and the Court cannot interfere in that which the plaintiff has already done." Further, he contended that, from the terms of the deed executed by the plaintiff, it was clear that the child had been adopted, and that the necessary rites enjoined by the Shastras had been performed; that the child had ceased to belong to his, the defendant's gotra or family, and had been enrolled in the gotra of the plaintiff, and that the name and family name of the child had been changed from Mittro to Ghose after the family name of his adoptive father.

The deeds in form are certainly not mere agreements to give and take in adoption.

The deed of gift addressed to the plaintiff commences—"This is a deed whereby the child is given in adoption." Then, after reciting that the plaintiff's deceased husband, in consequence of his having no issue, had during his life given permission to the plaintiff to adopt a male child, and that the plaintiff had asked the defendant for a child to compensate for the said defect and to perform the funeral rites of the plaintiff and her husband, &c., proceeded in the operative part of the deed as follows:—

"I have willingly given in adoption my second son, Noggendro Chundro Mittro, by my third wife, Sreemutty Monmohinee, under the altered name of Soshee Nauth Ghose. The said male child with whom henceforth I have no right at all according to Shastras, and who has thus become divested of gotra appertaining to my family, and being equal to the son of your body, has thus become vested with family rights and gotra (lineage) appertaining to your husband's family, under the name of Soshee Nauth Ghose, will discharge or perform all the secular, as well as all the religious, duties of your husband's family, and will be the owner himself and his heirs for ever of all your husband's property, namely, his zemindary, and all immoveable as well as moveable property, and lands paying rent or rent-free, which stand in his own name or in benamsee, and which exist at present or may hereafter be acquired. For this effect, I have

executed the deed whereby the child is given in adoption with the following respectable witnesses, that it will prove efficacious in future."

The deed executed by the plaintiff addressed to the defendant, commences:—

"This is a deed of adoption. My husband, the late Dwarkanath Ghose, died without issue, leaving me his heiress, on the 30th June 1863, corresponding to the 17th Assar of the year 1270. My husband, in consideration of his having no issue in his lifetime, gave me permission to adopt a son for the due performance of the funeral rites of himself and of his ancestors, paternal and maternal, and of myself, and for the due observance and continuation of the religious ceremonies and other ancestral duties, and the other rites and ceremonies peculiar to his family, and fitted to his social position, and for the care of his property, &c., and for the preservation of his name and honor, had expressed his desire that the son so adopted might be the exclusive proprietor of all his property and zemindary, and that none else might have any right or title to his property. At present, in obedience to the aforesaid injunctions, and with the unanimous consideration and opinion of myself and my near relations and members of the family, knowing you to be my sincere and faithful friend, and believing that by means of your respectable family the objects aimed at by myself and my husband will be realized, *I do, with the prescribed rites and ceremonies, adopt as my son Noggendro Chundro Mittro*, your second son by your third wife, Sreemutty Monmohinee. The said Noggendro Chundro Mittro has thus become divested of all the rights and gotra (lineage) appertaining to your family, and has become vested for ever with the rights and gotra of my husband's family under the name of Soshee Nauth Ghose. By virtue of which he, having become equal to the son of my body, is become the owner himself and his heirs of all my husband's ancestral and self-acquired property which stands in his own name or benamee, namely, zemindary and lands, rent-paying as well as rent-free, and gardens, &c., and all the moveable and immoveable property, &c. He will henceforth perform, in the manner described above, the funeral rites, &c., of myself and my husband and of his (my husband's) paternal and maternal ancestors, and shall also perform the religious and family rites and other duties for ever. During his minority, I, his mother, shall take care of all his property."

The deeds having been executed and attested were both registered and made over to the plaintiff's mookhtar.

The case was tried before the Principal Sudder Ameen, and amongst others the following issues were laid down: Whether the adoption of the child was complete or not, that is, whether the requirements of the Hindoo law were carried out or the gift was not complete and the child not made over. Whether the defendant refused to make over the child to the plaintiff or not. Witnesses were examined on both sides, and several letters which passed between the defendant and Soorjonarayan Singh, the brother of the plaintiff, were put in evidence. The Principal Sudder Ameen found that no religious ceremonies were performed; he also tried as a distinct issue whether there was a formal delivery and acceptance of the child, and found that issue in the negative in favor of the plaintiff. He said:—

"It is true that the language of the instruments conveys the idea that there was gift and acceptance, as well as completion of ceremonies; but as the plaintiff denies them *in toto* a judicial determination on these points becomes necessary. It has been already established that the ceremonies were not performed; therefore it remains to be seen whether there was formal gift and acceptance of the boy, as well as due delivery of the deeds. If the witnesses of the plaintiff are to be believed, and I see no reason to doubt their veracity from their respectable position, neither was there gift or acceptance of the boy nor due delivery of the deeds."

It is not very clear what the Principal Sudder Ameen meant by the latter

words, "nor due delivery of the deeds," or by the words used in another part of his judgment in which he says:—"It has been established that the deeds are void for want of delivery." It is clear that he did not use the word "delivery" in the technical sense in which that word is used in England when applied to the execution of a deed. He probably meant that the deeds were not interchanged; but that was not necessary or important, if the deeds were deeds of gift and adoption, and not mere agreements to give and adopt. The deed executed by the defendant was delivered to the plaintiff. The fact that the deed executed by the plaintiff was retained by her and not handed over to the defendant would rather tend to show that at that time it was considered that the child had been adopted. For if the child was adopted, the plaintiff became his mother and guardian, and would naturally keep the deeds of gift and adoption on behalf of the child as evidence of the adoption, and as part of the muniments of her child's title to his adoptive father's estate. [Be this as it may, however, it is clear that the deeds were executed. They are admitted by the plaintiff in the plaint and by the defendant in his written statement. Indeed, if they were not executed, the suit was useless and must fail.]

In concluding his judgment the Principal Sudder Ameen said:—

"Summing up, therefore, what has been stated above, it is clear that there has not been a due performance of the ceremonies, and the effect of the deeds was that it was agreed that the child should be made over for adoption; but the defendant has not done what he was required to do, namely, to hand over the child to the plaintiff; it is, therefore, ordered that the suit of the plaintiff be decreed, and she be declared to be not bound by the deeds dated the 30th Joistee 1271, which are also declared cancelled and inoperative. The costs of the plaintiff to be paid by the defendant."

Upon that judgment the following decree was drawn up:—

"It is ordered that this case be decreed; that the female plaintiff may not be required to observe the document dated the 30th Jeyt 1271, which has been declared null and void; and that the costs of the female plaintiff be paid by the defendant."

The defendant appealed to the Judge upon the following, amongst other grounds:—

"6. That, according to Hindoo law, the Court below was wrong in supposing that more ceremonies than the actual giving and receiving of the child are necessary and essential for the completion of a *Sudra* adoption. The non-observance of any other ceremony does not invalidate a *Sudra* adoption, as will be borne out by Hindoo law and decisions.

"7. That, from the judgment of the Court below, it is clear that it has considered adoption in general, and not as a *Sudra* adoption only, which was the sole point for contention in this suit."

The 14th ground of appeal was—

"That the Court below was wrong in deciding that the delivery of the child and of the two primary documents were not proved, inasmuch as there was sufficient satisfactory evidence in the case to establish the same."

The appeal was transferred by the Judge to the Additional Judge. The latter did not try the issue whether there was an actual or formal delivery of the child or not. He said—

"We now come to the merits of the case. The *first* point to be noted is that the issue in this case has been unnecessarily widened. Appellant contended that ceremonies had been performed, and brought forward witnesses *who distinctly swore that not only the giving and taking, but a number of other religious rites, were performed*. It was, therefore, quite unnecessary on the part of the Lower Court to enter into the question of what rites are or are not essential to a Hindoo adoption. If the defendant's (appellant's) witnesses are to be believed, not *only*

essential but admittedly non-essential rites were performed. Defendant (appellant) must abide by the evidence which he adduces, and stand or fall with it. His virtual plea is that all or many of the ceremonies were performed. He cannot, in the same breath, urge that one only (that of giving and taking) was performed, and that one only is necessary to the validity of a Sudra adoption.

"If the above view is correct, the simple issue in this case is whether the ceremonies of adoption have been performed (as alleged by appellants) or have not been performed.

"The Lower Court has found, after a careful enquiry and weighing of evidence documentary and verbal, on either side, that no religious ceremonies of any sort were performed, and on the numerous grounds recorded in its judgment has expressed an opinion that defendant's witnesses are not to be believed, whilst plaintiff's (respondent's) witnesses are stating the truth when they say that no ceremonies have ever been performed. The Lower Court also lays great weight on certain expressions used in a letter from appellant, dated 13th Cheyt 1271, which contains, in the Lower Court's opinion, expressions justifying the inference that, by defendant's own admission, no religious ceremonies had been performed, and consequently no valid adoption had taken place. The question before the Court is whether the finding of the Lower Court on the above question of fact is correct or not. If it is, plaintiff's (respondent's) claim for cancelment of documents must be decreed, for it is admitted on all hands that an adoption deed is void in the absence of a religious ceremony or ceremonies.

"After a careful consideration of the evidence, both verbal and documentary, adduced on either side, the conduct of the parties, and the various probabilities and improbabilities which have been brought to the notice of the Court by the Counsel on either side, this Court has come to the conclusion that there is no valid reason for disturbing the finding of the Lower Court to the effect that no ceremonies were performed, and that consequently the deeds of adoption filed in the case are null and void.

"The appeal is, therefore, dismissed with costs."

The defendant appealed specially to the High Court.

The fourth ground of appeal was—

"4. If any ceremonies were essential, the legal effect and weight of the evidence show that such had been performed, and such evidence could not be affected by the failure of defendant's witnesses to prove the performance of other non-essential ceremonies."

That ground of appeal was clearly directed to that part of the judgment of the Additional Judge in which, after saying that, if the defendant's witnesses were to be believed, not only essential, but non-essential rites were performed, "he could not in the same breath say that one only—that of giving and taking—was performed."

It appears to their Lordships that the view taken by the Additional Judge was not correct. The question to be determined was not whether the child was legally adopted or not, but whether there was sufficient ground for setting aside the deeds or declaring them to be void. If the defendant gave the child, or was willing to give the child, the plaintiff had no right to sue him in order to have a declaratory decree that the deeds were null and void because certain religious ceremonies necessary to constitute a valid adoption had not been performed.

If the defendant executed the deed of gift, which was admitted, and formally delivered the boy, it was the plaintiff's own fault if she did not formally accept the child and cause the religious ceremonies to be performed. If she chose to execute a deed, declaring that the child had been adopted by her with the prescribed rites and ceremonies, when in fact the child had not been even given, it was her own fault.

The most important issue in the cause was whether there was a formal gift

of the child, or, in other words, whether there was an actual delivery of the child in addition to the execution of the deeds. That issue was not tried by the Additional Judge.

The defendant appealed specially to the High Court, and that Court held that it was not necessary to determine whether or not a *Sudra* can be adopted without the performance of religious ceremonies, and dismissed the appeal upon the ground that there was no actual giving and receiving of the child. They said—

“We see no necessity to go into the question whether or not a *Sudra* can be adopted without the performance of religious ceremonies, namely, the offering of the burnt sacrifice, &c.

“The contention of the special appellant is, that by the execution of two deeds, the one purporting to be a gift, and the other an acceptance of the child by the several parties respectively executing the deeds, there was a valid giving and receiving of the child, so as to make him the adopted son of the person who by these deeds appears to have accepted him as a son.

“We think there is no foundation for the argument of the special appellant. It appears to us that the giving and receiving of a son in order to constitute a valid adoption, must be an actual giving and actual receiving of the child.”

The High Court appears to their Lordships to have been in error in considering merely whether there was any valid adoption or not, instead of considering whether, if there was no adoption, it was owing to the fault of the defendant, or to the fault of the plaintiff herself. They also appear to have been wrong in holding on special appeal that there had been no actual giving of the child when the Additional Judge had not tried that issue. They say—

“By the grounds of special appeal filed, the appellant does not suggest that there has been any actual giving and taking of the child, but only a constructive giving and taking by the execution of the deeds. We think that, assuming the facts relied upon as regards such giving and receiving to be established, it is not shown that there was in this case any valid adoption. The change of name, supposed to be evidenced by the deeds, is not a sufficient overt act to show that the child was given and received.”

With reference to that statement it appears to their Lordships that the fourth ground of appeal to the High Court referred to that part of the decision of the Additional Judge in which he held that the defendant could not rely upon the giving and taking alone, and that the only issue was whether the religious ceremonies had been performed. The word “ceremonies” in the fourth ground of appeal to the High Court was clearly intended to include the actual giving and taking, or delivery and acceptance of the child, for the Judge treated this giving and taking as a ceremony, but as one upon which alone the defendant could not rely. The judgment of the Judge is far from clear, arising from the use of the words “ceremonies” and “religious ceremonies.” He treats the giving and taking as a ceremony, but whether as a religious ceremony is not clear. He finds that the decision of the Principal Sudder Ameen that no religious ceremonies were performed was correct, and afterwards speaks of the same finding as one to the effect that no ceremonies were performed. Looking to the fact that the finding of the Principal Sudder Ameen that there was no formal giving and taking was distinct, and in addition to his finding that no religious ceremonies were performed, their Lordships think that the Additional Judge did not try or determine the issue whether there was a formal giving and taking notwithstanding the fourteenth ground of appeal to the Judge. This being so, it appears to their Lordships that the High Court were in error in deciding the case upon the ground that there was no actual giving and actual receiving of the child.

In the case of *Sreemutty Joymoney Dossee v. Sreemutty Sobosoonderee Dossee* (Fulton's Reports, 75), it was held by the Supreme Court in Calcutta

that amongst *Sudras* no religious ceremony except in the case of marriage is necessary.

If the Judges of the High Court considered that this suit was maintainable if there was no valid adoption, they ought to have determined whether, in the case of *Sudras*, any religious ceremonies were necessary to render an adoption valid, and if they considered that religious ceremonies were not necessary, they ought to have directed the Judge to try whether there was a formal delivery of the child, or whether the defendant refused to deliver him, an issue upon which the defendant had appealed to the Judge from the finding of the Principal Sudder Ameen. If their Lordships thought that this suit could be maintained, they would now do what they consider the High Court ought to have done, but their Lordships do not consider that this suit is under any circumstances maintainable.

The suit is not to set aside the adoption, or to declare that there was no valid adoption, and thus to remove a doubt as to the child's title to the estates. It is merely to set aside the deeds. They were not actually necessary to render the adoption valid, and if they be set aside, the defendant or the child may prove the adoption *aliunde*.

It was stated by the Principal Sudder Ameen that the estates of the plaintiff's deceased husband were of considerable value, paying a rental of Rs. 40,000 a year. The suit was valued at only Rs. 1,500. The appeal to Her Majesty in Council was allowed upon the ground that the suit indirectly involved a claim to property of not less value than Rs. 10,000. The defendant pleaded that the suit was undervalued, but the Principal Sudder Ameen held that, as the pleader of the defendant had not argued the point, it might be presumed to have been given up. It would have been difficult for the defendant to contend that the suit, to have the deeds declared void, or set aside, was of greater value than Rs. 1,500. The case was accordingly tried as a suit of that value. The consequence was that the regular appeal went to the Judge, and only a special appeal to the High Court. If the suit had been valued at Rs. 5,000 the appeal to the High Court would have been a regular appeal, in which they, and upon appeal from them, this tribunal could have examined the evidence and determined the issues in fact.

If a decree be made declaring that the deeds are invalid, a suit may still be brought by the infant to try his title to the estates, and in that suit the evidence may have to be weighed by the High Court, and afterwards by the Judicial Committee of the Privy Council. It would be very unsatisfactory if the deeds should be declared void in the present suit, and the adoption should afterwards be upheld in a suit by the infant against the widow, or any other child who, upon the faith of a declaratory decree in this suit, may be given to the plaintiff in adoption, and be adopted by her.

No fraud on the part of the defendant has been alleged or proved; all that has been charged against him is that he refused to give the child, or to execute a deed in cancellation of the former deeds.

If the instruments operated merely as agreements to give and accept the child in adoption, as contended by the plaintiff, the breach by the defendant of his agreement to give would not render the deeds null and void. The breach of an agreement by one of the parties thereto is a good ground for an action for damages or for a specific performance, but it does not render the contract void or constitute any ground for setting it aside, or for declaring it to be null and void.

The cause of suit is stated in the plaint to have arisen on the 10th Choitro 1272, when the defendant "denied executing," meaning "refused to execute," an *ikrar-namah* in cancellation of the *ikrarnamahs* aforesaid. One of the plaintiff's objects, as stated in her plaint, in having the documents set aside, was to throw off the burden which was on her in consequence of the deeds. The High Court says:—

"There was no adoption. The natural father of the child now refuses to carry out his intention to give his child for the purpose of adoption. But the

deeds are capable of being at any time used by him or his son to prove that there was an adoption. Under such circumstances, it is clear that the plaintiff has a right to come to the Court to ask relief, and pray to have the deeds declared void. We interfere for the protection of her right to her husband's property over which those deeds would cast a cloud, which it is necessary for the plaintiff's security to remove."

Their Lordships have already alluded to the absence of any allegation or proof of fraud on the part of the defendant, and also to the absence of any finding by the Judge upon the issue whether the defendant formally gave the child or refused to deliver him. If the child was lawfully adopted, the estates of the plaintiff's deceased husband vested in him as son and heir, and the plaintiff ceased to have the estate of a Hindoo widow therein; she also ceased to have any power to adopt another son during the life of the child.

It has been held that under the 15th and 16th Vict., cl. 85, s. 50, a declaratory decree cannot be made unless plaintiff would be entitled to consequential relief if he asked for it (*Hooke v. Lord Kensington*, 2 K. and J. 756). S. 15 Act VIII of 1859 is in similar terms. The plaintiff, upon the facts found, is not entitled to any relief against the defendant. It has been shown that, treating the documents as mere agreements between the plaintiff and the father of the child, the plaintiff could have no right to maintain the present suit. Treating the instruments as deeds of gift and adoption, which their Lordships consider them to be, there is no consequential relief to which the plaintiff would be entitled against the defendant if the deeds be declared void. Though deeds of gift and acceptance are not actually necessary for the validity of an adoption, they are still evidence in support of the child's title as an adopted son, and of his rights consequent upon the adoption. In a case of conflicting evidence, in a suit brought on behalf of the child against an adopting mother in respect of her deceased husband's estate, a declaration by her, whether by deed or word of mouth, that she had adopted the child with all necessary ceremonies, would be strong corroborative evidence in the child's favor. In the present case there was conflicting evidence as to the fact of a formal giving and taking, as well as to the fact of the performance of the necessary religious ceremonies; and even upon the evidence of the plaintiff's own witnesses, notwithstanding the allegation in the plaint that the child has remained in the house of his natural father, it appears that the child, whether adopted or not, did reside for some time in the house of the plaintiff. There are also expressions in the letters from the plaintiff's brother, from which it might be inferred that the child had been adopted, and that the plaintiff was desirous to have the adoption cancelled. Their Lordships express no opinion upon the evidence with reference to the fact of adoption, as the case is now before them merely upon appeal from a decision of the High Court upon special appeal.

It is not a matter of absolute right to obtain a declaratory decree; it is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation.

The child is no party to the present suit, and any declaration made in it with regard to the validity or invalidity of the deeds will not be binding upon him if a suit be hereafter brought on his behalf against the present plaintiff respecting the estate of her deceased husband; nor would it be binding in any suit between the child and the reversionary heirs of the deceased husband after the death of the plaintiff; or between the child and any other child who, upon the faith of a declaratory decree in this suit, may hereafter be given in adoption or adopted by the widow; or between the child and his natural brothers, or any other person

who may hereafter claim to exclude him from the heritage of his natural father's property upon the ground that he has been adopted into another family. It appears to their Lordships that, under these circumstances, it would not be exercising a sound discretion, even if it could be done, to order the deeds to be cancelled or to set them aside or to declare them void. The defendant takes no interest under the deed of adoption. A declaration binding upon him only and not upon the child would be worse than useless, for it would not protect the plaintiff, or any child whom she may adopt, from any claims on behalf of the defendant's son to the estates; and it might induce some other person to give his son to the plaintiff in adoption and also induce the plaintiff to adopt another child when the declaration in the decree could not be of any possible use to them.

If the defendant's son was adopted, the defendant had no power to cancel the deed of adoption, or to give the plaintiff permission to adopt another son. Nor would his refusal to send back to the plaintiff her adopted son, or the fact of his harbouring him in his original home invalidate the adoption. Whether the child was adopted or not, the defendant was not bound to execute a deed in cancellation of the former documents, and his refusal to execute such a deed could not give the plaintiff a cause of action as alleged in her plaint, or rightly subject the defendant to the costs of the suit which have been awarded against him.

It was suggested that a suit against the father, in his own right and as guardian of his minor son, was tantamount to a suit against the father and the son. But that is not correct. If the son had been made a co-defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. In a suit by the plaintiff to set aside the deeds upon the ground that there had been no adoption, the plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the plaintiff the guardian of the child, if he had sued her for a declaration that the child had been validly adopted.

This is not a mere technical objection. If the father really refused to give the child in adoption, because he did not desire to have him adopted, he was not a proper person to protect the child's interest, or likely to make the best case on his behalf in a suit to declare the adoption invalid. In making these remarks their Lordships do not desire to impute to the father, in the present case, any neglect of his son's interests, for he appears to have desired to establish the adoption, and to have acted properly in refusing to execute a deed of cancellation when under the belief, whether right or wrong, that the adoption was complete.

The law is clear upon the subject of guardianship of male minors.

By Act XL of 1858, passed before this suit was instituted, it was enacted that the care of the persons of all minors (not being European British subjects), and the charge of their property, shall be subject to the jurisdiction of the Civil Court; and by s. 3 it is enacted that, where the property is of small value, the Court having jurisdiction may allow any relative of a minor to institute or defend a suit in his behalf. In other cases a certificate of administration is necessary.

The suit must be treated as one against the defendant, the father, alone; and for the reasons above given their Lordships will humbly advise Her Majesty that the decree of the High Court, and the decrees of both the Lower Courts, be reversed, and that the suit be dismissed, and that the plaintiff (the respondent) do pay to the defendant (the appellant) the costs of this appeal and the costs in all the Lower Courts.

It is hardly necessary to add that this decision will be no bar to the trial of the question whether the child was or was not duly adopted in any suit properly framed for that purpose.

The 21st January 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Jageer tenure—Possessory action—Onus probandi.

*On Appeal from the High Court at Calcutta.**

Maharajah Juggernath Sahee and another
versus

Mussamut Ahlad Kowur and others.

In a suit to recover possession of certain lands upon the ground that they were granted as a jageer tenure by plaintiff's ancestor to one P and his lineal descendants, and that such descendant had failed :

HELD, that it was necessary for plaintiff to prove the grant alleged in his plaint, without which no cause of action would have been shown : and as the tenure was created in the proper and usual manner, *i.e.*, by pottah and kubooleut, the latter would be in the possession of plaintiff's ancestors. As this was not produced, no secondary evidence given of it, and no foundation laid for giving such evidence, it was unnecessary to go further into plaintiff's case.

This was a suit brought by the plaintiff to recover possession of certain lands upon the ground that those lands were granted by an ancestor of his to one Pryag Roy to be held in jageer tenure, that is, to Pryag Roy and his lineal descendants, that Pryag Roy's lineal descendants had failed, and therefore the plaintiff was entitled to resume possession.

A good deal has been said on the subject of the burden of proof in this case. It is manifest that the plaintiff could not, by merely alleging that a grant had been made and that that grant had failed, entitle himself to a decree ; some burden of proof must rest upon him : and the only real question is, what amount of proof could be reasonably expected from him, so as to shift the burden of proof upon the defendants. Their Lordships are clearly of opinion that it was necessary for him to prove the grant which he alleged in his plaint, without which the plaint would have shown no cause of action, namely, a grant to Pryag Roy ; for on whomsoever the burden of proof may lie with respect to the subsequent part of the case, whether it lies on the plaintiff to prove that the descendants of Pryag Roy had failed, or upon the defendant to prove that they still lived, it is necessary to ascertain to whom the grant was made, in order to determine the subsequent question to be tried, namely, whose descendants have or have not failed.

It appears by the plaintiff's own showing that this tenure was created in the proper and usual manner, namely, by a pottah and kubooleut, the pottah being the grant itself, which would be presumed to be in the possession of the defendants,—the kubooleut being also an original document, whereby the grantee acknowledges the grant, and that he holds upon the terms of the grant ; this would be in the possession of the ancestors of the plaintiff, and would be expected to be found among his muniments of title. The plaintiff alleges that such a kubooleut did exist, but he has failed to give any proof of it whatever. He has not produced the kubooleut ; he has not given secondary evidence of it ; he has not even laid the foundation for giving secondary evidence, if he had secondary evidence of it in his possession. He does not call anybody who has the custody of his muniments of title, or who is acquainted with them or with their

* From the judgment of Loch and Glover, *J.J.*, in Regular Appeal No. 279 of 1867, decided 19th May 1868.

place of custody, for the purpose of showing that search has been made, and that no such kubooleut has been found. Indeed, it is not inconsistent with the plaintiff's case that such a kubooleut or some kubooleut under which this property was granted may at this moment be in his possession. He has contented himself with putting in certain criminal proceedings instituted by him in 1842 against his then Canoongoe, wherein he complained that the Canoongoe had abstracted his records. It appears by those proceedings that the Canoongoe was convicted and sentenced to imprisonment until he should deliver them up, but it is not shown that that sentence was ever executed, or if executed to any extent whether it had or had not the effect of inducing the Canoongoe to give up all or any of the records. But it would appear from this proceeding, that, at all events, according to the plaintiff's showing, the kubooleut was in existence at no very distant time, namely, in the year 1842; and it appears to their Lordships that there would be, or ought to be, no very great difficulty in proving that such a kubooleut did then exist, and that it was one of the documents which were abstracted by the Canoongoe (if, indeed, it were so abstracted); because in these criminal proceedings no less than three witnesses were called, who gave a general description of the documents said to be abstracted, though they do not, indeed, specify this. None of these witnesses are now called, nor is any explanation given of their not being called. It is not shown whether they are dead or absent, or whether it is impossible to call them; and the plaintiff himself, who instituted these very proceedings, and who may be supposed to be cognizant of a document of such importance, if it existed among his records, does not think fit himself to give evidence.

Under these circumstances there is an entire failure of proof of the kubooleut. No evidence either primary or secondary is given of it, nor indeed, as before observed, has even the foundation been laid for giving secondary evidence.

But it has been contended on the part of the plaintiff that the absence of this proof may be supplied by other evidence in the case. It is said that the nature of the tenure is proved by the admissions of the defendants, and so far their Lordships are disposed to agree with the Counsel for the plaintiff. But then it is further alleged that it has been shown that Pryag Roy was the first person in possession of this property under the grant. And if it had appeared that Pryag Roy was in fact the first jagheer in possession of this property, and that it had descended from Pryag Roy through father and son to the last owner, Deo Persaud, then it might have been that some evidence was given of the nature of the tenure and of the person to whom it was granted, independently of the kubooleut, so as to shift the proof upon the defendants; but their Lordships are of opinion that it is not proved that Pryag Roy was the person originally in possession, and that, therefore, the absence of the kubooleut is not supplied by evidence of the description referred to.

That being so, in their Lordships' opinion, the plaintiff has altogether failed to prove the very foundation of his case, namely, the grant to Pryag Roy; and therefore it becomes unnecessary to consider the questions which would have arisen if he had given this proof. It becomes unnecessary to determine whether or not the descendants of Pryag Roy have failed, or on whom the burden of proof lies with respect to this issue. It is unnecessary to determine whether or not the defendants have shown that the grant was, as they allege, made to Anund Roy, or to determine the truth or falsehood of the charge of forgery which has been preferred against them. If indeed the plaintiff had given any evidence whatever whereby he brought himself into Court, then the conduct of the defendants might have been material, for in such a case proof of the fraud and forgery on their part might have assisted the plaintiff's proof; but until the plaintiff has given evidence sufficient to bring himself into Court, all the subsequent questions become immaterial and unnecessary to be enquired into. This their Lordships

understand to have been substantially the view of the High Court, who declined to go into these questions.

For these reasons their Lordships are of opinion that the plaintiff has failed to prove his case, and that the judgment of the High Court is right; and they will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 22nd January 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Adverse possession—Declaratory decree—Act VIII of 1859 s. 15.

On Appeal from the High Court at Bengal.

Sadut Ali Khan

versus

Khajeh Abdool Gunnee ;*

and

Khajeh Abdool Gunnee

versus

Mussamut Zamoorudoonnessa Khanum.†

A sharer (K) in a zemindary having been unsuccessful in proceeding against the holder of a sub-tenure to enhance its rent, and doubt having been thrown on his zemindary title, brought a suit to establish his right of enhancement. The holders of the tenure contended that even if the zemindary right had passed to him by purchase, he had never received rents, and his claim was barred by limitation. And with reference to a compromise, under which at the close of a former litigation, a certain sum had been paid to K as mesne profits, it was argued that the last item of the rent of the sub-tenure, entering into that sum, must have accrued more than twelve years previously :

HELD that the payment of the sum within the twelve years was evidence of a recognition of title sufficient to exclude the notion of an adverse possession for more than twelve years :

HELD that the High Court had exercised a sound discretion in entertaining a suit for a declaratory decree where a zemindar, who in a suit for enhancement had had his zemindary right denied, came into Court to have that right ascertained and declared :

HELD, with reference to s. 15 Code of Civil Procedure, that where a declaratory decree is sought without consequential relief in the same suit, the Court must see that the declaration of right may be the foundation of relief somewhere, and that that condition was sufficiently met in the present case.

In delivering judgment upon these appeals their Lordships think it necessary, in the first place, briefly to review the history of this litigation.

Fyz Ali Khan, a Mahomedan zemindar in the district of Mymensingh, died on the 16th December 1824, leaving two widows and a son. The son is the appellant in the first, and the husband of the respondent in the second appeal.

The widows were Shumsoonnassa and Reazon, who was the mother of the appellant Sadut Ali Khan. Fyz Ali Khan, upon the occasion of his marriage with Shumsoonnassa Begum, had contracted to give her a certain dower, of which one-third was to be prompt; and it appears to have been agreed on the same occasion, that he should in satisfaction of that portion of the dower which was

* From the judgment of Loch and Hobhouse, J.J., in Regular Appeal No. 128 of 1867, decided 4th February 1868.

† From the judgment of Phear and E. Jackson, J.J., in Regular Appeal No. 34 of 1870, decided 26th August 1870.

prompt, make over to her, as he accordingly did make over by a kabinnamah, twenty-two villages forming part of his zemindary. A partition was then in the course of being made between him and his co-sharers in the larger zemindary of which that property which, for the purposes of this suit, may be called his zemindary, was part; on that partition three of the villages comprised in the kabinnamah fell to the lot of one of his co-sharers; and it is contended on the part of Sadut Ali, that thereupon an ikrarnamah was, a year after the marriage, executed by Fyz Ali, by which he substituted three other villages forming part of his zemindary in the place of those three villages, and created a sub-tenure or dependent talook out of the twenty-two villages as then constituted under the name of Russoolpoor, on which he received a gross rent of Rs. 49.

In the second suit a considerable contest has been raised as to the genuineness of the ikrarnamah, but it is perfectly certain that by some means or another the substitution of the three new villages for the three former villages did take place; and that whereas the kabinnamah was silent as to the reservation of any rent, the twenty-two villages were afterwards held upon the terms of paying a rent of Rs. 49.

It will be more convenient, since it is necessary to keep the two appeals in some measure distinct, to consider the objections made to the genuineness of the ikrarnamah when their Lordships come to consider that suit, and to assume that either by the ikrarnamah or some other means, the twenty-two villages really did, become a sub-tenure paying one rent of Rs. 49.

Immediately upon the death of Fyz Ali there began a litigation concerning his estate, which has continued nearly up to this time, and constitutes an amount of litigation concerning one estate which one would vain hope is singular even in India. Their Lordships do not think it necessary to go through the history of that litigation further than may be required in order to show the precise relation in which the parties to these appeals stand to each other.

The first suit was brought by Reazoon Begum, on her own behalf and as guardian of her infant son Sadut Ali, against Shumssoonnessa Begum, who had got into possession of the whole estate and had called in question the marriage of Reazoon with Fyz Ali and the legitimacy of Sadut Ali, in order to establish the right of herself and her son to share in the estate.

That suit went through all the Indian Courts, and was ultimately brought before this Committee. In 1844 Her Majesty made a final order affirming the decisions of the Indian Courts, which were in favor of the rights claimed by the plaintiffs.

Pending that litigation, Khajeh Ali Mollah, the father of the party who is the respondent in the first appeal and the appellant in the second appeal, had made advances to Reazoon for the purpose of enabling her to carry on her suit; and, as is usual in India, those advances ended in an arrangement by which she agreed to give him one moiety of what should be recovered in that suit. That agreement was afterwards confirmed by Sadut Ali Khan upon obtaining his majority; and there is no question now upon the present appeals that it was a good and binding agreement, and that it was the foundation of the title of the present Khajeh, who has succeeded to the rights of his father.

It is not immaterial, with reference to some of the arguments which have been addressed to their Lordships at the bar, to observe that although the agreement was originally for one moiety, which would be $7\frac{1}{2}$ annas of the 15 annas which were finally decreed to the mother and her son, the Khajeh, upon a representation founded on the existence of the sub-tenure and the poverty of Reazoon and her son, agreed to waive his rights as to half an anna, and that the ultimate arrangement was that he should take only 7 of the 15 annas. It is, therefore, clear that the ultimate contract between the parties was made with a full knowledge of the existence of the sub-tenure. And if matters had remained as they

then were, the rights of the parties would have stood thus: Reazoon Begum would have been entitled to one anna of the zemindary right; Shumssoonessa Begum would have been entitled to another anna of the zemindary right and also to the talookdary interest in the villages; Sadut Ali Khan would have been entitled to seven annas of the zemindary right; and Khajeh Abdool would have been entitled to seven annas of the zemindary right.

It had been expressly provided by the original decree of the Sudder Court, which was affirmed by Her Majesty in Council, that the villages which formed the sub-tenure were to be taken as separated from the corpus of the estate, subject of course to any rent which might be payable in respect of them to the zemindars; and the division of the assets of the zemindary between Reazoon and her son on the one side, and Shumssoonessa on the other, was accordingly made on that footing.

The position of the parties, however, was afterwards changed. Shumssoonessa Begum had died pending her appeal to Her Majesty in Council. It was prosecuted by her heir and brother Hedayetoolah; and he having failed to pay, pursuant to the order in Council, the costs of the appeal, her interest in Fyz Ali's estate which had descended to him, and of which he was then in possession, was attached and put up to sale. It was bought by Sadut Ali, who afterwards transferred the sub-tenure, and possibly the whole of what he bought, to his wife, who is the respondent in the second appeal.

There is some evidence that in the first instance the Khajeh was put into some kind of constructive possession of the seven annas of the zemindary which had been assigned to him. Disputes afterwards took place between the parties, and he found it necessary to bring a suit in order to enforce his rights under the purchase. In that suit a final decree was made in his favor in 1853. Thereupon the rights and position of the parties seem to have been as follows:—The wife of Sadut Ali Khan, Zamoordoonessa, as the holder of the sub-tenure was entitled to the beneficial interest therein; but whatever rent was payable by her to the zemindary was divisible between those entitled to the zemindary according to their respective shares; the appellant being entitled to seven annas of that rent, whatever it might be. As soon as the decree had been made in his favor, he seems to have conceived the notion that he was entitled as zemindar to enhance that rent; and he took proceedings on two occasions, before he brought the suit which has given rise to the first appeal, in order to establish his right to enhance. He was unsuccessful upon both occasions; and upon the last, doubt was thrown upon his title to claim a zemindary right in respect of the villages included in the sub-tenure. Thereupon he instituted the suit out of which the first appeal has arisen. The defendants in that suit, Sadut Ali Khan and his wife, although, as will presently be shown, they had on a former occasion admitted the plaintiff's right to share in the rent reserved on the twenty-two villages, saw fit to contest that right, and alleged that no zemindary right in respect of the village had passed under the purchase to Khajeh Ali Mollah.

They also contended that if any had passed, the plaintiff had never received any rents, and that by reason of his non-reception of any share of the rent for a period of more than twelve years, his suit was barred by limitation. Formal issues were settled to raise these defences, and the cause was tried upon them. These were the real points upon which the case was fought in the Courts below; and it has now been admitted at the bar by Mr. Leith that he cannot support the first of them. It is then conceded that, by reason of the transfer to the Khajeh of the seven annas share in the zemindary, he became entitled to a proportionate share of the Rs. 49 reserved upon the twenty-two villages.

It was however contended and fully argued by Mr. Doyne that the suit was barred by the Statute of Limitations. Their Lordships have fully considered the able argument that was addressed to them upon that point, and they are not

satisfied that the Statute of Limitations was a bar to the suit. The circumstance which was chiefly relied upon by the High Court and made the principal ground of their judgment, was that in the course of the suit which the Khajeh brought to enforce his rights under the agreement for purchase, a large sum for mesne profits became due from Sadut Ali Khan to him ; that ultimately there was a compromise between them which fixed the amount to be paid at, I think Rs. 70,000, which sum was actually paid to him within the twelve years. It was argued, however, by Mr. Doyne that the last item of the rent of the villages which could have entered into the sum for which that compromise was made must have been rent which had accrued more than twelve years before the commencement of the suit. Their Lordships are nevertheless not disposed to dispute the view of the High Court that the payment of the sum taken to include the arrears of that rent within the twelve years was evidence of a recognition of the title of the Khajeh to the rent, which is sufficient to exclude the notion of an adverse possession for more than twelve years before the institution of this suit.

The case, however, of the respondent does not appear to their Lordships to depend solely upon that admission. There has been throughout this long litigation a good deal of what one may call blowing hot and cold ; and it certainly appears that, in the first of the proceedings which were taken anterior to the suit for the purpose of enhancing the rent, the contention of the defendants was this :—" True, you are entitled as zemindar to a proportionate share of the existing rent of this talook, but you are not entitled to enhance that rent." Therefore it appears to their Lordships that this is not a case to which the Statute of Limitations could fairly or properly be applied.

That disposes of the points which were really the grounds of defence taken in the Courts in India. It was, however, strenuously argued that the suit ought to fail because it is a suit for a mere declaratory decree seeking no consequential relief. And the objection, as their Lordships gather, which was so taken at the bar was twofold ; first, that no such suit would lie unless some consequential relief could be granted as ancillary to it ; and secondly, that to entertain such a suit is a matter of discretion in the Court, and that the Court had in this instance exercised its discretion unsoundly.

Now, with respect to the last of these objections, it might be sufficient to say that if the High Court has exercised its discretion in a matter wherein the law gives it a discretion, their Lordships would not upon light ground interfere with the exercise of that discretion. Nor assuming that there was a discretion to entertain the suit, do their Lordships think that in this case it was unsoundly exercised. The respondent in his last suit for enhancement had been turned round on the ground that he had not any zemindary right in these villages, and he naturally came into the Civil Court in order to have that right ascertained and declared. And if his suit had been dismissed after the parties had joined in the issues in which they did join, the decree would have been a bar to his right to recover even his proportionate share of the rent of the Rs. 49.

Their Lordships have now to consider the first objection.

It must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit ; otherwise s. 15 of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision of the English Statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is

now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindary title.

Therefore upon both grounds it appeared to their Lordships yesterday on the close of the appellant's case that he had failed to show any reason for disturbing the decision of the High Court in the first suit, and that the decree which was the subject of this appeal ought to be affirmed.

Now, it is not unimportant with reference to the second appeal to see what that decree was. It is in these words:—"It is ordered and decreed by the said Court that this appeal be decreed, and the decree of the Lower Court be reversed. And it is declared that the twenty-two villages in the suit comprise a tenure situated within and being part of and paying a rent of Rs. 49 to the proprietors of the zemindary No. 10 on the towjee of the Collector of Mymensingh, comprising five annas, one gundah, one cowrie, and one krant of Pergunnah Ateeah. And it is further declared that plaintiff is a proprietor of seven annas out of fifteen annas of that zemindary, and that as proprietor he is entitled to a share of the rent of this tenure in proportion to his interest in the estate." It seems to their Lordships impossible for the appellant who was the plaintiff in the second suit to go behind that decree, and to say that the twenty-two villages did not constitute a tenure within the zemindary, on which a gross rent of Rs. 49 was reserved to the zemindars.

Having got this decree the Khajeh proceeded to bring his suit for enhancement against Zamoorudonnessa Begum as the holder of the tenure. Among the issues settled in that suit there were these:—1st. Whether the notice had specified the particulars required by law to be specified, and whether it had been duly served. And the second, which was the material one, is in these words:—"Are the villages in question liable to enhancement of rent as stated by the plaintiff, or fit to be exempted from increased assessment, being held by defendant at a fixed rate in perpetuity under a lekhun granted by the former zemindar." The notice, it was admitted, was a notice which was necessarily given under s. 13 Act X of 1859. In the view their Lordships have taken of the second issue, it is not necessary for them to consider whether that notice was sufficient. The Deputy Collector who tried the case in the first instance considered that it was sufficient. Some doubt was thrown upon that by Mr. Justice Phear in the High Court. He seems to have considered it insufficient; but their Lordships think it will be far more satisfactory to decide this case upon its merits, and the question raised by the second issue, viz., whether the rent is enhanceable or not, in a suit regularly framed.

The foundation of the tenant's title was the kabinnamah; and the transaction upon the face of the kabinnamah was a transfer of the twenty-two villages included in it to Shumsoonessa in satisfaction of the one-third of her agreed dower. It did not reserve any rent whatever. It did not make any mention of or provision for the payment of the Government Revenue payable in respect of those particular villages; and though it did not contain any words of inheritance in the strict sense of the term, it did not contain any express direction that the enjoyment of the villages granted should be limited to any particular time. The nature of the transaction affords strong ground for the conclusion that the villages were intended to be made over absolutely, and for all time; because the woman was entitled to the third of her dower absolutely. She might have disposed of that as she pleased; and when in lieu of that she took a grant of the villages the presumption is that she was intended to take an absolute interest. Again, the hereditary nature of her interest seems to be almost put beyond a doubt by the decree in the first suit, which is the foundation of the Khajeh's title, because, when she died, her heir, who was appointed to carry on the suit in her place, did so, and the decree contains a direction concerning these villages, notwithstanding her demise, which implies

the existence of the tenure. Nor does the hereditary character of the tenure seem to have been disputed up to the present time.

It may seem strange that no provision was made expressly in the instrument for the payment of the Government Revenue. But the zemindar may have been willing to take the whole of the Government Revenue upon himself; and his doing this may have been an element in the settlement of the terms upon which the third of the dower was to be given up. Of course such a transaction might be impeached by a purchaser of the zemindary for arrears of Government Revenue. But it is nevertheless good against all who claim title under Fyz Ali Khan.

Nor can the fact that the instrument is silent concerning the payment of the Government Revenue affect the questions raised by this appeal; because even if the grant be taken to be a grant of the villages subject to the payment of the Government Revenue, and the zemindar may have paid the Government Revenue on account of the tenant, his right to recover what he had so paid could not enter into a suit for enhancement of rent, but would be a matter for which he must seek his remedy in a Civil Court.

The question of the ikrarnamah is now to be considered. Their Lordships find that the validity of this instrument has been affirmed by the concurrent judgment of both the Indian Courts. They do not deny that there may be circumstances which throw some suspicion upon it, or that it is a document which has not satisfied all the officers before whom it appears to have been produced; but upon the whole they can see no sufficient grounds for disturbing the finding of the Courts below. The plaintiff cannot be heard to say that there was not a substitution of three villages for three of those included in the kabinnamah; or that the twenty-two villages were not afterwards held as a sub-tenure on which a rent was reserved. He comes into the Court, having got a declaration in the other suit that such was the fact, and alleging that by reason of it the relation of landlord and tenant subsisted between him and the defendant, and he fails to show by what means other than the ikrarnamah the substitution of the villages and the creation of the tenure took place.

Therefore, it seems to their Lordships that they must accept the ikrarnamah as established, and act upon it accordingly. If they do that, it appears to them that inasmuch as the ikrarnamah declares the rent to be permanent, the case for enhancement altogether fails, and that the decree of the Indian Courts in the second suit ought also to be affirmed.

The result will be that their Lordships will humbly advise Her Majesty to affirm both the decrees under appeal, and to dismiss each appeal, with costs.

The 23rd January 1873

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Deed of sale—Consideration money—Onus probandi.

On Appeal from the High Court at Allahabad.

Nawab Syud Allee Shah

versus

Mussamut Anianee Begum.

In a suit to recover the balance of purchase-money, alleged to have been due upon the sale of a

decree, where plaintiff's case was that the consideration-money was not paid, but a *rooqua* given for it, payable when the mutation of names took place :

HELD, that the *onus* of proving non-payment was thrown upon plaintiff in consequence of the acknowledgments she had made of the receipt of the whole purchase-money, viz., an admission which was made, and recorded under Act XX of 1866, at the time when the deed was registered, and again an acknowledgment made in the petition presented to the Court which made the decree for mutation of names.

Although, when a deed of sale containing an acknowledgment of payment is written, payment is not made, it may become an acknowledgment afterwards, *i.e.*, when the deed is handed over.

This was a suit brought by the respondent Mussamut Amanee Begum, against the Nawab Syud Allee Shah, to recover a sum of Rs. 13,000 as the balance of the purchase-money which she alleges was due to her upon a sale made by her to the Nawab of a decree which she had obtained in the Courts in India. Her statement is that the price which was agreed to be paid by the Nawab for the decree was Rs. 14,000; that she received Rs. 1,000 only of that amount, and that the remainder was left in the hands of the Nawab. She not only denies the payment in fact, but she sets up an affirmative case. She says that a note under the seal of the Nawab was given to her for Rs. 13,000, which was to be paid off when the mutation of names took place. Therefore, her case is that the consideration-money was not paid, but a *rooqua* given for it, payable when the mutation of names took place. Now, although in a general way, it may be said that the proof of the payment of the consideration lies upon the party who asserts the payment, their Lordships think that in this case the onus of proof was shifted and thrown upon the respondent in consequence of the acknowledgments she had made of the receipt of the whole purchase-money. Their Lordships think it is impossible to say that all those acknowledgments are merely formal; some of them seem to have been regular admissions made in a formal way of the receipt of the money, and which were intended to be and were acted upon.

The deed of sale bears date on the 1st February 1868. It contains the agreement to sell the half of the decree, that half being stated to be Rs. 16,956, and it contains an acknowledgment of the payment of the whole consideration. Now it is to be observed that this acknowledgment may, after the deed has been delivered over or registered, amount to an admission of the payment; although at the time when it was written, payment obviously was not made, for it is written in with the rest of the deed, and the deed was clearly written and executed by the respondent before the money was paid. However, that is perfectly consistent with its afterwards becoming an acknowledgment of the payment of the money, because, although the money was not paid at the time the deed was written, and whilst the deed remained in the hands of the respondent or of her agent, it was of course inoperative for any purpose, it may be inferred that the deed would not have been handed over until the money was paid; but undoubtedly it would seem from the observations of the Subordinate Judge and the Judges of the High Court that it is not unusual that such deeds should be handed over, although the consideration-money be not paid.

But the acknowledgment of the payment of the whole purchase-money does not rest upon the deed of sale; on the contrary, there are two subsequent acknowledgments which appear to their Lordships to be entitled to greater consideration and weight. The deed was registered on the 17th February, a fortnight after its date, and at the time of the registration, Abdool Humeed, who was the agent of the respondent, and her son-in-law, made an admission, which is recorded, that the whole consideration-money was received "in cash in a lump." It appears that that admission is one which, if made, the Indian Registration Act of 1866 requires the Registrar to record. S. 65 of that Act, which relates to the procedure on admitting the registration, enacts that "on every document admitted to registration there should be endorsed from time to time the following particulars;" and amongst the particulars is this:—"Any payment of money or delivery of

goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration made in his presence in reference to such execution." Thus the Legislature has thought it desirable that the public register should contain a record of any payment that takes place in the presence of the registering officer, and of any admission of payment made in his presence in reference to such execution, and requires him to record it. The acknowledgment was made and recorded in pursuance of this Act, and the presumption ought to be in favor of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it.

Their Lordships do not say that an admission so made is conclusive, but still it ought to afford a strong presumption of truth, and throw upon him who makes it, when he comes to impeach such an acknowledgment, the burden of satisfying the Court, by strong and cogent evidence, that it was made under some circumstances of mistake or error. Nothing of the kind appears here, and one does not see why the admission should have been made in this case unless it were true, because it was not necessary for the purpose of the registration, the Act only requiring that, if the admission be made, it shall be recorded.

But the evidence of acknowledgment does not stop there. A further act was necessary to perfect the title of the appellant, namely, the mutation of names in the Court which had given the decree, and accordingly, on the 3rd March, a petition was presented to that Court by Abdool Humeed, which again contains an acknowledgment of the payment. That petition states the sale of the decree, and contains an allegation that the Mussamut had received the consideration-money from the purchaser, who had become the proprietor of her half-share, and upon that petition her name was expunged and that of the purchaser of the decree recorded in her place. There seemed to be again no necessity for making this acknowledgment, for the name might have been changed, for anything which appears, without such a statement, but it is made, and that so late as the 3rd March, more than two months after the transaction.

It seems, therefore, to their Lordships that the onus was thrown upon the respondent to prove that the money was not paid. She sets up that this *rooqua* was given, and that the money was to be paid when the mutation of names took place, and was not paid. Then her case is that in the following October the Nawab came to her moulvee and asked him for the note, as if he was going to pay it off and having obtained possession of it, said, "I cannot pay it until you come to Meerut;" and when the moulvee went to Meerut he refused to pay at all. That, no doubt, would be a gross fraud on the part of the Nawab, but fraud is not to be presumed, and must be proved by satisfactory evidence. The evidence is of the most meagre description. The witnesses who speak to the Nawab having thus obtained possession of the note do not say that any remonstrance or any objection was made at the time. They simply say that he so obtained the note, and then said, "Come to Meerut, and it shall be paid."

The Nawab, who was examined as a witness, was asked no questions upon the subject in cross-examination. It seems to their Lordships that the Judge of first instance came to the right conclusion in finding that he could not give credit to the story of the note. Then, if credit cannot be given to that transaction, it seems to their Lordships that none can be given to the rest of the case of the respondent. She has set up an affirmative case which is entirely untrue; and when that has been done, there is the strongest inference that the fact of payment which that affirmative case was intended to refute is a fact which, but for the attempted refutation, she knew would be established against her by the evidence upon the other side. When we come to the evidence of the fact of payment, witnesses are called on both sides, and observations may be made on all of them. They were connected with the parties on the one side or on the other, and if the case rested on their testimony, it would be very difficult to say which set of

witnesses should be credited; but after the admissions which have been made supposing their Lordships were left in doubt upon that evidence, they could not find for the respondent.

It is not unimportant to observe that the Nawab, who is a gentleman of rank, went into the witness-box on this occasion, and gave his testimony, and of course offered himself for cross-examination. Their Lordships have often said that it would be very desirable if native gentlemen would do that more frequently, because presumptions are necessarily made against them, if when parties in a Court of Justice, and facts are in dispute the knowledge of which must rest with them, they will not present themselves to the Court to state their own evidence and knowledge of those facts. Presumptions are necessarily made against persons who will not subject themselves to examination when a *prima facie* case is made against them, and when by their own evidence they might have answered it. However, in this case, the Nawab certainly did present himself as a witness, and he has stated in the most distinct manner that the money was paid.

Upon the evidence, therefore, as it stands at present, their Lordships think that the respondent has entirely failed to show that the acknowledgments of her agents are untrue, and that the money was left unpaid. The Subordinate Judge seemed to have felt some doubt as to his having got at the truth of the transaction. He doubted whether it was a real transaction such as the documents represent; but if it were not, still the respondent would not be entitled to recover the Rs. 13,000. If the transaction was not a real one, then of course, it never could have been intended that the Rs. 13,000 should be paid, but after all that is a mere suspicion; both parties were content to treat the transaction as a real one, and Courts of Justice cannot act upon suspicion when both parties come before them so treating it. They must then regard the evidence which is brought forward on either side according to the rules which usually guide the Courts in the consideration of issues and the evidence brought to support them.

The Judges of the High Court have scarcely gone at all into the consideration of the evidence, but, treating the evidence on both sides as doubtful, they have drawn an inference from an agreement that was subsequently made between the parties,—an inference so strongly in favor of the respondent that they think they can rest their judgment upon it, and reverse that of the Subordinate Judge. Their Lordships, upon looking at that document, cannot say that in one aspect such an inference may not be made; but on the other hand, inferences may be made from it which support the case of the appellant. No doubt it is a document which cannot altogether be accounted for. It seems that in the original deed of sale there had been a clause to the effect that if the decretal money was not realized, the property of the respondent should be liable to make good the consideration for the sale to the Nawab. It is stated that that clause was struck out at the execution of the deed by the moulvees of the parties from some misunderstanding, or from the fact of one having over-reached the other; but undoubtedly it appears to have been struck out by consent, for both moulvees signed the memorandum in the margin that that was so. After the registration and the mutation of names had taken place, a fresh agreement was signed by the respondent on the 1st April, the object of which is said to have been to restore the clause which had been so struck out. Apparently in words the clause goes further, for it seems to make her property liable not merely for the consideration-money, but for the whole amount of the decree. However, in a subsequent proceeding, both parties appear to have treated this agreement as only restoring the original clause and making her property liable for the consideration-money. The High Court dwelt a good deal upon the agreement as a new and increased liability that she took upon herself, and as there was no consideration for her incurring it, their inference is that she did it in order to obtain payment of this money. If the clause is literally taken, it would be no doubt a very unwise agreement, be-

cause she was undertaking a much larger liability; and Rs. 13,000 was an inadequate consideration for what she was doing. But if it really was her intention in signing it to get the Rs. 13,000, the question immediately occurs why did not she obtain it? She had this document in her own hands, and if the Nawab was reluctant to pay this money, she might have said, "Well, I will give you this agreement. I want the Rs. 13,000. I will give you this agreement if you will pay me." But this was not done. Therefore, it seems that no strong inference can arise in her favor from the circumstance of her having made it; and, on the other side, the appellant says:—"If the money had been unpaid, why was not some reference made in this agreement to the fact that it was unpaid." From the omission to do so it is inferred on his part that the money was not really due at that time, otherwise some mention of it would have been made in this fresh document drawn up long after the time when, according to the statement of the respondent, the money ought to have been paid.

It is also not unworthy of observation that from the time when it is said this money ought, according to the respondent's own case, to have been paid, namely in March, it is not pretended that any demand was made for it until October, although we must assume that the respondent was a needy woman.

Upon the whole, therefore, their Lordships think there was not sufficient ground for disturbing the first judgment of the Subordinate Judge, and they will humbly advise Her Majesty to allow this appeal, to reverse the decision of the High Court, and, in lieu thereof, to order that the appeal to the High Court be dismissed, and the judgment of the Subordinate Judge be affirmed, and that the costs, if any, paid by the appellant to the respondent in the Court below ~~should be repaid~~. Their Lordships in this case say nothing about the costs of this appeal, as they understood that the suit was prosecuted below as a pauper suit.

The 24th January 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Lawrence Peel.

*Enhancement—Notice—Middleman—Alluvion—Act X of 1859 s. 17—
Reg. XI of 1825 s. 4 cl. 1.*

*On Appeal from the High Court at Calcutta.**

Soorasoonderee Dabea and another, representatives of the late
Gopal Lall Thakoor
versus
Golam Ali.

In a suit for arrears of rent in pursuance of a notice of enhancement, where it was admitted that defendant was entitled to a perpetual right of occupancy so long as he paid the proper rent, and also that he was a middleman, and not a cultivator; and it appeared from the kubooleut that a howaladaree amulnamah had been granted at defendant's request, without any rent for the first year, at varying rates less than Rs. 5 a kancee up to 1264, and at the fixed rate of Rs. 5 per kancee in and after that year:

HELD, that it could not have been intended that Rs. 5 should be the rent for that year only, but that the more reasonable construction was that that was to be the rent per annum during the remainder of the holding, and that consequently the rent was not liable to enhancement beyond Rs. 5 a kancee.

* From the judgment of Bayley and Phear, *J.J.*, in Regular Appeal No. 213 of 1867, decided 3rd January 1868,—9 W. R. 65.

HELD, that defendant might be liable under Reg. XI of 1825 s. 4 cl. 1, but not in this suit which was under Act X of 1859 s. 17. If liable to enhancement at all, his rent could only be enhanced according to the pergunnah rate payable by similar holders.

A suit to enhance being very different from a suit to recover arrears of rent at the rate originally fixed, HELD that plaintiff was not entitled to a decree in this suit for the rent of 1272 at the rate fixed in the kubooleut.

The appellants are the executors and representatives of Gopal Lall Thakoor deceased, who was the plaintiff in the suit below.

The appeal is from a decision of a Division Bench of the High Court in Bengal, overruling a decision given in favor of the plaintiff by the Deputy Collector of Madareepore, Zillah Backergunge.

The suit was brought on 12th July 1866, to recover the sum of Rs. 5,120 for arrears of rent for the year 1272, in pursuance of a notice of enhancement served under the provisions of s. 13 Act X of 1859, together with interest thereon, amounting altogether to the sum of Rs. 5,613-13-10 with costs and future interest.

The grounds of enhancement relied upon by the plaintiff were, 1st, that the value of the produce and the productive powers of the land had increased otherwise than by the agency or at the expense of the defendant; and, 2ndly, that the quantity of land held by the defendant was greater than the quantity for which rent had been previously paid by him.

The excess as regards the quantity of land held by the defendant, and in respect of which enhancement was claimed, consisted partly of lands within the boundaries described in the kubooleut under which the defendant held, partly of lands subsequently added thereto by alluvion.

It is necessary to consider, 1st, whether the defendant is liable to enhancement; 2ndly, if liable, whether he was liable to be enhanced as a middleman or as a ryot; and, 3rdly, if liable only as a middleman, whether he was liable to be enhanced in the manner and to the extent claimed by the notice.

The defendant produced a document purporting to be a pottah executed by the plaintiff. It was contended on the part of the plaintiff, and founded by the Deputy Collector, that the document was a forgery. Their Lordships are of opinion that the High Court was right in holding that it was not material to determine whether the alleged pottah was a forgery or not, for a kubooleut dated the 4th Bhadro 1260, signed by the defendant, was produced on the part of the plaintiff, and was admitted by the defendant to be a genuine document. That document shows the nature and terms of the defendant's holding; it is set out at page 94 of the record. By that instrument, after reciting that within the chur formed on the site of the old diluviated lands of the villages of Panchcottee and Chur Panchcottee, &c., bounded as therein mentioned, there were about 8 drones, 6 kanees, and 8 gundahs of jungle waste land fit for cultivation, for 8 annas whereof, viz., 4 drones, 3 kanees, and 16 cowries, the defendant had applied for a howaladaree amulnamah, at a rate of rent of Rs. 5 per kanee, without any rent for the then present year 1260; at the rate of Rs. 1 per kanee for the year 1261; at the rate of Rs. 2 per kanee for the year 1262; at the rate of Rs. 3 per kanee for the year 1263; and at the full customary rate of Rs. 5 for the year 1264; it was declared by the defendant that for 4 drones 3 kanees, and 4 gundahs of land within the boundaries therein mentioned, the said Gopal Lall Thakoor had granted a howaladaree amulnamah according to the prayer contained in the said application, and the defendant then agreed as follows:—

"We shall till and cultivate the d. 4, k. 3, g. 4 (four drones, three kanees, and sixteen cowries) of land situate within the boundaries aforesaid, less rukba, at the rate of g. 4 (sixteen cowries), per kanee, viz., k. 11, g. 4 (eleven kanees and sixteen cowries), that is, d. 3, k. 8 (three drones and eight kanees), and hold during the year 1260 without any rent, after which we shall continue to pay as rent according to the instalments mentioned below, year by year, and month by month,—in the year 1261, Rs. 56 (fifty-six), being at the rate of one rupee per kanee; in the

year 1262, Rs. 112 (one hundred and twelve), being at the rate of Rs. 2 per kanee; in the year 1263, Rs. 168 (one hundred and sixty-eight), being at the rate of Rs. 3 per kanee; and in the year 1264, Rs. 280 (two hundred and eighty), being at the full customary rate of Rs. 5 per kanee. We will not make any objections or excuses on the ground of drought, inundation, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation, cultivated or not cultivated, and the like, and even if we do, they shall not be admitted. In the event of our making default in paying our rent according to the instalments, we will pay the arrear due with interest at the rate of 1 (one) rupee per cent. per mensem on the lapsed instalments. Should we neglect to do so, the arrear will be realized with interest according to the law for the time being in force. After the month of Pous of the year 1261 (twelve hundred and sixty-one) notice of 15 days will be issued to us from your office to file a kubooleut, specifying the quantity of land and amount of rent, according to measurement as per boundaries. In the event of our not attending before the Ameen who may be deputed to make the measurement, and causing the measurement to be made and the rent to be fixed, the measurement will be made in our absence, and whatever quantity of land may be found on measurement to be cultivated or fit for cultivation, we shall be taken to have accepted and engaged for, as part and parcel of this howala; out of the same, the cultivated land in excess of the quantity mentioned above, less rukba, shall be charged with rent, which being added to the rent fixed at the rates mentioned above, we will pay from the year 1261. We will take a pottah according to the practice of your zemindary office after executing a kubooleut, specify the total quantity of land measured, with the rent thereof, at the rates mentioned above and progressive rates, being exempt from the payment of rent for two years in respect of lands fit for cultivation, continue to pay rent according to the instalments and conditions mentioned in the kubooleut. We shall not be able to make any excuse or objection thereto, and even if we do, they shall not be admitted. To this effect we execute this kubooleut, having received the howaladaree amulnamah. Dated the 4th Bhadro 1260."

It was admitted on the part of the appellant that the defendant was entitled to a perpetual right of occupancy so long as he paid the rent which the appellant had a right to demand; but it was contended on his behalf that the rent was not fixed beyond the year 1264, and was therefore subject to enhancement after that date. The defendant was a middleman, and not a cultivator of the land. By the express terms of the kubooleut he was to have a howaladaree allowance at the rate of 4 gundas per kanee, and he agreed to make no objection or excuse in regard to the payment of rent on account of the death or absconding of tenants. Indeed it was admitted that the holder was a middleman, and not a cultivator of the land himself. In his judgment the Principal Sudder Ameen said:—"It is admitted that the holder is a middleman ryot;" and he held that the tenure of the defendant was nothing more than a right of occupancy, and that he was liable to enhancement under s. 17 Act X of 1859.

He said:—"The tenant or holder of such a tenure is, strictly speaking, a ryot with a right of occupancy, whether he cultivates the land himself or sublets to others, and is a middleman. For enhancement of such a tenure there is no other law but s. 17 Act X of 1859, which is necessarily applicable; notice under cls. 2 and 3 s. 17 served on the defendants, under s. 13 of the Act, is therefore valid at law."

Having held that the rent was subject to enhancement, he proceeded to try to what extent it ought to be enhanced. There was a contest before him as to what quantity was within the boundaries specified in the kubooleut; but he considered it entirely immaterial, and held that all the cultivable lands, whether included within the boundaries or not, ought to be assessed at the same rate. He found that, instead of Rs. 5 per kanee (the plaintiff having claimed 16 by his notice),

the rent ought to be Rs. 10, 10 annas ; and after deducting the howaladaree allowance at the rate mentioned in the kubooleut, there were 16 drones 10 kanees and 17 gundahs of culturable land fit for assessment (p. 415), and that the jumma, according to that rate, was Rs. 2,881 11 annas 7 pies. He held that the defendant, being a middleman, ought to have an allowance of 10 per cent. for collection. Deducting that allowance, he considered that the jumma should be enhanced to Rs. 2,599 12 annas 11 pies, and gave the plaintiff a decree for the amount, with interest.

Upon appeal from that decision, the High Court held that, according to the terms of the kubooleut, there was a grant from the plaintiff to the defendant of a permanent tenure at a fixed rate of rent, and that the plaintiff's suit ought to be dismissed.

Mr. Justice Bayley, in delivering his judgment, said :—

" It is impossible, I think, to read this kubooleut without coming to the conclusion that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of merely rent-free, or partly progressive jumma allowed in those cases (and not in the case of cultivated lands), and that the full customary rent of Rs. 5 per kanee from 1264 was thereafter to be paid. I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear all the expense and trouble of reclamation, and having done so, was, in the first year after the full rent would be paid, viz., after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rates of neighbouring cultivated lands as to which no jungle waste had to be cleared."

The kubooleut did not contain the term "mokururree," or the words "from generation to generation," or any word to that effect, and the kubooleut was one of modern date, and there was not as in Dhunput Singh's case* any long uninterrupted enjoyment at a fixed unvarying rent. It was however admitted by both parties on argument that the tenure was a permanent one. It is unnecessary for their Lordships to express any opinion upon that point, and they therefore abstain from doing so. Looking at the words of the kubooleut, their Lordships are of opinion that it was the intention of the parties that, in and after the year 1264, the defendant should hold at the fixed rent of Rs. 5 per kanee, and that consequently the rent was not liable to enhancement beyond that rate. It appears from the recital in the kubooleut that the defendant applied for a howaladaree amulnamah at the rate of Rs. 5 a kanee, without any rent for the year 1260, and at varying rates less than Rs. 5 a kanee up to and inclusive of 1264, and that a howaladaree amulnamah had been granted according to the defendant's prayer. The rent was to be payable by certain instalments, and the defendant agreed to pay it after 1260, year by year, and month by month, according to the instalments mentioned in the kubooleut. In applying for an amulnamah at the rate of Rs. 5 a kanee, it could not have been intended that the Rs. 5 should be the rent for the year 1264 only ; it is a much more reasonable construction to hold that Rs. 5 a kanee was intended to be the rent for 1264 and during the remainder of the holding. The defendant, as a middleman, might be ruined if he were liable to have his rent enhanced in the manner contended for by the plaintiff. By the terms of the notice it was proposed to enhance his rent from Rs. 280, the amount fixed for the year 1264, to Rs. 5,120 for the year 1272. The notice was dated the 19th Cheyt 1271, and was served on the 25th or 26th, not many days before the end of that month. It does not appear what rent the defendant was receiving from his ryots, but he could scarcely have had time before the end of the month of Cheyt to serve his ryots with notices of enhancement for 1272 ; yet, according to s. 13, any notice from him to his ryots to be available for 1272 must have been given before the end of Cheyt 1271.

* 9 W. R. P. C. 3 ; and p. 92 ante.

Their Lordships are of opinion that the rent was not subject to enhancement beyond Rs. 5 a kanee. The defendant might be liable under s. 4 cl.1 Reg. XI of 1825 to pay rent for the lands gained by alluvion ; but this is not a suit merely to recover rent for those lands, or to assess them, but it is a suit to enhance the rent of the defendant, under s. 17 Act X of 1859, upon the ground that he was liable to enhancement under that section. The defendant was a middleman, and not a ryot, having a right of occupancy within the meaning of s. 17 Act X of 1859, or liable to enhancement under that section. If liable to enhancement at all, he could only be enhanced according to the pergunnah rate of the rents payable by similar holders. (*Dhunput Singh's Case*, 11 Moore's Indian Appeal Cases, p. 265,* and the case there cited with approbation.)

Their Lordships consider that this objection is fatal to the whole of the plaintiff's case. In *Dhunput Singh's case* it was said :—"To assess an intermediate tenant according to the rent paid by ryots, must necessarily deprive him of all beneficial interest in his tenure." According to the tenure of the defendant in the present case, he was not to make any objections on the ground of drought, inundations, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation, cultivated or not cultivated, or the like. He could not at any rate be liable to any higher rent than holders of tenures upon those terms.

In the present case, if the defendant was liable under cl. 3 s. 17 to be assessed for land gained by alluvion beyond the boundaries mentioned in the kubooleut, upon the ground that the land held by him had been found upon measurement to be more than that for which he had previously paid rent, he would be liable to pay rent for the land outside the boundaries mentioned in the kubooleut, even though it might be sandy or unfit for cultivation.

It was contended on the part of the appellants that, even if they were not entitled to enhance the rent, they were entitled to recover rent at the rate specified in the kubooleut. Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entirely upon different principles. To a suit for enhancement it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised, nor could an issue have been properly raised in this suit as to whether the rent for 1272 at the rate specified in the kubooleut had been paid or satisfied ; nor is there anything in the case to show whether it has been paid or not. Their Lordships are of opinion that the plaintiff is not entitled to a decree in this suit for the rent of 1272 at the rate fixed by the kubooleut. They concur with the High Court in thinking that the present suit ought to be dismissed with costs, and they will therefore humbly advise Her Majesty that the decree of the High Court be affirmed with the costs of this appeal.

The 24th January 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Enhancement of rent—Act X of 1859 ss. 15 and 16—Presumption—

Onus probandi—Arrears—Issues.

*On Appeal from the High Court at Calcutta.**

Nuffer Chunder Paul Chowdry and another
versus
 Jonathan Poulson.

In a suit for enhancement of rent of an intermediate tenure, where the defence was that the land had been held at a uniform rent from the decennial settlement, and the defendant, seeking to avail himself of the presumption in Act X of 1859 ss. 15 and 16, proved that the rent had not been changed for twenty years before the commencement of the suit, and thereby threw upon the plaintiff the burden of showing that the rent had been fixed at some later period than the decennial settlement :

HELD that the plaintiff had succeeded in proving that which was cast upon him to prove, viz., by producing a decree declaring his right to enhance, which had been passed in a suit brought by him against defendant's father under whom defendant claimed.

HELD also (the Privy Council adopting a decision of the High Court) that in a suit for arrears of rent at enhanced rates, when the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved.

This was a suit for enhancement of rent, to which the defence in substance was that the land with reference to which the question arose had been held at a uniform rent from the decennial settlement, and the defendant sought to avail himself of ss. 15 and 16 Act X of 1859. The Deputy Collector gave his decision for the plaintiff, and determined upon a certain enhanced rent in pursuance of enquiries which he had made. This decision was reversed by the High Court, who held that the plaintiff was not entitled to enhance.

The question has been reduced to one of comparatively small dimensions. The defendant, as has been stated, relies upon ss. 15 and 16 Act X of 1859.

Those sections are in these terms :—

S. 15 says :—"No dependant talookdar, or other person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the ryots," which is this case, "who in the provinces of Bengal, Behar, Orissa, and Benares holds his talook or tenure (otherwise than under a terminable lease) at a fixed rent, which has not been changed from the time of the permanent settlement, shall be liable to any enhancement of such rent, anything in s. 2 Reg. VIII of 1793, or in any other law to the contrary notwithstanding." Then s. 16 goes on to say :—"Whenever in any suit under this Act it shall be proved that the rent at which a talook or other tenure is held in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such talook or tenure has been held at that rent from the time of the permanent settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

In their Lordships' opinion, the defendant did establish that the rent at which the talook was held had not been changed for a period of twenty years before the commencement of this suit, and that he thereby cast upon the plaintiff the burden of showing "the contrary" (in the words of the Act), or that the rent had been fixed at some later period, and their Lordships are of opinion that the plaintiff has succeeded in proving that which was cast upon him to prove. His proof consisted mainly in this : that in 1860 a suit was brought, which was decided in 1863 by the High Court, by the plaintiff or his predecessor in title against the defendant's father, under whom the defendant claims, for enhancement of rent. The case of the defendant was then this : in the first place he said that no sufficient notice had been proved ; secondly, he said that the talook had been granted to him or his predecessor in title in the year 1824 by various pottahs, and that they fixed a uniform mokurree rent which could not subsequently be changed. But he did not set up any title previous to those pottahs. He did not set up that which was open to him to set up, namely, that he had held at a fixed rent from

* From the judgment of Phear and Hobhouse, *J.J.*, in Regular Appeals Nos. 2 and 35 of 1868, decided 1st August 1868.

the permanent settlement, or, indeed, twelve years before it, which at that time would have been an answer to the case. It should be stated that this suit was decided before Act X, to which previous reference has been made, came into operation. The state of the law then was that he could defend himself by showing an ancient tenure, going back twelve years before the decennial settlement; but he made no case of the kind. He made a case of mukurree tenure established by pottahs in 1824. Upon that case the Court below gave a decree to the plaintiff on both points, on the ground that the notice was sufficient, the pottahs not being established, and that the power to enhance had been proved. The High Court upon appeal disagreed with the Lower Court upon the first point. They held that the notice was not sufficient, but they proceeded to decide that the plaintiff had a right to enhance.

It has been said that this declaration on their part that the plaintiff had a right to enhance, although he had given no sufficient notice, was *ultra vires*: that upon failure of proof of notice, the Court had no right to make any such declaration, and, consequently, that such declaration is of no effect; but their Lordships upon this point entirely adopt a decision which is reported in Marshall's Reports of Cases in Appeal to the High Court in Bengal, vol. i. p. 523, heard in full Bench before Sir Barnes Peacock, Mr. Justice Steer, Mr. Justice Norman, Mr. Justice Kemp, and Mr. Justice Seton-Karr, which is precisely in point upon this question. It is there stated that "in a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved." In this case the question of the right to enhancement was tried, as well as the question of notice, and the Court gave a declaratory decree as to the right to enhance.

That being so, their Lordships are of opinion that this decree of the Court in 1863 does amount to proof sufficient to rebut the presumption referred to in s. 16 Act X of 1859, arising from twenty years' uniform payment of rent, that that uniform payment had extended to the time of the decennial settlement. It also amounts to proof that the rent was fixed at some later period.

On this ground, therefore, their Lordships are of opinion that the plaintiff has satisfied the burden of proof which was thrown upon him. This decision of their Lordships is very much in accordance with a case in the High Court, on the 15th February 1865, of Rakhal Doss Bose v. Sheikh Golam Surwur,* which is thus described in the marginal note:—"The bringing of a suit by a landlord to recover arrears of rent at enhanced rates, under Act X of 1859, cannot annul the former decree of a competent Court, declaring the ryot's holding to be liable to enhancement, by entitling the ryot (on proof of payment of uniform rent for twenty years) to claim the benefit of the presumption under s. 4." It is to be observed that s. 16 is almost in the same words as s. 4; the one referring to ryots, and the other to under-tenants or talookdars.

With respect to the question of the pottahs, which were put in evidence by the defendant in the former suit which has been referred to, but which were not believed to be genuine at that time, either by the Court of first instance or the Court of Appeal, it appears that these pottahs were rejected also in the present suit, both by the Court of first instance and the Court of Appeal. Their Lordships are not prepared to say that that rejection was wrong; but even if they had been received in evidence, their Lordships are of opinion, upon referring to them, that they would not have established the contention of the defendant in this suit, that he had held by a uniform tenure, commencing, at all events, as early as the decennial settlement. The effect of those grants does not appear to be to show a mere continuance of possession, but, according to their Lordships' view, they rather point to the creation of a new title.

* 2 W. R. Act X Rulings 69.

For these reasons, their Lordships are of opinion that the decision of the High Court should be reversed ; that the appeal of the respondent from the Court of the Assistant Collector to the High Court should be dismissed with costs ; and that the last mentioned judgment of the Assistant Collector should be confirmed. Their Lordships will humbly advise Her Majesty to this effect. The respondents will pay the costs of this appeal.

The 12th February 1873.

Present :

Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Right to light—Obstruction—User—Agents—Constructive knowledge.

*On Appeal from the High Court at Calcutta.**

Elliott and others

versus

Bhoobun Mohun Bannerjee.

In a suit for an injunction to restrain defendants from proceeding with a building, and to have a portion of it taken down, which had the effect of obstructing light to which plaintiffs were entitled through their windows (the English law before the passing of the Prescription Act, 2nd & 3rd William IV c. 71, being applicable, and plaintiffs being required to show an uninterrupted user of at least 20 years, with the acquiescence of the defendants) :

HELD that, as the building was commenced, and commenced with the manifest intention of being erected as an obstruction before the expiration of the 20 years, the plaintiffs had not established their case.

Quære.—Is not knowledge on the part of an agent who collects rent for the owner, and is entrusted with the authority of fixing the amount, constructive knowledge on the part of the owner sufficient to satisfy the exigence of proof on the part of the plaintiffs in such a case?

This was a suit for an injunction praying that the defendants might be restrained from proceeding with a certain building, and that a portion of it might be taken down, which had the effect of obstructing light which the plaintiffs alleged they were entitled to have through their windows. It would appear that the windows in respect to which the right to the light is claimed were so far completed on the 14th April 1850, that the origin of the right would then accrue. That is the finding of Mr. Justice Norman, the Judge of first instance, a finding in which their Lordships concur.

The suit was commenced on the 18th May 1870, rather more than a month beyond the expiration of 20 years from the former date of April 14th 1850.

It is admitted that the Prescription Act, the 2nd & 3rd William IV c. 71, does not apply, and that we must have resort to the English law which prevailed before its passing. So far as this would seem to be clear, that the plaintiffs, in order to establish their title, would have to show an uninterrupted user of at least 20 years, with the acquiescence of the defendant, the owner of the servient tenement. But some questions of nicety have been raised as to what would or would not amount to acquiescence, and it was discussed whether actual knowledge was necessary to be shown on the part of the defendants. That proof of such actual knowledge was necessary appears to have been the view of the Court

* From the judgments of Couch, C.J., and Markby, J., sitting on appeal from ordinary original civil jurisdiction,—6 B. L. R., 85.

above, which reversed the decision of Mr. Justice Norman, the Judge of first instance, and found, as a fact, that actual knowledge was not shown to have existed on the part of the defendants. If the decision of the case rested upon this point, their Lordships would have desired to hear further argument, because they are by no means satisfied that knowledge on the part of the agent, who acted for the rajah, the owner of the property in 1850 (from whom the defendants purchased), who collected his rents, and, further, was entrusted with the authority of fixing their amount, would not be constructive knowledge on the part of the rajah, sufficient to satisfy the exigence of proof on the part of the plaintiffs.

Another question arose in the case as to whether the fact of the premises being let to tenants at, as it would appear, a monthly rent, on the commencement of the accruing of this right, namely, in 1850, would have had any bearing upon the rights of the parties. But their Lordships do not think it necessary to enter into a discussion of these questions, because they have come to the conclusion, independently of them, that the plaintiffs have not established an uninterrupted user of these lights for the space of 20 years, with the acquiescence of the defendants. It must be taken that the enjoyment commenced on the 14th April 1850. It would appear that in March 1870, the plaintiffs received a notice from the defendants, or, at all events, they were informed by the defendants that it was their intention to erect a building of 24 feet or more in height on the north of the premises of the building in question, which would have the effect undoubtedly of obstructing their lights. It appears that that building was actually commenced on the 23rd March 1870, and its construction was continued. It is true that it was not raised to such a height as to actually amount to an obstruction until some days after the 20 years had elapsed; but it was commenced, and commenced with the manifest intention of being erected as an obstruction before the expiration of the 20 years.

Under these circumstances it appears to their Lordships that it is quite impossible to presume enjoyment for 20 years with the acquiescence of the owner of the servient tenement, when before the expiration of those 20 years, the owner not merely gave notice of his intention to interfere with that enjoyment and to raise an obstruction, but in pursuance of that notice actually commenced the erection of that obstruction which was completed a few days after the expiration of the time in question.

Under these circumstances their Lordships have come to the conclusion that there was not an enjoyment for 20 years on the part of the plaintiffs with the acquiescence of the defendant such as to entitle them to maintain this suit.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Appellate Court, the High Court of Calcutta, be affirmed, and this appeal dismissed with costs.

The 14th February 1873.

Present :

Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

"Mafee-birt Tenure"—Hindoo law—Succession—Service tenures.

On Appeal from the High Court at Allahabad.

Rajah Mahendra Singh
versus
 Jokha Singh and others.

Whatever the words "mafee-birt tenure" may have imported originally, the *prima facie* meaning of the words has come to be an hereditary tenure.

Where ancestral property has apparently descended in the ordinary way of Hindoo property, first to the son and thence to the mother, it lies on those who say that it is confined to the direct descendants of the original donee to prove their case and show by some custom that that was the proper construction of the grant.

Where the original donee of a service tenure ceases to do any service and pays in lieu a rent which his descendants continue to pay, the condition of the tenure becomes altered from service to rent.

This is a suit which was brought originally by the respondents to recover the possession of and property in a village called Mouzah Sumaroon. The original respondents, the plaintiffs in the suit, claimed to be heirs of a person named Theodeen, and beyond all question they proved that the property in question had been enjoyed by the father of Theodeen, Bhowanee Singh; that on his death it had descended to his son Theodeen; and on Theodeen's death it had gone to his mother as his heir; and that would *prima facie* be evidence that this was property which went from heir to heir in the ordinary way of Hindoo property.

But then, in answer to that, there is produced the actual pottah by which the property was originally conveyed to Bhowanee Singh; and it is contended that, notwithstanding this property went from him to his son, and then from the son to the mother, it really was only a property which Bhowanee Singh was entitled to hold for his life, and that appears to have been so held by the first Court before which it came, and then by the first Court of appeal, those judgments having been reversed by the High Court.

Now the words of the grant are:—"I, Surubjeet Singh, do hereby declare that I have given Baboo Bhowanee Singh, Mouzah Sumaroon in Tuffeh Surrou, Pergunnah Ratonpoor Bansee, with all its cardinal boundaries and the julkur, bunkur, and roads, as a "mafee-birt tenure," in lieu of his share in Mouzah Deorah, and he can take possession thereof in perfect security, and continue to do service to me, and that whoever of my descendants should become rajah, he should maintain this grant."

The High Court in the first place appear to have been of opinion that the words "mafee-birt tenure" *prima facie* import that it is an hereditary tenure, and their Lordships do not dissent from that opinion. As far as an explanation of the words "mafee-birt" is given in the authorities, in Wilson's dictionary and so forth, it would rather appear that whatever they may have imported originally, a "mafee-birt tenure" has, at any rate, in a great number of instances, become an hereditary tenure. Their Lordships do not dissent from the opinion that *prima facie* that would be its meaning.

But then there are various considerations which appear on the facts to support that conclusion. There is what I have already stated, that it has actually descended without dispute from the original donee to his son, and from his son to his mother. That would *prima facie* tend to show that it was an hereditary property. Besides that it is said to be given "in lieu of his share in Mouzah Deorah." Well, then, what was Mouzah Deorah, and what were the rights of the parties to that? The defendant in his written statements says:—"The village in suit, and another village named Deorah, was given in lieu of service to the ancestor of Bhowanee Buksh. When the latter village came into the possession of the plaintiff's ancestor in lieu of service, the village in suit was given to Bhowanee Buksh Singh, the father of Theodeen Singh, in lieu of service."

Therefore it appears that both the villages, Mouzah Deorah and the village in question, had been, according to this statement, given in lieu of service to an ancestor of Bhowanee Buksh. If that is so, it seems clear that the pottah in

question was given for the purpose of dividing that property which they held jointly, and giving Bhowanee Singh the interest in Mouzah Sumaroon in lieu of the joint interest which he previously had in both properties. That would seem to show very clearly that these two villages had originally been ancestral property, as they were given to some ancestor of Bhowanee Singh.

Then it is said that they are in lieu of service. No doubt that is stated in this document also. Their Lordships do not think there is anything to show that that was a service of a kind which prevented this being ancestral property descending in the ordinary way.

Well, then, in addition to that, some proceedings were taken before the Collector during the time that the widow was in possession of the property ; and, as their Lordships read those proceedings, first, there was the petition of the widow, she claiming then to have not merely the "birt" rights, but claiming to be the zemindar. He disputed that ; and, as their Lordships read the answer he made to that petition, he practically admitted that she was entitled to hold it as property which had descended to her, though he denied her the rights of a zemindar. Then, no doubt, these proceedings appear to have ended in a sort of award made by the Collectors, which apparently was made by consent : the result of which was, that instead of paying the Rs. 29, which had been previously paid, she was to hold it rent-free and give it up at her death. It is not, in fact, contended that that award can in any way bind the plaintiffs.

The great argument which has been adduced before their Lordships is that though this was ancestral property—descendible property—yet it would descend only to the direct descendants of the original donee. Their Lordships are of opinion that it being proved not to be originally for life only, but to be an hereditary property, and having apparently descended in the ordinary way of Hindoo property, first to the sons, and then from the son to the mother, it lies on those who say that it is confined to direct descendants, and that no one can claim it but the direct descendants of the original donee, to prove their case and show that by some custom that was the proper construction. In the absence of that, their Lordships agree with the conclusion to which the High Court came, that this was property which went in the ordinary way of Hindoo property.

But, then, it was said by Mr. Leith that the Court below ought to have said on what terms this property was to be held, if it was held at all ; and their Lordships are of opinion that though it was originally given rent-free, yet that as the original donee ceased to do any services, and paid a rent of Rs. 29 per annum in lieu of those services ; that this sum continued to be paid by his son, and then was continued to be paid by the mother, at any rate until she made the agreement ; that the proper conclusion therefore is that no service is now to be performed, and that it is to be held on the payment of an annual fixed rent of Rs. 29. Their Lordships think that the decree of the High Court should be varied by inserting this declaration ; but that this variation should make no difference as to the costs ; and that, subject to that alteration, the appeal should be dismissed.

Their Lordships will, therefore, humbly recommend Her Majesty that the decree of the High Court should be varied by inserting a declaration that the property is to be held subject to the payment of an annual fixed rent of Rs. 29 and that, with this variation, the appeal should be dismissed with costs.

The 15th February 1873.

Present :

Lord Justice James, Sir Barnes Peacock, Lord Justice Mellish, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo law—Joint family property—Separate acquisition—Onus probandi.

*On Appeal from the High Court at Calcutta.**

Chand Hurree Maitee

versus

Rajah Norendro Narain Roy and another.

As a result of litigation, a decree was passed establishing the title of *R* as a brother by adoption to *L*, and a co-sharer of his family property ; but no possession was actually directed to be given to *R* except of the zemindary which was the principal family estate. Subsequently an execution-creditor of *R* took possession of two lots, which were no part of the zemindary proper ; the one having been acquired as a separate inheritance by an ancestor, and the other having been purchased by *L* in the name of the priest of the family :

HELD, that *R*'s title to the two lots was the same as his title to the zemindary ; and that the burden of proof lay upon those who insisted that the two lots did not form part of the joint family estate.

In this case their Lordships are of opinion that the decree of the High Court cannot be sustained, and that the decree of the officiating Principal Sudder Ameen ought to be affirmed.

The property in question consisted of two small lots of land, apparently of considerable value at the present time, which had been taken possession of by the appellant as an execution-creditor of one Roodro Narain, which Roodro Narain was by adoption the brother of Lukee Narain, the predecessor in title of the respondents. It appears that Roodro Narain and Lukee Narain as far back as the year 1845 had litigation for the purpose of establishing the title of Roodro Narain as a brother and co-sharer in the family property. He succeeded in that litigation. His title was established as a brother and co-sharer. But it appears, as far as there is any evidence before their Lordships, that in the decree establishing his right no possession was actually directed to be given to him except of the zemindary, which was the principal family estate. It appears that the two lots in question were no parts of the zemindary proper, but one of them had been acquired as a separate inheritance by the ancestor, and the other was purchased by Lukee Narain himself before the title of Roodro Narain was established. It was purchased benamee in the name of the priest of the family. The Sudder Ameen decided in favor of the appellant. Their Lordships are of opinion that under the circumstances Roodro Narain's title to the two lots was precisely the same as his title to the zemindary ; that the family property with regard to the one lot would be exactly in point of title the same as the zemindary itself ; and with regard to that which was purchased in the name of the priest the presumption of law and the presumption of fact would be that the property acquired in that way by the managing representative member of the joint family would be joint family property. The burden of proof, therefore, lay upon those who insisted that these two lots did not form part of that joint family estate. If they did form part of that joint family estate, then the title of the execution-creditor so far as it was affirmed by the Principal Sudder Ameen (which was only to one moiety) was a good title. It was, therefore, on the respondents to show that

* From the judgment of Bayley and Macpherson, *J.J.*, in Regular Appeal No. 166 of 1867, decided 27th February 1868.

there had been anything which amounted to adverse possession so as to be an ouster of the co-tenant.

Their Lordships, having looked through the evidence, are satisfied that there is nothing like trustworthy evidence that amounts at all to proof of such adverse possession or ouster. It is perfectly well known to all persons conversant with these matters in India that the receipt by one member of a family may be quite consistent with the title of the whole. One member of a family may be in receipt of one part of an estate, and another may be in receipt of another part of the estate, and they may have afterwards to account the one to the other in respect of the excess of receipts over their respective rights. Moreover, there being no evidence of the adverse possession, except the receipt of rents on behalf of Lukee Narain and Lukee Narain's descendants, there is on the other side evidence of very nearly the same character, evidence not amounting to much, but evidence of the same character and description showing Roodro Narain's occupation or possession of part of the property, his personal dealing with it, and also receipts of rent on his behalf.

Under those circumstances their Lordships will humbly recommend to Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen be affirmed; that the appellants receive back all the costs which they have paid under the order of the High Court; and that having regard to the arrangement entered into by the appellant with the respondent Norendro Narain Roy, that each party was to bear his own costs in the Lower Courts and all subsequent Courts, their Lordships will recommend that one-half the costs of the appellant in the Courts below, and one-half the costs of this appeal, be paid to him by Ranee Treepoora Soondoree, the second respondent.

The 28th February 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Mokurruree grants—Limitation—Onus probandi.

*On Appeal from the High Court at Calcutta.**

Tekaetnee Goura Coomaree
versus

Mussamut Saroo Coomaree and others.

In a suit by the guardian of a minor to recover possession of certain lands in her zemindary and to set aside an alleged mokurruree grant, plaintiff's case was that defendants had held under a ticca lease and had wrongfully held on after its expiration. Defendants set up an old mokurruree grant under which they claimed to hold in perpetuity upon the payment of a fixed rent.

The High Court, over-ruling the decision of the first Court upon the statute of limitations, held, and in the opinion of the Privy Council rightly, that the statute does not begin to run in favor of the mokurrureedar against the zemindar until the latter has had notice that the former claims under a mokurruree grant, and such notice was not given in the present instance twelve years before the commencement of the suit:

HELD also, in concurrence with the High Court, that the plaintiff's case was a false one, and their *kuboolents* forgeries, and though the *onus* lay on the defendants to prove his mokurruree grant, there were sufficient grounds for upholding it as genuine, as an ancient grant brought from proper custody and verified by long possession and analogous grants.

* From the judgment of Kemp and E. Jackson, JJ., in Regular Appeal No. 168 of 1869, decided 4th February 1870.—13 W. R. 129.

This was a suit instituted by the plaintiff as the guardian of a minor, in respect of her right as zemindar of Pergunnah Khurukdeah, to recover possession of certain lands in that pergunnah from the defendants, and to set aside an alleged mokurruree grant. The plaintiff's case was, that the defendants had held under a ticca lease from 1851 to 1860, and that consequently after the expiration of the lease they had wrongfully held on. The defendants set up an old mokurruree grant under which they claimed to hold in perpetuity upon the payment of a fixed rent of Rs. 13 per annum.

The substance of the evidence on both sides may be very shortly stated. The plaintiff endeavored to prove that the defendants had held possession from 1827 downwards under certain leases for short terms at small but variable rents, and four kubooleuts were put in—the earliest in 1827—the latest, which has been before mentioned, in 1851, four in all, under which the land was held respectively at rents of Rs. 21, Rs. 16, Rs. 17, and Rs. 22 per annum, but the plaintiff gave no evidence of payment of rent under those kubooleuts. The plaintiff also gave some evidence, which will be subsequently referred to, of supposed admissions on the part of the defendants. The defendants put in an ancient sunnud or grant in the year 1793, purporting to grant to them these lands on a mokurruree tenure, at a rent of Rs. 13 per annum, payable from generation to generation. They showed that in the next year after this alleged grant, a return had been made of the gross profits of this mouzah at Rs. 13 per annum, which they contended to be some confirmation of their case. They further put in receipts for rent (and on that subject the evidence was not of a very satisfactory character) in 1799, at the rate of Rs. 13 per annum, and another receipt in 1831 of Rs. 13 per annum for five years. They further gave evidence that they and their ancestors were related to the plaintiff and to her ancestors, that consequently it was not unlikely that grants of this kind might have been made to them for maintenance; and they further showed that grants of a similar character had been made to other members of the family.

It now becomes necessary to refer to two previous suits which had been instituted by the plaintiff. A suit was instituted in 1859 for rent under the last lease, and, pending that suit, another was instituted on a bond given for alleged arrears of rent. That rent suit came on for hearing in the first instance before the Moonsiff, who found for the defendants, upon this ground :—It appeared that one Bhugwunt Sahoy, a money-lender, had intervened in that suit, alleging that the plaintiff had assigned to him, for a term of five years, fifteen out of the twenty-two rupees of rent, and he put in two documents, one purporting to be the assignment to which the defendants were parties, and another a bond executed by the defendants. The defendants alleged that although true it was that they had been parties to an assignment of rent to Bhugwunt, it was an assignment of the Rs. 13, which was payable by them. They declared these deeds put in to be forgeries, and that Bhugwunt was in fact acting in collusion with the plaintiff. The Moonsiff decreed in favor of the defendants upon the ground, as far as it is ascertainable, that taking the rent which was due to Bhugwunt under the assignment, and taking also that for which the plaintiffs gave credit, the defendants had paid the whole, and therefore the plaintiffs failed in their suit. Upon this the defendants appealed, although the decision was in their favor, on the ground that the decision was adverse to their mokurruree title, and the case came on before the Chief Assistant Commissioner. The Chief Assistant Commissioner found that the case of the plaintiffs was altogether false and fraudulent, that all the kubooleuts, four in number, which they put in, were forgeries, and he appears to have taken the view of the defendants with respect to the transaction with Bhugwunt Sahoy, that one of the deeds at all events was spurious. It should be stated that they alleged that those deeds were got up for the purpose of fixing them with an admission of being mere ordinary lessees instead of mokurrureedars.

The Assistant Commissioner also found that the case of the defendants was proved, that they had proved their grant and possession, and he gave judgment in favor of the defendants. The same was the issue of the suit on the bond for rent. That was also decreed in favor of the defendants, and the bond was pronounced to be spurious. The decision in the rent suit was in the year 1861, and it should be stated that before that date, namely, in the year 1854, the defendants had granted to a certain Coal Company their rights in this mouzah, purporting to make them a mokurruree grant; and the Coal Company had worked the coals, had erected buildings, and carried on considerable mining operations in an open and notorious manner (which must, of course, have been perfectly well known to the plaintiffs) from the year 1854 down to the time of the commencement of this suit, which was in the year 1858. The plaintiffs laid by from the time of the decision in the rent suit, which was in 1861, till 1868, being aware of all these works going on, without bringing any suit, and they have given no explanation of that delay.

It is under these circumstances that the present case came on for hearing. The Judge in the first instance in the present suit, in which the evidence was substantially the same as in the rent suit, acting in a great measure upon the decision of the Assistant Commissioner in the rent suit, came to the conclusion that these kubooleuts on the part of the plaintiffs were false. He also expressed a good deal of doubt as to the genuineness of the mokurruree grant put in by the defendants, chiefly, not entirely, on the ground of certain expressions contained in that grant which appeared to him of a suspicious character; but he decided in favor of the defendants upon the statute of limitations, holding that the defendants had held, for more than twelve years before the commencement of the suit, adverse possession to the plaintiffs. On the case coming before the High Court, they over-ruled the decision of the Judge of the Court of first instance upon the statute of limitations, holding, and their Lordships are of opinion rightly, that the statute does not begin to run in favor of the mokurrureedar against a zemindar until the zemindar has had notice that the mokurrureedar claims under a mokurruree grant, and that in this case it was not shown that notice had been given to the plaintiffs of such a tenure twelve years before the commencement of the suit. The High Court decided in favor of the defendants upon the merits. They agree with the Commissioner in considering the case of the plaintiffs to have been a false one and their kubooleuts forgeries, and they uphold the genuineness of the mokurruree grant. Mr. Justice Kemp answers the objections made by the Judge of first instance to the mokurruree grant based on the expressions contained in it in a manner which appears to their Lordships satisfactory, and Mr. Justice Kemp their Lordships understand to be a Judge well conversant with subjects of that kind.

It has been contended that the High Court were wrong in coming to this conclusion. It has been argued that the *onus* of proof of a mokurruree grant lies entirely upon the defendant, and that he is not relieved from this burden of proof even if the plaintiff, as in this case, had failed to prove his kubooleuts, and their Lordships assent to these propositions. The question, therefore, is simply whether there were sufficient grounds on which the finding of the High Court can be supported that the defendant had made out his case. Their Lordships are of opinion that there were sufficient grounds to support the finding. The grant itself, though perhaps not proved in the most satisfactory manner, still purported to be an ancient grant and came from the proper custody. It is to a certain extent, at all events, verified by the other evidence which has been referred to of the return of the gross produce and of the receipts, and it is still further verified by the evidence which the defendants gave of long continued possession, carrying that possession back a great deal further than the plaintiffs had admitted, in fact, to the time of the grant itself and even beyond it; and,

further, by the proof which was given by the defendants, which their Lordships concur with the High Court in considering satisfactory, that the ancestors of the defendants were relations of the ancestors of the plaintiffs; and that other grants of the same description had been made to other members of the family.

It only remains to notice some evidence as to admissions of the defendants, relied on on the part of the plaintiff. The first of those admissions consists of the two documents put in by Bhugwunt Sahoy. The Assistant Commissioner in the rent suit treated one, if not both, of these documents as false. The High Court do not, indeed, very distinctly say whether or not they take this view, but they content themselves generally with observing that the assignment to Bhugwunt does not appear to militate much against the case of the defendants, and their Lordships are not prepared to say that the High Court were wrong in coming to that conclusion. There is, then, another document much relied upon on the part of the plaintiffs, and that was what purports to be an authenticated copy of a rasinamah or journal kept in the Collectorate, whereby there appears to be an entry of the substance of a petition said to have been filed by the defendants on the 31st December 1852, in which they state that they held on lease from 1259 to 1267 Fuslee. The original petition, of which this purports to be an abstract, is not produced; its non-production is accounted for by the allegation that the Court-house in which the records were kept was burnt, and all the records with it. How this document escaped the fire, where it was kept, by whom it was kept, who made the entries, there is no evidence whatever. Nor is there any evidence of enquiries being made upon that subject. Therefore whether or not it was possible to call the person who made the entries, their Lordships are unable to say.

Under these circumstances, their Lordships cannot regard the proof of this document as of a very satisfactory character, and they agree with the First Commissioner in his observation that this document is at all events not of sufficient value to outweigh the evidence on the part of the defendants.

Their Lordships observe that no notice whatever is taken of this document in either of the judgments in the present suit, and they are very much disposed to infer from that, that no substantial reliance can have been placed upon it on behalf of the defendants. But, be that as it may, they do not think it of sufficient weight to counterbalance the evidence on the part of the defendants.

For these reasons, their Lordships are of opinion that there was ample ground on which the High Court were justified in finding for the defendants, and that that finding was right. Their Lordships will therefore humbly advise Her Majesty that that judgment be affirmed, and this appeal dismissed with costs.

The 5th March 1873.

Present :

Sir J. W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law—Streedhun—Misrepresentation by husband—Estoppel—Heirs.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Macpherson and Glover, J.J., in Regular Appeal No. 143 of 1867, decided 15th April 1868.

Luchmun Chunder Geer Gossain and another
versus
 Kalli Churn Singh and others.

Mr. Doyne and Mr. John Cutler for Appellants.

Mr. Leith, Q.C., and Mr. Bell for Respondents.

Under the Hindoo law a married woman is at liberty to make any disposition she likes of money constituting her streedhun or separate and peculiar property; and, if she purchases immoveable property with such streedhun, she has a right to sell that immoveable property.

Where the husband during his lifetime did in every way, both publicly and privately whenever called upon to make any representation on the subject, always represent that certain immoveable property was his wife's, the purchasers from her could not after his death be equitably turned out of the property in favor of his heirs. The heirs after his death would be as much bound by the father's misrepresentations as he would have been during his life.

This was an appeal by the defendants in the suit from a judgment and decree of the High Court of Calcutta, dated the 15th April 1868, affirming in part, and reversing in part, a judgment and decree of the Principal Sudder Ameen of Rajshahye, dated the 16th March 1867.

The facts appear from the following which are the material portions of the judgments of the said Judges :—

Glover, J.—“This was a suit by one Kalli Churn, the adopted son of Ubotar Singh, for himself and as guardian of his minor brother Rajcoomar Singh to set aside a deed of sale made in 1270 B.S. by his mother Ulpa Burmoneeah, on the ground that the property (a durputnee mehal called Turuff Boalea, &c.) belonged to his father's estate, and as such descended to him (Kalli Churn) and to his minor brother, and was never the separate property of Ulpa Burmoneeah, who had in consequence no right to sell it. Certain other parties to whom Kalli Churn is said to have sold half of the mehal (in anticipation) for the purpose of defraying the costs of suit were made co-plaintiffs. The Gossain defendants, after taking several objections to the age and adoption of Kalli Churn, allege that the mehal was bought by Ulpa Burmoneeah with her own funds; that she was the recognized proprietress, and had power to dispose of the property in any way she liked; that she did dispose of it to them (defendants) on the 8th Falgoon 1270 for a consideration of Rs. 12,000, and that they have been since in undisturbed possession. Ulpa Burmoneeah filed a somewhat similar reply; she admitted the sale to the Gossains, but instead of claiming the estate as purchased with her own streedhun-money, pleaded that her husband had bought it and made it over to her in gift. The Principal Sudder Ameen considered that the conveyance to Ulpa by her husband was merely nominal; that he furnished the money for the purchase, and retained the management of the property up to his death; that Ulpa had consequently no interest in the mehal, and no right to sell to the Gossains. He therefore decreed for the plaintiffs. The Gossains appeal, and Mr. Doyne on their behalf contends, first, that the money for the purchase of the durputnee is proved to have been Ulpa's; second, that if it were not, the husband Ubotar Singh gave out to all the world persistently to the day of his death that the estate was his wife's, and that therefore the Gossains, being innocent purchasers for value without notice, must be confirmed in possession; third, that the plaintiff Kalli Churn consented to the sale, and if not already concluded by his adopting father's acts is concluded by his own. Other objections were taken at the hearing as to the adoption of Kalli Churn, which were however not pressed. On the first ground of appeal, I find for the respondent there is a large quantity of oral evidence adduced on either side to prove the source of the purchase-money, but none of the witnesses for Ulpa can speak decidedly as to the way in which she obtained funds for the purchase, whilst it is admitted by all, and indeed by Ulpa herself, that she was the child of poor parents, and had no streedhun when she was

married. Her evidence as to the purchase is moreover distinctly opposed to that of the witnesses examined to prove her ownership. They describe how the money was taken from Ulpa's strong-box, and how the balance was made up by the pledging of her ornaments, whilst Ulpa herself owns in her written statement that her husband bought the estate, though he afterwards gave it to her, and had the title-deed made out in her name; either Ulpa or her witnesses have clearly perjured themselves. It seems to me established by the other evidence in the case that Ubotar Singh was a man of some means, a petty zemindar at the least, whilst Ulpa is admitted by all to have had nothing at all at the time of her marriage, and to have had no means afterwards of amassing a sum so considerable as the purchase-money (Rs. 3,200) of the mehal standing in her name. I have no doubt, after carefully going through all the evidence, that Ubotar Singh purchased the durputnee with his own money in his wife's name, and that at the time of his death, there being no direct evidence to support Ulpa's averment of gift. After marriage it formed part of his estate. The question then arises, did Ubotar Singh by his conduct give all the world to believe that the property was not his, but his wife's? And can the appellants, who are *bond fide* purchasers without notice, be made to lose their money on account of a latent defect in their vendee's title which they could not by any amount of care have discovered for themselves? It appears to me that Ubotar Singh did from first to last give every one to understand that his wife Ulpa Burmoneeah was the real, as well as the nominal, owner of the estate; not only did he tell many persons who asked him about the matter that such was the case, but he made statements to the same effect in certain judicial proceedings in which he was involved, and whenever the question was mooted, either publicly or privately, denied most positively that he had any interest in the property. I observe that not one of the witnesses, now called upon to prove his ownership, are able to give decisive opinions on the point. Some of them suppose it was Ubotar's because he had consulted them about the purchase, others think it was Ulpa's, but all admit that the ostensible acts of ownership were performed by Ulpa, and the most they are able to say is that they do not know who was the real owner, Ubotar or Ulpa. I do not lay much stress on the fact that all public documents and all collection papers are in Ulpa's name, because that would be equally consistent with either theory, but so far as common report could go, it was undoubtedly published to the world that the wife, and not the husband, was the proprietor of Boalea. Then as to the documentary evidence of ownership. There is a record of a suit under Act IV of 1840 in which Ulpa as first party sued for possession as against an ijaradar who had been put in by the zemindar. The Magistrate retained the former in possession, but the Judge on appeal reversed his order and gave possession to Ulpa as the durputneedar. On the 9th July 1850, Taramonee Dasse, the durputneedar, got a decree in the Collector's Court against Ulpa the durputneedar for rents due in Turuff Boalea, and afterwards Ulpa herself recovered from the ijaradar set up in the Act IV suit above noticed the amount of his illegal collections. There is then the record of the suit brought by Russoo Bewah, in which Ubotar Singh was charged with cutting and carrying off a quantity of bamboos, and was by the orders of the Magistrate made the second party in the suit, Russoo Bewah being the first. In that case he filed a kyofeut (23rd November 1857) in which he disclaimed all liability on the ground that Turuff Boalea belonged to his wife Ulpa, and that he had no concern with it. Again, in the case brought by Meajan Khalifa under Act IV of 1840 for ouster from 2½ beegahs of land, Ubotar Singh took the same course and declared his wife to be the sole owner of the property. Ubotar Singh died in 1266 B.S., and up to that time there was on his part a persistent declaration both by words and action that the durputnee estate was his wife Ulpa's, and not his own.

"Such declaration moreover coming from one who had no apparent object in

deceiving the world by a false statement, he being admittedly in easy circumstances and holding several other properties in his own name. It was suggested rather than directly argued that Ubotar Singh, being a jemadar in the jail at Rajshahye, was afraid of holding land situate so near the jail buildings, as that was in his own name, but it is admitted by the witnesses who give this as a reason for the benamee purchase that there was no prohibition against Government servants of Ubotar's class holding land within the district in which they were employed, and that Ubotar's dismissal from his jemadarship was not caused by his being discovered to be the real owner of the durputnee is proved by the record of the Magistrate's proceeding in the case. Ubotar Singh lost his place, not because he was the purchaser of Turuff Boalea, but because he had committed a riot on the land, and had taken with him a *posse* of jail burkundazes to make his side the stronger. If their case went no further than this, I should be inclined to hold that the appellants would be fairly entitled to the position of innocent purchasers for value without notice. The result of enquiry on their part could not have given them more precise information than that which appears on this record, and could it be said that in the face of such direct evidence, both oral and documentary, as to the ownership of the land, that respondents were not justified in purchasing from Ulpa. But, besides the persistent statements of Ubotar Singh during his life, there is to my mind strong evidence that Kalli Churn after Ubotar's death assisted those statements by his own acts."

After stating what those acts were, the Judge proceeded as follows:—

"Everything was done to induce the appellants to consider Ulpa as the owner of the estate, and Kalli Churn, although he had many opportunities, never took any steps to reveal what he now states to be the true position of the parties, but corroborated as well by his acts as by his omissions the public avowals made by Ubotar Singh. So far as regards Kalli Churn's personal claim, therefore, I think that the Lower Court's decision should be reversed, and the suit dismissed with costs. Then remains that portion which Kalli Churn sues for on behalf of his minor brother Rajcoomar Singh. And so far I think that the Principal Sudder Ameen's decision should be confirmed, for Rajcoomar occupies a very different position from that of Kalli Churn, and cannot be concluded by any statements made by Ubotar or by Ulpa. Indeed, Ubotar died long before the appellants purchased, and it is nowhere contended that they were induced to come forward by any misrepresentation on the part of the father, and by those of his mother, Rajcoomar would not be in any way bound. For, if the finding above come to, namely, that Ubotar was at the time of his death the real owner of the mehal be correct, it proves Rajcoomar as heir would be entitled to succeed to his portion of his father's property. As regards this portion of the claim, the purchasers' only remedy would be an action against their vendor to recover such part of the purchase-money. The appellants must pay the costs on this portion of their appeal."

Macpherson, J.—"Under these circumstances, I am of opinion that, so far as the share which Kalli Churn's claims in this durputnee is concerned, the decree of the Lower Court ought to be reversed, and the suit ought to be dismissed with costs in proportion. For a party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person. Nor will the fact that Kalli Churn attained his full age only shortly before the date of the sale avail him in any way. (See *Nicholson v. Hooper*, 4 Mylne and Craig, p. 186, and the cases collected in *White and Tudor's Leading Cases*, 2nd edition, p. 20.) But as regards the share of the minor plaintiff, I think the decree of the Lower Court must be confirmed. I do not think that the mere fact of Ubotar's and Ulpa's having given out that the property was the property of Ulpa alone, is sufficient to prevent the minor from having his rights declared in this suit. The minor

certainly is not bound by the representations made by his mother : and as Ubotar died long before the sale of the 8th Falgoon 1270, there is no evidence to show that it was by representations made by Ubotar that the Gossains were induced to purchase. As regards the share of the minor, a decree of the Lower Court is confirmed with costs in proportion."

The following are the material portions of the deed of sale :—"To the ever to be remembered Ulpa Burmoneeah, wife of Ubotar Singh, of good manners, this durputnee kubalah is executed in the year 1262 (twelve hundred and sixty-two). I execute this kubalah having concluded with you a durputnee talook settlement according to your prayer at a rent of Rs. 1,791, and for the proper consideration of Rs. 3,200 of the whole of my rights in Boalea proper of Turuff Boalea of Dehee Boalea.

"You and your heirs shall have the power and right to alienate by sale or gift the aforesaid durputnee rights, and to grant successive under-leases thereof in putnee keeping entire the rents, but you should give me notice of the same. And as power has been given to me to avoid and set aside the engagements of the former proprietor in my right as auction-purchaser, I make over to you the like power. But you shall not interfere with ancient lakheraj (rent-free) tenures confirmed by law, and the aforesaid debuttur (granted for the worship of idols) and burhmutter (granted for the support of brahmins) tenures. You shall carry out whatever orders are or shall hereafter be directed, or are or shall hereafter be usual to be complied with, issued by the Civil or Criminal Court, the Collectorate, the Commissioner, the Survey, Thakbust, or the like authorities. Whatever processes shall be issued by the authorities in respect of the aforesaid mehals in my name or in that of the proprietor zemindar, you shall give me notice, accompanied with a copy thereof, and carry out the orders. Whatever information it is usual to give as regards the Police, you shall furnish according to law at the proper place. You shall comply with whatever orders are issued by any of the authorities, or when necessary from my office through peons calling for any papers, and without any objection carry out the same and file the papers. In the event of my being held answerable, or any fine being imposed on account of your default or laches in carrying out the orders of the authorities, you shall be responsible for the same. I shall have no concern therewith. You too having agreed to the aforesaid fixed rent, and the above terms, have voluntarily filed the kubooleut (counterpart of the lease). To this effect I execute this durputnee kubalah (deed of sale), having received the full amount of the consideration-money aforesaid from your streedhun fund, through your husband Ubotar Singh by my husband."

The following judgment of the Judicial Committee of the Privy Council was delivered by Sir Barnes Peacock :—

The appellants in this case were the defendants in the suit below. The suit was brought against them by Kalli Churn Singh on behalf of himself and as guardian of his minor brother Rajcoomar Singh, to recover certain property from the defendants, upon the ground that it had descended to the plaintiffs as the sons of Ubotar Singh, their deceased father. The defendants set up in answer to that suit that they had purchased the property from Ulpa, the wife of the father, and that the property had been bought by Ulpa out of her own streedhun. The Lower Court found in favor of the plaintiffs. Upon appeal the High Court reversed the decision as to one moiety of the property, namely, the share belonging to Kalli Churn, upon the ground that he had represented that the property belonged to his mother Ulpa. It is admitted that the property was purchased under a deed of the 14th Assar 1262 from Taramonec Dasse, who was the putneedar. The purchase-money was Rs. 3,200, and it was stated in the deed of sale to Ulpa that she and her heirs should have the power and right to alienate by sale or gift the aforesaid durputnee rights, and to grant successive under-leases thereof

in putnee. It also contained the following clause:—"I execute this durputnee kubalah, having received the full amount of the consideration-money aforesaid from your streedhun fund through your husband Ubotar Singh by my husband." Nothing could be clearer on the face of that deed than that the property was purchased by Ulpa out of her own streedhun. The purchase being of a durputnee, a mutation of names would be effected in the sherishta of the putneedar, and that mutation would be into the name of Ulpa as the owner of the property by purchase. It has been contended at the Bar that Ulpa had no power to sell this property, even if it had been her own streedhun, inasmuch as it is laid down that a wife cannot sell immoveable property which has come to her from her husband as her separate property. The deed of sale, however, does not represent that the immoveable property conveyed by the deed had been given to Ulpa by her husband, but that Ulpa was the purchaser of the immoveable property by means of moveable property, namely, the Rs. 3,200 which were her streedhun. According to the authority which has been cited by Mr. Bell from Macnaghten's Treatise on Inheritance, the Rs. 3,200 being the wife's streedhun were disposable according to the wife's pleasure. The passage from Macnaghten is at page 40. This is the passage:—"It may be here observed that the Hindoo law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure." Now, this deed represents that the Rs. 3,200 were her streedhun, of which, according to the authority cited, she was at liberty to make any disposition, and she did make a disposition of it by purchasing the property conveyed to her by the deed for the Rs. 3,200. If the property was purchased by her with Rs. 3,200, her own streedhun, she had a right to sell that property to the defendants, and she did sell it to them for a much larger sum than the Rs. 3,200, viz., for Rs. 12,000, the actual value which the plaintiffs themselves have put upon it by the valuation of their suit. But it is said that, although the property was purchased by means of Rs. 3,200 represented to be the streedhun of Ulpa, it was not really her streedhun, but that the Rs. 3,200 were advanced by the husband, and that the property was purchased by him in the name of Ulpa. It has been found by the Court below, and also, on appeal, by the High Court, that the defendants were *bond fide* purchasers of this property; that on the face of the deed it appeared that the property was purchased with the lady's streedhun, and that the husband during his lifetime had in every way, both publicly and privately, whenever he was called upon to make any representation on the subject, always represented that this was his wife's property. The defendants having purchased the property from Ulpa *bond fide* for a valuable consideration, and for the full value of the property, it appears to their Lordships that it would be contrary to every principle of equity that they should be turned out of the property in favor of the heirs of the husband. The High Court held that the elder of the two plaintiffs, the elder brother, was not entitled to recover his share of the property, inasmuch as he had lent himself to the representations which had been previously made by his father; and that having joined in a misrepresentation of the real state of facts, he was not at liberty to recover his share of the property, even though it might really have been the father's. But the learned Judges held that the minor brother was in a different position. One of the learned Judges says:—"I think that the Principal Sudder Ameen's decision should be confirmed, for Rajcoomar"—that is the younger brother—"occupies a very different position from that of Kalli Churn, and cannot be concluded by any statements made by Ubotar"—that is the father—"or by Ulpa. Indeed, Ubotar died long before the appellants purchased, and it is nowhere contended that they were induced to come forward by any misrepresentation on the part of the father, and by those of his mother, Rajcoomar would not be in any way bound." Mr. Justice Macpherson says:—"I do not think that the mere fact of Ubotar's and Ulpa's having given

out that the property was the property of Ulpa alone, is sufficient to prevent the minor from having his rights declared in this suit. The minor certainly is not bound by the representations made by his mother." Now, although the minor could not be bound by the representations made by his mother, if he really inherited this property from his father, still the question is whether he was not estopped by the representations of his father in his lifetime, from saying that this property was his father's, and consequently that it had descended to him. It is said that the misrepresentations were made by the widow when she sold the property after the father's death, but were there not misrepresentations also made by the father in his lifetime? If the property were purchased by him, and the Rs. 3,200 which were paid as the purchase-money were the property of the father, did he not represent and hold out to the world that the property was purchased out of the Rs. 3,200 which were the streedhun of his wife? That was a misrepresentation of the father by means of which the widow after his death was enabled to sell the property. It was said that the minor would not be bound by the acts of the father before his death. Suppose the father had actually sold this property to the mother, and had made a misrepresentation by a deed of sale, would not the minor son have been bound by that deed, although the father might have had some secret understanding with the mother that it was purchased in her name benamee for the father? It appears to their Lordships that there was a misrepresentation by the father in allowing the property to be taken by the wife under a deed of sale, representing that the purchase-money was her streedhun, and in all his acts, both public and private, during his lifetime, representing that the property was his wife's. After that representation on the part of the father, his heirs were no more entitled to recover than the father would have been in his lifetime. The heirs were as much bound by the misrepresentations made by the father, as the father would have been if the wife in his lifetime had actually sold the property to a *bona fide* purchaser. In such case the father could not have recovered the property from the purchaser; and it appears to their Lordships that the minor claiming by descent from the father is equally bound by those misrepresentations, and that he cannot, as heir to the father, set up that that property belonged to the father, when the father could not in his own lifetime, under similar circumstances, have set up that the property belonged to him.

But, then, it is contended that the pleadings in this case have not raised the real question in dispute. The suit was brought to set aside an illegal deed of sale executed by the defendant No. 2, the mother. It is thus stated:—"The properties have been left by Ubotar Singh deceased, the father of your petitioner plaintiff No. 1. That on the 14th Assar 1262 B.S., he had acquired the durputnee rights of the said mehals, from their putneedar Taramonee Dasse, the wife of Kashinath Shaha, for a consideration of Rs. 3,200, and that having then acquired a lease of the same, in the name of the defendant No. 2, he continued to hold and enjoy them both in the Sudder and Mofussil," and that afterwards he died and that this property descended to his two sons. Now the defendants had purchased under a deed representing that this property had been purchased out of the wife's streedhun. They knew nothing as to the real facts of the case; they stated what they believed the facts to be, taking the facts as they were represented at the time of the purchase. They believed the deed which represented that the purchase-money was the wife's streedhun, and they believed the representations which had been made by the husband in his lifetime. In answer to the plaint, which says that the property was the husband's, and that he died possessed of this property purchased in the name of his wife, they say:—"Ulpa Burmoneeah acquired through her husband Ubotar Singh, a durputnee settlement of the disputed mehal from the putneedar thereof, Taramonee Dasse, on payment of a bonus of Rs. 3,200 out of her own 'streedhun' funds." They stated in their defence what they found represented upon the purchase-deed of the wife. They merely stated what they

were led by the representation to believe, namely, that the property was purchased by means of the streedhun funds of the wife, and that, consequently, it did not pass to the sons upon the death of their father, but that the wife having purchased the property out of her streedhun was entitled to sell it. It appears, then, to their Lordships that the pleadings were sufficient to raise the question. Then the issues were raised and they are to be found at page 138 of the record:—"Is it true that the Ubotar Singh, the late father of the principal plaintiffs, acquired the durputnee of the disputed property in the name of the defendant No. 2 with his own funds, and remained in possession of the same during his lifetime, or that the durputnee was obtained by the said defendant with her own 'streedhun' and she herself held possession of it?" If the defendants were entitled to avail themselves of the estoppel in consequence of the misrepresentation of the husband, they are entitled to use that estoppel as matter of proof, and they use it to prove that the durputnee was not purchased out of the father's own property, but that it was obtained by the mother Ulpa, with her own streedhun, and that she herself held possession of it. So they prove the issue on their part by means of the estoppel. The written statement is the only pleading of the defendants in this case. There is no pleading now in India by way of confession and avoidance. It was not necessary, therefore, to plead the estoppel on the part of the heirs arising from the misrepresentation of the father. The defendants allege the facts as they find them represented in the deed which was their title-deed. They go to trial upon those facts, and they put in evidence the misrepresentations of the father and the title-deed founded upon those misrepresentations as proof of their case, which was that the property was purchased out of the separate estate of the wife.

Under these circumstances, their Lordships are of opinion that the High Court ought to have reversed the decision of the Lower Court, not only as regards the share of the elder brother, but also as to the share of Rajcoomar, and they will humbly recommend to Her Majesty that the decree of the High Court be reversed as to the share of Rajcoomar, that the decrees of both the Lower Courts be reversed as to the share of Rajcoomar, and as to the costs in respect of that share, and that the suit be dismissed as to that share, and that the respondents do pay to the appellants the costs in both the Lower Courts calculated on the value of that share, and also the costs of this appeal, and that the said decree of the High Court be affirmed as to the share of the plaintiff Kalli Churn and as to the costs calculated upon the valuation of that share.

Agents for the appellants: Messrs. *Barrow and Barton*.

Agent for the respondents: Mr. *Oehme*.

The 6th March 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Lord Justice Mellish,
Sir Robert P. Collier, and Sir Lawrence Peel.

Joint Property—Findings on facts.

*On Appeal from the High Court at Calcutta.**

* From the judgment of Kemp and E. Jackson, J.J., in Regular Appeal No. 167 of 1867, decided 24th February 1868.

Joynarain Giri
versus
 Sheeb Proshad Giri and others.

The ordinary rule which the Privy Council have observed respecting the findings on questions of fact by two Courts was held to apply to the following case, in which plaintiff alleged that he and defendant had lived in commensality, and enjoyed certain joint property of which defendant being the elder was the manager, and applied for his share thereof. Defendant alleged that the property was not joint. On this issue both Courts had found against the defendants.

The Privy Council saw no ground for reversing the decision of the Lower Courts.

Their Lordships are of opinion that the ordinary rule which they have observed respecting the findings on questions of fact by two Courts applies in this case. It was a case in which the plaintiff alleged that he and the defendant had lived in commensality and enjoyed certain joint property of which the defendant being the elder was the manager ; that the defendant had claimed exclusive possession as against him, and their commensality had ceased, and he applied for his share of the joint property. The defendant alleged that the property was not joint. Upon that issue both Courts have found against him ; and it is not now contended that the finding is not right with respect to the bulk of the property. But it is alleged that, with respect to a certain portion of the plaintiff's claim, the decision is wrong, or at all events that some further enquiries should be instituted. That portion of the claim is this. It appears that the plaintiff and defendant held a joint lease of certain khas lands from the Government, and certain joint property had been deposited as a security for the payment of the rent of the Government, but the defendant alleges that, since the institution of this suit, that property had been taken possession of by the Government in consequence of the failure of the ryots to pay the rent, which he attributes to a certain cyclone which occurred in 1864, wherefore he was unable to pay the plaintiff his share of it ; and he further alleges that all papers connected with the transaction by which he could prove this part of his allegation were lost in the cyclone. Both Courts appear to have disbelieved the defendant's statement upon this matter, which was almost entirely unsupported by any evidence except his own, that evidence being of a very unsatisfactory character. It appears to their Lordships that the whole of this part of the case was in fact before both Courts, and the defendant, if he had a case, might have proved it, and they are not disposed to set aside the finding of the Courts that the plaintiff is entitled to his half of this joint property which was deposited as a security for the payment of the rent with the Government. As to the amount of mesne profits to which he would be entitled, that is another question, but that has not been concluded, and will be determined upon execution. It appears to their Lordships that this is the only matter upon which any enquiry could be necessary, and upon this an enquiry will be held. There was also a question as to the plaintiff's right to recover certain nij-jote lands which the defendant said he had given up to the landlord. The Courts below did not believe his story upon that, they did not believe that he proved that they were given up to the landlord ; but if they have been given up to the landlord, then the plaintiff will not get them in execution.

On the whole their Lordships see no ground for reversing the decision of the two Courts, which appears to be on questions of fact which they have properly enquired into ; and under these circumstances their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment of the Court below.

The 13th and 14th March 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Ghatwals—Resumption—Dispensation of services—Enhancement of revenue—
Ejectment (by auction-purchaser at revenue sale)—Construction—
Hereditary—Mokurruree istemraree.*

On Appeal from the High Court at Calcutta.

Nos. 500 and 502 of 1865.

Rajah Leelanund Singh and others

versus

Munoorunjun Singh and another.

No. 498 of 1865.

Rajah Leelanund Singh Bahadoor

versus

Mussamut Lakhpathy Thakoorain.

No. 10 of 1869.

Thakoor Munoorunjun Singh and another

versus

Rajah Leelanund Singh and another.

No. 11 of 1869.

Mussamut Lakhpathy Thakoorain

versus

Rajah Leelanund Sing Bahadoor and the Government.

Where lands were held by ghatwals upon a grant subject to certain services, it was held that, as long as the holders of those grants were willing and able to perform the services, the zemindar had no right to put an end to the tenure, whether the services were required or not, and notwithstanding an arrangement came to between the zemindar and the Government by which the Government had increased the revenue of the zemindary in consideration of the dispensation with those services by the Government.

Accordingly, when the Government received half of the profits of the land for revenue and left only one half the profits of the land in the receipt of the ghatwals, the Government was held to be receiving a portion of the profits of the land which ought to have gone to the ghatwals, and a portion which ought to have gone to the zemindar; in other words, the Government was held bound to return the one-half of the profits which they received as revenue, by paying to the zemindar the rent which was due to him under the tenure, and returning to the ghatwals the remainder of the money.

Where the words "mokurruree istemraree" were used, although it was doubtful whether they meant permanent during the life of the person to whom they were granted, or permanent as regards hereditary descent, coupling those words with the usage, the tenures were held to be hereditary.

Where a ghatwalee tenure was assumed to have been granted subsequently to the date of the Permanent Settlement, namely in 1794, an auction-purchaser at a revenue sale was held not entitled to turn the holder out of possession, his only right (if any) being to enhance the rent.

The plaintiffs in this suit (No. 500 of 1865,—delivered 13th March 1873), Rajah Leelanund Singh and others, brought a suit to recover possession of talook Khukwara in the zemindary of Khuruckpore. The plaintiffs were purchasers under a sale for arrears of revenue against Kadir Ali, the former zemindar of the zemindary; but their Lordships are of opinion that as auction-purchasers they have no greater rights, so far as this case is concerned, than they would have had as original zemindars. Indeed, that point has been admitted by the learned counsel who argued this case on behalf of the appellants. The other plaintiffs are merely lessees of the zemindars; and the case may be treated as a suit by the zemindars of Khuruckpore against the defendants, to recover possession of the talook Khukwara.

The question is, whether they are entitled to recover possession of that talook. Their contention is that it was held as a ghatwalee tenure, and that they have a right, when the ghatwalee services are dispensed with and not required, to take possession of the lands which were held subject to those services.

The earliest sunnud that we find is one granted by Captain Brown in the year 1776 to Rankoo Singh and Bhyro Singh, who were the ancestors of the present defendants. By that grant the talook in question was granted at a rent of Rs. 245 : 12 annas to Rankoo Singh and Bhyro Singh by Captain James Brown, who must be assumed now to have had power to make the grant. A subsequent sunnud of Kadir Ali, who was the ancestor of the zemindar against whom the zemindary was sold for arrears of revenue, was also made in the year 1779 at the same rent. That grant was a ghatwalee grant, and it was made more than twelve years prior to the permanent settlement. The question is, whether the zemindar, by dispensing with the ghatwalee services, has a right to recover possession of the lands? It was held in the case of the same Rajah, Leelanund Singh v. the Government of Bengal,* that the Government was not entitled to resume this talook as police lands. That was upon the ground that the talook had been assessed to revenue, and was a portion of the māl lands of the zemindary. But although the lands were not resumeable, that is to say, although the Government could not re-assess the talook with revenue, it did not dispense with the services upon which the lands were held at the time of the permanent settlement. The lands therefore remained liable to the ghatwalee services.

It is contended that the sunnuds, in effect, merely gave certain lands as wages to hired servants, and that the zemindar, whenever he chose, provided the Government dispensed with the ghatwalee services, might put an end to the tenure and take back the lands, which were allotted in lieu of wages. It appears to their Lordships that that contention is not a correct one; that these sunnuds were grants of the land subject to certain services, viz, the service of paying a small rent of Rs. 245 : 12 annas, and also of performing the ghatwalee duties. They were not therefore the hiring of a servant, giving him certain land by way of wages, but grants of land upon the condition of certain services.

A similar case was argued in the High Court, reported in the 6th volume of the Weekly Reporter, p. 198. It was there held that, "Where a ghatwalee tenure was granted more than 100 years ago, under a valid sunnud from a person representing the then Government, and had been allowed during that period to change hands by descent or purchase without question, the zemindar was incompetent, of his mere motion, without the assent and against the will of the Government, to put an end to the ghatwalee services, to deprive the ghatwals of their lands, and to treat them as trespassers."

It is unnecessary to go particularly into the reasons for that decision. They are very fully pointed out in the decision itself, and that decision was, on the 18th July 1871,† affirmed upon appeal by the Judicial Committee, who also gave their reasons for affirming the decision.

It may therefore be assumed, upon the principle of those decisions, that the zemindar had no right to turn the tenants out of possession by dispensing with their services unless the Government had dispensed with those services, as between the Government and the zemindar. The only question then is, whether the fact of the Government's having consented to dispense with those services as regards the zemindar, and the zemindar's having agreed with the Government to pay an additional revenue of Rs. 10,000 in consideration of the Government's having absolved them from the services, makes such a distinction in this case that the zemindar, as between him and the ghatwals, is entitled to treat them as trespassers, and turn them out of possession. In the cases which have been cited it was stated that even if the Government had not dispensed with the services it

* 4 W. R. P. C. 77; 1 Suth. P. C. R. 248.

† See p. 491 *ante*.

appeared to their Lordships that the zemindar would have had no right to treat the ghatwalee holders as trespassers, and their Lordships see no distinction between those cases and the present. The lands were held upon a grant, subject to certain services, and as long as the holders of those grants were willing and able to perform the services the zemindar had no right to put an end to the tenure, whether the services were required or not.

Some documents were referred to from which it appeared that certain ghatwals had been dismissed by the zemindar, but it does not appear that that was merely because the zemindar did not require their services. They may have been dismissed for incompetence or because they did not properly perform the services to which their tenures were subject. In such a case they might be dismissed, but the zemindar has no right to put an end to the tenure so long as the holders of the tenure were willing and able to perform the services.

The words "mokurruree istemrarae" are used, and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted or permanent as regards hereditary descent their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary.

Under these circumstances, it appears to their Lordships that the decision of the High Court was correct, and they will humbly advise Her Majesty to affirm the decision, with costs.

In this case (No. 502 of 1865,—delivered 13th March 1873) the plaintiff seeks to recover possession of certain lands, and not merely to enhance the rent of those lands. It appears to their Lordships that there is no distinction between this case and the case which has just been determined, except that in this case the sunnud was not granted prior to the date of the permanent settlement, whereas in the former case it was granted prior to that settlement.

In this case the sunnud which was produced was dated in 1794, and was subsequent to the date of the permanent settlement. But it appears to their Lordships, looking to the terms of the sunnud, that it was not an original sunnud, but that it treated the lands included in it as old ghatwalee lands. It is unnecessary, however, to determine whether the tenure was created by that sunnud of 1794, or existed from an earlier date, for, whether it was created in 1794 or not, it appears to their Lordships that the plaintiff is not entitled to maintain this suit, and to turn the defendant out of possession. Upon the principle of the case just decided, the plaintiff is not entitled to turn the defendant out of possession upon the ground that he has dispensed with the services. He is not entitled as a purchaser at a sale for arrears of revenue to turn the defendant out of possession upon the ground that the grant under which the defendant claimed was created subsequently to the time of the permanent settlement. At the date of the purchase at the sale for arrears of revenue, Reg. XI of 1822 was the law which governed such sales; but that Regulation had been repealed before this suit was commenced, and, unless the Regulation of 1793 is still in existence, there is no law which would entitle the plaintiff to avail himself of the fact of his being a purchaser at an auction sale. Their Lordships had some doubt in the case which has been cited of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy*,* whether the Regulation of 1793 was in existence or not; but they held that, assuming it to be still in force, it did not authorize a purchaser at a sale for arrears of Government Revenue to treat the pottahs mentioned in s. 5 of that Regulation as absolutely void for the purpose of turning the holder out of possession, but that the purchaser was only entitled to enhance the rent. That section enacted: "Whenever the whole or a portion of the lands of any zemindar, independent talookdar, or other actual proprietor of land shall be disposed of at a public sale for the discharge of arrears of the public assessment, all engagements which such proprietor shall

* 2 W. R. P. C. 13; 1 Suth. P. C. R. 548.

have contracted with dependent talookdars, whose talooks may be situated in the lands sold, as also all leases to under-farmers and pottahs to ryots for the cultivation of the whole or any part of such lands (with the exception of the engagements, pottahs, and leases specified in ss. 7 and 8) shall stand cancelled from the day of sale, and the purchaser or purchasers of the lands shall be at liberty to collect from such dependent talookdars, and from the ryots or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rights of the pergunnah or district in which such lands may be situated, had the engagements so cancelled never existed." In the case to which I have just referred their Lordships held that the meaning of the words "shall stand cancelled from the day of sale," was not that they should be absolutely cancelled for the purpose of enabling the purchaser to recover possession of the lands, but that they were to stand cancelled from the day of sale so far as to enable the purchaser to exercise the power given of enhancing the rent to the pergunnah rates. Therefore, assuming that the ghatwalee tenure in question was created subsequently to the date of the permanent settlement, viz., in the year 1794, their Lordships are of opinion that the plaintiff would not as an auction-purchaser be entitled to turn the defendant out of possession, but that his only right, if any, would be to enhance the rent. The decision in the case of *Ranee Surnomoyee v. Sutteeschunder Roy* was upheld in the case of the *Maharajah Suttosurrin Ghosal v. Moheshchunder Mitter and others** (12 Moore's Indian Appeals).

Their Lordships are of opinion that in any view of this case, the plaintiff is not entitled to maintain this suit and to turn the defendant out of possession. Their Lordships express no opinion as to whether the plaintiff would be entitled to enhance the rent. Whether the circumstances of the case would enable him to enhance the rent, or whether a suit to enhance would be barred by the Statute of Limitations, are questions which are not at present before their Lordships, and as to which they wish to express no opinion.

Under these circumstances their Lordships will humbly recommend Her Majesty to affirm the decision of the High Court, and to dismiss the appeal, with costs.

This case (No. 498 of 1865,—delivered 13th March 1873) being governed by the same principles, their Lordships will humbly recommend Her Majesty that the decision of the High Court be affirmed, and the appeal dismissed, with costs.

In this case (No. 10 of 1869,—delivered 14th March 1874) Thakoor Munorunjun Singh and Tekaet Lokenauth Singh are the appellants, and Rajah Leelanund Singh and the Government are the respondents. The appeal is from a judgment of the High Court, acting as Special Commissioners, dated the 25th August 1868.

The case, as stated by the Judges in delivering their decision, arises out of the proceedings of Government to resume certain ghatwalee lands in Khurruk-pore.

They say:—"On the appeal of Rajah Leelanund Singh and the Government, Her Majesty, in a Council held on the 25th July 1855,† held that the ghatwalee lands in the zemindary of Khurruk-pore were not liable to resumption and reassessment under the provisions of cl. 4 s. 8 Reg. I of 1793, which related to simple police establishments, and they set aside the resumption and gave a decree for mesne profits in favor of the Rajah, appellant. The mesne profits which Government had to refund consisted of the rent or revenue paid by the ghatwals, whose lands were resumed, and with whom a settlement had been made at half jumma, which settlement was in force so long as the resumption decrees were not

* 11 W. R. P. C. 10; and p. 180 *ante*.

† 4 W. R. P. C. 77; 1 Suth. P. C. R. 248.

set aside. On the strength of the decrees which he had obtained in the Privy Council in July 1855 Rajah Leelanund Singh applied for a review of judgment in all the other cases in which ghatwalee lands in the zemindary of Khurrukpore had been resumed : and the review was admitted and a decree passed in 1860 by three Judges of the late Sudder Court, sitting as Special Commissioners, who reversed the order for resumption, but declined to determine the question as to mesne profits, which had been realized by Government." From that judgment an appeal was presented by Rajah Leelanund Singh to Her Majesty in Council, and on the 4th February 1864* the Judicial Committee held that, "The Judges who made the decree of 1860 ought not, in their Lordships' view of the matter, to have been silent as to the title to the money, but ought to have declared and acted on it, if able to do so, from the materials and parties before them, and if not so able to have directed an enquiry to ascertain the person or persons entitled." Upon that the case was remitted to the High Court, and the decision now under appeal was passed by the learned Judges. They held that, according to the theory of the ghatwalee tenures, the lands were assigned to the ghatwalees for maintenance in return for and in payment of police duties performed by them. The profits of the ghatwalee lands, they said, might therefore be said to represent the wages which, if paid in money, would have been paid to the ghatwals for their services; and they proceeded to say that it appeared to them that the ghatwals had, on the half rates which they pocketed during the existence of the settlement, been amply compensated for any loss which they had sustained ("though they did not appear to have sustained any") during the period when, owing to particular circumstances, they did not and could not perform their police duties. They said, "It has been suggested to us that the value of the services of the ghatwals might be computed by ascertaining the numerical strength of each post and assigning to the sirdar and each of the ghatwals a salary suitable to the position; but, on the view we have taken above, such computation appears to be unnecessary, for if we are correct in looking upon the whole profits of the ghatwalee lands as equivalent to the wages which the ghatwals would otherwise have received, it is apparent that when they did no service and retained one half of the profits for their own benefit they cannot claim the other half paid by them to Government in the shape of revenue." They said, "The whole of the money paid by the ghatwals to the Government in the shape of revenue should be paid over to the zemindar Rajah Leelanund Singh, partly as the quit-rent due to him, and the remainder as compensation for the loss of the services of the ghatwals during the period the settlement with the ghatwals continued in force. The sums to be refunded will, as provided for by the decree of the Privy Council, carry interest to the date of liquidation."

Now, the *status* of the ghatwals has been determined in the cases which were before their Lordships yesterday, and it was then held that the ghatwals held the lands in question upon a tenure, by which they were liable to a certain rent and also to certain ghatwalee services, and that, notwithstanding the arrangement which had been come to between the zemindar and the Government, by which the Government had increased the revenue of the zemindary to the extent of Rs. 10,000 a year, in consideration of the dispensation by Government of the services, the ghatwals were still entitled to hold their lands upon the tenure upon which they had been granted, and were entitled to hold the land and to receive the rents and profits thereof, paying to the zemindar the rent reserved upon the tenure.

Now, applying that principle to the present case, it appears that when the Government received half of the profits of the land for revenue, and left only one-half the profits of the land in the receipt of the ghatwals, the Government were receiving a portion of the profits of the land which ought to have gone to

* 1 W. R. P. C. 20; 1 Suth. P. C. R. 535.

the ghatwals. They were receiving also a portion of the profits of the land which ought to have gone to the zemindar ; in other words, the Government were bound to return the one-half of the profits of the land which they received as revenue, by paying to the zemindar the rent which was due to him under the tenure, and returning to the ghatwals the remainder of the money.

Under these circumstances, their Lordships are of opinion that the judgment and decree of the High Court should be varied, and they will humbly recommend to Her Majesty that the judgment and decree of the High Court, acting as Special Commissioners, be varied, and that it be decreed,—That out of the moneys received by the Government of Bengal in respect of the lands included in the tenure of the appellants the zemindar do receive the amount of the money rent payable under the ghatwalee tenure during the period in respect of which the moneys in the hands of the Government were received as revenue, that the remainder be paid to the appellants, and that the case be remitted to the High Court as Special Commissioners, who are, if necessary, to determine the amounts to be repaid to the parties respectively, according to the principle above laid down, the moneys so to be paid to carry interest as directed by the Lower Court.

Looking to all the circumstances of the case, their Lordships will humbly recommend to Her Majesty that each party be directed to pay his own costs incurred in India subsequently to the Order of Her Majesty in Council of the 1st March 1864, that is the date of the Order in Council which was passed in pursuance of the decision of the Judicial Committee of February 1864. It does not appear at present—for we have not the decree of the High Court before us—whether the High Court awarded any and what costs by that decree ; but if any costs have been paid by either party under the decree now under appeal such costs are to be refunded, and each party will bear his own costs of this appeal. In regard to the Government, their Lordships think that the Government ought to bear its own costs of this appeal.

The second case (No. 11 of 1869,—delivered 14th March 1873) in which Mussamut Lakhputty Thakoorain is appellant will be decided upon similar principles, and the recommendation to Her Majesty will be in similar terms.

The 15th March 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Mahomedan law—Dower (prompt or deferred)—Certificate of administration
—Act XXVII of 1860.*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Mirza Bedar Bukht Mahomed Ali Bahadoor

versus

Mirza Khurram Bukht Yahya Ali Khan Bahadoor.

The appellant, one of the royal family of Oudh, sued his father, the respondent, for Rs. 50,000 as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum, who left as her heirs her husband (the appellant), her only son, and three daughters, who were made joint defendants. The plaintiff's case was that the dower being unpaid, he as co-heir became entitled to three-tenths ; but having regard to the circumstances of the husband, he had limited his claim. The respondent disputed the genuineness of the kabinnamah and the amount of the alleged dower, pleading that whatever was its amount it had been satisfied during the lifetime of Oomrao Begum. The first Court decreed the

suit, but the Lower Appellate Court holding that the defendant had established his plea of satisfaction, reversed the decision :

HELD, that the mehrnamah was a genuine document, and that the dower was of the amount alleged by the plaintiff subject to modification according to the law and practice in Oudh ; but that as plaintiff had taken out no certificate, under Act XXVII of 1860 s. 3, the cause should be remitted to the Judicial Commissioner to have it ascertained what amount of dower was payable by the respondent to the estate of his deceased wife, and what, after payment of debts, was the share of dower due to each co-sharer.

Where it is not expressed whether the payment of the dower is to be prompt or deferred, the rule is to regard the whole as due on demand.

Quære.—Where no time for the payment of deferred dower is expressly limited by contract, must it be presumed to be payable on the death of either husband or wife, or only on the death of the husband?

This is an appeal from a decree of the Judicial Commissioner of Oudh, which dismissed the suit of the appellant, thereby reversing the decree which had been made in his favor by the Civil Judge of Lucknow.

The suit was brought by the appellant to recover from his father, the respondent, the sum of Rs. 50,000 as his share of the dower alleged to have been settled on his mother, the late Oomrao Begum. His case was that his parents intermarried in December 1831; that the lady's mehr, or dower, was then fixed at the sum of nine lacs of sicca rupees; that the contract for the payment of that sum was on the occasion of the marriage, or shortly afterwards, embodied in the kabinnamah annexed to the plaint, and set forth at page 3 of the record; that Oomrao Begum died in January 1868, leaving as her heirs, according to Mahomedan law, her husband, the appellant, her only son, and three daughters, who were made joint defendants to the suit; that the dower being unpaid, the appellant as such co-heir thereupon became entitled to three-tenths of it; but that, in deference to the law which prevails in Oudh, by which the Courts of Justice are empowered to reduce extravagant dowers to such an amount as, having regard to the circumstances of the husband, they may deem reasonable, he had limited his claim to Rs. 50,000.

The parties are of the Royal family of Oudh. The respondent's father, Mahomed Ali, at the date of the marriage, was uncle to the then reigning king, but in 1837 he succeeded to the throne, and, dying in 1842, was succeeded by the respondent's elder brother, the late Amjud Ali, who was the father of Wajid Ali, the living ex-king.

The case of the respondent was that the kabinnamah produced was not genuine; that the stipulated dower was not nine lacs of rupees, but a much smaller sum, possibly not exceeding the fatima dower of 500 dirhems; but that whatever was its amount, it had been satisfied in the lifetime of Oomrao Begum, and during the reign of Mahomed Ali Shah, by the payment of Rs. 7,000 and the gift of a pair of armlets valued at Rs. 3,000. Other objections were also taken to the suit, which will be afterwards considered.

The issues originally settled were—

1. Whether the plaintiff could maintain his suit without producing a certificate under the provisions of Act XXVII of 1860 s. 3, as one of the heirs of his mother.
2. Whether the kabinnamah produced was genuine or not.
3. Whether the stamp was sufficient.
4. Whether the defendant had paid, and his wife accepted, the sum of Rs. 10,000 in lieu of her claim to dower.
5. What was the extent and value of the plaintiff's share.

Two other issues were afterwards added, viz., whether the respondent was a minor at the date of his marriage; and if so, whether that fact would invalidate the deed of dower according to Mahomedan law.

The two latter issues, and the second of the original issues, were submitted to a jury chosen by consent of both parties, and were found in favor of the plaintiff. But exception was afterwards taken to the regularity of this proceeding.

and their Lordships will therefore treat the case as if there had been no regular finding of a jury on these points. The final result of the trial, however, in the Court of first instance was that the Judge found all the issues in favor of the plaintiff. On appeal, the Judicial Commissioner, confining himself almost entirely to the second and fourth of the original issues, concurred with the Civil Judge in his finding on the former; but upon the latter held that the defendant had established his plea of satisfaction, and, therefore, dismissed the suit.

Other points have been raised by Mr. Bell at the Bar, which will be afterwards considered; but their Lordships will deal, in the first instance, with the two material issues which have just been mentioned. They can see no ground for disturbing the concurrent judgments of the two Courts upon the first of them. It is no doubt true that the document relied upon did not come from that which would at first sight appear to be the proper place of custody, viz., the Dufter-khanah of Oomrao Begum. The admitted facts concerning its production are that, on the death of Oomrao Begum, and when some question had arisen touching her missing mehrnamah, Nawab Moomtaz Mahal, the widow of a former King of Oudh, went to the house of the deceased lady, and, in the presence of both the appellant and respondent, and also of other persons, produced a tin cylinder, which she said she had received from Oomrao Begum some three years before; that on opening the cylinder this document, with another, was found in it; and that, with the father's assent, it remained in the possession of the son. The evidence as to the father's behaviour on this occasion will be considered hereafter when their Lordships come to deal with the other issue. Mr. Bell has commented strongly on the omission of the appellant to prove by his own deposition, or otherwise, the identity of the document annexed to the plaint with that produced by Moomtaz Mahal. But that fact seems never to have been questioned in the Court below. The question of course remains whether the document so produced had really been delivered by Oomrao Begum to Moomtaz Mahal; and if so, whether it was what it purports to be, the mehrnamah executed upon or shortly after marriage. There is little, if any, evidence on this point except that of Moomtaz Mahal herself. She states that when intending to go on a pilgrimage, she sent the tin case containing the mehrnamah of her adopted daughter to Oomrao Begum for safe custody; that afterwards Oomrao Begum returned the case to her in the state in which she produced it. Her evidence is not very clear or consistent as to her knowledge that the case, when returned, contained the mehrnamah of Oomrao Begum also. It would seem that the only knowledge or information she had on the subject was derived from a statement which she says Oomrao Begum subsequently made to her to the effect that her "amount" was in the case. It is, moreover, to be observed that this story cannot be reconciled with the evidence of the two sisters of Oomrao Begum, who depose to having seen the document in the hands of their sister not very long before her death; except by supposing that, although they are speaking truly to the fact of its production to them, they are mistaken as to the date at which it was produced. The Judge of first instance, however, seems to have given full credence to Moomtaz Mahal, and if the genuineness of the deed is otherwise proved, that fact will go far to support her testimony. The theory of the Judicial Commissioner that Oomrao Begum, having been satisfied, became indifferent about the custody of the deed, and that it found its way in some unexplained manner into the hands of Moomtaz Mahal, is pure speculation, and depends upon the assumption that her claim for dower had really been satisfied, which is the question to be hereafter considered.

As to the genuineness of the instrument produced, we have the evidence of his widow as to the seal of Amjud Ali, and the evidence of the half-brother of Oomrao Begum, to say nothing of that of the two sisters, on which by reason of its inconsistency with that of Moomtaz Mahal it may not be safe to rely.

That the dower was for the large, not to say excessive, sum specified in the deed is consistent with all we know concerning the customs of Mahomedans of the class of the respondent. That a man of his rank should, on the occasion of his first marriage, have fixed the dower of his wife at 500 dirhems, or any trifling sum, seems highly improbable. And there is evidence in the cause that other women of Oomrao Begum's family had very large dowers secured to them on their marriage. Both Courts, as well as the jurors, having the original document with all the evidence relating to it before them, have, on that evidence, come to the conclusion that it was the genuine mehrnamah. Nor can their Lordships see any sufficient grounds for impugning the correctness of that conclusion.

The next question to be considered is, whether the respondent has made out that his wife's claim for dower was satisfied by him in her lifetime. The burden of proving this issue of course lay upon him; nor was it made lighter by the circumstance that he disputed the contract which has now been established against him, and contended that the obligation, which he professed to have satisfied, was a very different one.

What then is the case of satisfaction which he made? It is that his father, who had then become king, gave to him out of the estate of his grandmother, and shortly after her death, Rs. 7,000 in cash, and two armlets worth Rs. 3,000, and requested him to transfer both money and jewels to his wife; that he sent both to his wife by his servants, and afterwards personally waited on her; that on the occasion of that visit he told her that the things which he had sent were given in satisfaction of her dower, and asked her to give up her mehrnamah; that she so accepted them and did give up the mehrnamah; and that he afterwards gave that document, which he describes as written on red paper, to his darogah, since deceased, by whom it was lost during the rebellion.

The story is, to a considerable extent, corroborated by Moonga Begum and Musseeta Begum, who state that they were present during the conversation between the husband and wife, but both these witnesses expressly say that no document was given up by her in their presence to the respondent. Two other female witnesses speak to verbal admissions made by Oomrao on subsequent occasions to the effect that she had no longer any subsisting claims for dower. And a servant who was called to prove that he carried the money and jewels to Oomrao Begum's house, has deposed that, on the following day, he saw a red paper in the respondent's hands, which he gave to the darogah to keep, saying it was his wife's mehrnamah.

The document now proved to be the mehrnamah is written, not on red, but on white paper.

It appears to their Lordships, as it appeared to the Judge of first instance, that this evidence is too weak to establish the plea of satisfaction. The document said to have been returned to the respondent cannot have been the document now proved to be the real mehrnamah, which, upon the evidence, their Lordships believe to have remained for years afterwards in the possession of Oomrao Begum, and to have been sent by her to Moomtaz Mahal. And in this conclusion their Lordships are confirmed by the account which the witnesses, including the respondent himself, give of his behaviour on the occasion of the production of the document by Moomtaz Mahal. A question had then arisen touching his liability for the dower. Is it credible that, when the missing document was produced, he should merely have said I am "burree" (free) from its obligations, and allowed it without remonstrance to pass into the hands of the party interested in enforcing it? Is it credible that, if his story were true, he should not have said, "this is not the genuine mehrnamah; or, if genuine, it must have been fraudulently obtained from my darogah to whose custody I committed it?"

It need hardly be observed that the case which this weak and inconsistent evidence is produced to establish is one that involves startling improbabilities. It

must now be taken to be an established fact that the stipulated amount of dower was nine lacs of rupees. One reason for fixing these excessive dowers is notoriously the desire to protect the woman from capricious repudiation. It is in the highest degree improbable that Oomrao Begum should, within ten years of her marriage, relinquish that protection for so small a sum as Rs. 10,000. On the other hand, if the money and jewels really passed from the husband to the wife, their amount and value are not so large as to be inconsistent with the hypothesis that they were a free gift from the son of a reigning king to his wife. And if not a gift, the transaction may have been in the nature of a payment on account. Whether the money or jewels really passed or not, their Lordships are of opinion that the respondent has failed to prove that, in consideration of them his wife wholly relinquished her claim to dower; and consequently that the judgment of the Judicial Commissioner on this issue cannot be supported.

Mr. Bell, however, has taken other objections to the suit, which must now be considered.

He has argued that, by the general Mahomedan law, and at all events by the law of Oudh as modified by the Punjab Code, the dower was not payable except upon the dissolution of the marriage by divorce, or upon the death of the husband; and consequently that no suit for its recovery by the representatives of the wife will lie during the husband's lifetime.

Their Lordships do not think that the general law on this point is controlled or affected by the Punjab Code. The only articles which could have this effect are the 10th and 11th of the 6th section of the part entitled Principles of Law. These, like the other portions of this somewhat informal Code, consist of a statement or recital of what the general law is, followed by provisions for the modification of it, in its practical application to the Punjab. These recitals cannot be taken to have altered the law, because they contain an imperfect or inaccurate statement of it. And the particular articles under consideration certainly do not contain an exhaustive exposition of the Mahomedan law relating to dower, and the circumstances under which it becomes demandable. The first contemplates only the event of a divorce: the other that of the husband's death; neither makes any distinction between prompt and deferred dower, and both assume the dower to be excessive. If then by the general law, dower, whether prompt or deferred, may be claimed from the husband by the heirs of the wife on the dissolution of the marriage by her death, that part of the law is not abrogated by the Punjab Code; although it may be true, as their Lordships think it is, that the power given to the Courts to modify excessive dowers is capable of being exercised in such a case, as well as in the particular cases expressly mentioned in the recitals.

The real question then is, whether Mr. Bell's proposition is supported by the general Mahomedan law. It clearly cannot be maintained as to dower which is prompt, and therefore exigible by the wife during the coverture. If there be any doubt on this subject, it would be set at rest by cases XXIX, XXXIII, and XXXV in Macnaghten's "Precedents," pp. 278, 286, 288. But the note to the first of these cases shows that there is some room for doubt in the case of deferred dower. It is, of course, indisputable that the term to which payment is to be deferred may be fixed by the contract; that, for example, the husband is at liberty to stipulate that the dower shall not be payable until divorce, or his own death. The difficulty is to say what is the rule in the absence of express stipulation, as where the dower is merely described as "mowujil," or deferred. Case XXX of Macnaghten's "Precedents," p. 280, seems to show that questions of this kind are to be determined by local usage. On the other hand, case XXXIX of Macnaghten's "Precedents," p. 293, seems to be an authority for holding that the heirs of the wife may sue the husband in his lifetime for deferred dower.

The Hedaya appears to be almost silent on the precise question; but there is a passage at pp. 155, 156, of Vol. I, which, in some measure, favors the conclu-

sion that the heirs of the wife, who has pre-deceased her husband, cannot claim the dower until he also has died.

Mr. Baillie, in his *Digest of Mahomedan Law*, p. 92, states broadly that deferred dower is not exigible till the dissolution of the marriage. The authority which he cites is that of *Omduton Nisa Begum*, 1 S. D. A. Reports, p. 276. That was a case between Sheahs, in which it was held that a very considerable sum which had been settled as dower by deed was recoverable by the wife; although out of regard to the letter of the law, a very moderate sum had, on the performance of the ceremony, been verbally declared by the priest to be the dower. In the course of the suit questions were put to the law officers, and in their answer to one of these they say:—"It is the custom to make one-half or a third of a dower *Mojul*, or demandable immediately, and the remainder *Mowujjil*, or payable at a future period; the payment of the former part should be immediate; the latter part becomes payable on divorce or death." This dictum is not precise upon the point, since the death referred to may be that of the husband; and the authority is of little value, since it is clear (the suit having been commenced by the wife in the husband's lifetime) that the dower in that case must have been prompt. He died pending the suit, and the contest was ultimately between the wife and his heirs.

An authority of greater value is the case of *Gholam Husan Ali v. Zeinub Beebee*, at page 48 of the same volume of reports. There the dower was partly prompt, and partly deferred. Certain questions in the course of the suit were put to the law officers: and the 5th and 6th of them raised the question now under consideration. In the answers to them it is broadly stated that "The dower is payable by the husband like other debts, on the demand of the wife or her heirs;" and again, that "the wife or her heirs could claim the appointed dower from *Jafur Ali* (the husband) in his lifetime; or from his heirs after his death." But even this case does not involve an adjudication upon the question whether the deferred dower could be recovered from the husband in his lifetime; since, although the wife pre-deceased him, the suit was not instituted by her heirs until after his death, and was brought against his heirs.

Upon the whole, then, this question cannot be said to be so concluded by authority as to be free from doubt or difficulty. Clear proof of local usage might have some bearing upon it; but it ought not to be determined by mere considerations of convenience.

There may, no doubt, be great inconvenience in allowing the heirs of a wife to ruin the husband by exacting one of the enormous dowries which are so frequently stipulated for in India. But that is only one of the many inconvenient consequences of this preposterous custom. For there is also great and obvious inconvenience in allowing the assets applicable to the payment of his just and ordinary debts to be diminished; and his other heirs to be disinherited by the exaction of an enormous dower after the husband's death. Nevertheless, it has been frequently ruled by the Courts of the Regulation Provinces, and their decisions have been confirmed by this tribunal, that such contracts are strictly enforceable against the husband's estate. If the Mahomedans of India were content to fix the amount of dower, according to the true spirit and intention of their law, at a moderate sum, it would be perfectly agreeable to reason, that that which is intended to form part of the woman's estate should become hers on the dissolution of the marriage, whether by her own or her husband's death.

Their Lordships, however, do not think it necessary in this case to decide whether deferred dower, whenever no time for its payment is expressly limited by contract, must be presumed to be payable on the dissolution of the marriage by the death of either husband or wife; or whether it becomes demandable only on the death of the husband. For, upon the true construction of the contract, in this case, they are of opinion that the dower was prompt. The admitted rule seems

to be that laid down in Macnaghten's "Principles," Chap. 7, Article 22, to the effect that "When it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand. And this seems to have been the view taken of the contract in the Courts below; since the objection taken to the suit on the ground that the dower could only be claimed on the divorce of the wife or death of the husband was founded upon the decision of Sir George Cooper, which is set out at page 11 of the record; a decision which, as it made no distinction in this respect between prompt and deferred dower, but applied the rule to a dower of the former class, appears to their Lordships to be clearly erroneous.

Another point insisted upon by Mr. Bell was that the suit could not be maintained, because the plaintiff (the appellant), not having obtained a certificate under the provisions of Act XXVII of 1860 s. 3, was not entitled to sue for or recover a debt due to the estate of Oomrao Begum; or the proportionate share of that debt to which as one of her heirs he was entitled. The point was taken in the Court below, was decided against the respondent by the Civil Judge, and is not made one of the grounds of this appeal to the Judicial Commissioner. This, in their Lordships' opinion, would be a sufficient answer to the objection if it were merely formal; as it would be in the case of a person who, being plainly entitled to the whole debt, might be suing for it without a certificate. Their Lordships, however, have come to the conclusion that the objection involves considerations which constitute substantial objections to the manner in which this suit is brought. The latter is obviously, as is shown by the amount of the stamp and the statements in the plaint, limited to the recovery of the plaintiffs' share in the dower. Though his sisters are made formal parties, the plaint does not ask for a binding declaration as to the gross amount of the whole dower. It cannot be contended that a debtor to a Mahomedan estate is liable to be vexed by a separate suit by every co-sharer in that estate for his share of the debt. The Act invoked was probably in part designed to protect the debtor against a multiplicity of suits. And as between the co-sharers there are obvious objections to allowing a scramble for shares in an entire debt, since the first who takes out execution may exhaust the whole means of the debtor. Again, if the respondent be treated as the sharer in possession of the estate of Oomrao Begum, and the suit, as one in the nature of an administration suit, it ought to be framed as an administration suit. No co-sharer would be entitled to receive his share until the debts of the deceased had been ascertained, and provision made for the payment of them. Until that is done the amount of the share is uncertain; and if the appellant had clothed himself with the character of an administrator by obtaining a certificate under the Act, he must have given security for the due administration of whatever he might recover.

Lastly, having regard to the provisions of the Punjab Code, their Lordships are disposed to agree with the Judicial Commissioner in holding that it was incumbent on the Civil Judge to consider and determine more particularly than he has done what amount of dower it was reasonable, with reference to the respondent's means, to award. There should have been an express issue on that point, and a finding thereon binding on all the heirs. Their Lordships have not before them the materials for making such an award; nor, perhaps, would it be proper for them to attempt it in the absence of the daughters of Oomrao Begum.

The conclusion, therefore, to which their Lordships have come is, that they will humbly recommend Her Majesty to reverse both the decree under appeal and that of the Civil Judge; to declare that the mehrnamah on which the suit is brought is a genuine document; and that the dower stipulated thereby was the sum of nine lacs of sicca rupees; that the amount of such dower is subject to modification according to the law and practice of the Courts of Oudh; and that, subject to such modification, it was a debt due from the respondent to the estate

of Oomrao Begum at the date of her death. They will further advise Her Majesty to remit the cause to the Judicial Commissioner of Oudh, with directions to have it duly ascertained what, having regard to the law and practice of Oudh, is the gross amount of the dower payable by the respondent to the estate of his deceased wife ; which, if any, of her debts remain unpaid ; and what, after providing for the payment of such debts, is the share of the dower awarded which is due to each co-sharer in her estate. When this is done, the appellant will of course be entitled to sue out execution for his share only. In fixing the amount to be recovered, and in awarding execution, the Court will, of course, have regard to such special considerations (if any) as, under the Mahomedan law, arise out of the relation of the parties to each other, viz., that of parent and child.

Their Lordships, considering the peculiar circumstances of this case, are of opinion that each party should bear his costs of this appeal.

The 20th March 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Mahomedan law—Sheeah and Soonnee—Marriage—Minor—Puberty—
Fazoollee—Legitimacy—Inheritance—Presumption.*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Newab Mulka Jehan Sahiba and others

versus

Mahomed Ushkurree Khan and another.

In the absence of evidence to the contrary, the presumption of Mahomedan law is that a girl attains puberty when she reaches the age of nine years.

The Soonnees hold marriages by minors to be voidable only, (*i.e.*, complete unless avoided) by dissent to be declared by the girl as soon as puberty is developed.

The Sheeahs, on the other hand, hold that they are *fazoollee* only and incomplete until ratified by assent. The marriage of a minor is binding and irrevocable if contracted by the father or grandfather, but not when contracted by guardians of a lower degree, as the mother or grandmother, who can only contract a *fazoollee* marriage. A *fazoollee* marriage requires the assent of the minor, after attaining puberty and mature understanding, to perfect it ; there being evidence either of express assent or of facts from which it may be presumed. Unless the assent of a girl after attaining puberty can be shown or presumed, the marriage is imperfect and can create no rights or obligations.

The acknowledgment of the legitimacy of a daughter affords a strong presumption in favor of the right of her mother to inherit from her.

This was a suit brought by the appellants in the Civil Court of the Judge of Lucknow under s. 15 Act VIII of 1859, to obtain a declaration of their right to inherit the property of Sooltan Ara Begum deceased.

The appellants are members of the royal family of Oudh ; Newab Mulka Jehan is the grandmother, and the other appellants are the half-brothers and sisters of Sooltan Ara Begum ; her father was the late Humayoon Bukht, son of Mahomed Ally Shah, late King of Oudh, and Newab Mulka Jehan ; and her mother is the respondent, Pearee Khanum.

The respondent, Ushkurree Khan, claiming to be the husband of Sooltan Ara Begum, and her mother Pearee Khanum opposed the appellant's claim. The Civil Judge dismissed the suit, and his judgment has been affirmed by the Officiating Judicial Commissioner.

The questions are, first, whether the marriage of Ara Begum with the first respondent was perfect at her death so as to confer a right on him, as her husband, to inherit; and second, whether her mother, Pearee Khanum, is entitled to a share of her property.

The ceremony of a marriage between Ara Begum and Ushkurree Khan was performed on the 16th October 1859 in the *fazoollee* (translated, nominal) form. Both were then minors, and were so treated; there is evidence that she was eight years and some months old; he, about nine. Ara Begum's father was then dead, and the marriage was contracted by Mulka Jehan, her grandmother. It was celebrated with great pomp in the presence of the grandmother and the relatives of the girl. Pearee Khanum (the mother) says, "I was associated in the marriage; I was not directly consulted, but I was quite agreeable." Soon after the marriage Mulka Jehan took Ara Begum to Arabia to visit the holy places, and the girl died there without, as far as it appears, having met or communicated with her husband since the marriage. There is a discrepancy in the evidence as to her age when she died; the appellants asserting she was eleven years of age only, her mother that she was thirteen. It seems probable, from the evidence, that she was nearer the former age than the latter; but it is not material, since, according to the evidence of the high priests, in the absence of evidence to the contrary, the presumption of the Mahomedan law is that a girl attains puberty when she reaches the age of nine years. In this case, then, it may be taken, there being no evidence to the contrary, that Ara Begum had attained the age of puberty before her death; but there is no evidence that, after attaining it, the subject of the marriage was ever presented to her, or that she expressed in any way assent to or dissent from it.

The first question arising on these facts is, whether the marriage was inchoate only and in suspense, until ratified by the assent of the girl on her reaching the age of puberty, or whether it was complete and valid, unless dissented from and rejected by her on her attaining that age; and upon the decision of it, the rights of the parties depend. If the latter be the law, as the girl died without any expression of dissent, the marriage cannot now be avoided, whereas if the former be the true doctrine, the marriage, unless ratified (which will be hereafter discussed) remains imperfect, and can confer no rights. The determination of the question must be governed by Mahomedan law and the doctrines of the Sheeah sect, to which the royal family of Oudh and the husband's family belonged.

Authorities were cited to show that the two great Mahomedan sects differ on the point upon which the case hinges. It is said that the Soonnees hold marriages like the present to be voidable only, *i.e.*, complete unless avoided by dissent—the Sheeahs, on the other hand, that they are *fazoollee* only, and incomplete until ratified by assent. And there certainly seems to be ground for the opinion that this distinction exists, and that the latter is the doctrine of the Sheeahs.

The evidence of the high priests of Lucknow, given in the suit, appears to be clear upon the point, and upon the rights of the parties in cases like the present. They declare the law to be that the marriage of a minor contracted by the father or grandfather is binding and irrevocable, they having the legal right to contract for the minor; but that this irrevocable power of contract does not belong to guardians of a lower degree, as the mother or grandmother, who can only contract a *fazoollee* marriage, that is, one incomplete for want of sufficient authority. They declare that, according to the Sheeah doctrine, a *fazoollee* marriage requires the assent of the minor, after attaining puberty and mature understanding, to perfect it, and that, in the event of death intervening before such assent is given, the marriage remains incomplete.

It was proved that in accordance with the law thus laid down, the ceremony of the marriage in this case was in the *fazoollee* form.

In Wilson's Glossary the word "Fazuli" is thus defined: "In Mahomedan law, an unaccredited agent, one who acts for another without authority, and whose transactions are invalid unless confirmed by the principle." The word appears also from the Glossary to be used as an adjective, to denote contracts requiring such confirmation.

Their Lordships see no reason to disparage the learning or fairness of the high priests who were examined upon the law, and they have observed with regret the strong animadversions made by the Officiating Judicial Commissioner upon their evidence, which, in so far as it states the law, appears to be in accordance with the written authorities.

Part II of Mr. Baillie's Digest of Mahomedan law (as stated by the author in the introduction), is intended to exhibit the doctrines of the Sheeah sect, and to be composed entirely of translations from the "Sharaya-ool-Islam," a work, he says, of the highest authority in that sect.

The following are extracts from Chap. 1, s. 2, p. 9:—

"The contract of marriage may, according to the most approved doctrine, remain in suspense, as already mentioned, for the sanction of the person having authority in the matter; and if a young girl is contracted in marriage by any other person than her father or paternal grandfather, whether the person be nearly or remotely related to her, the contract cannot pass or be operative, unless subsequently allowed or approved by herself, even though the person were her brother or paternal uncle. In the case of a virgin this permission or assent may be inferred from her silence when the matter is propounded to her; but a woman who is not a virgin must be put to the trouble of giving expression by actual speech to her permission or assent."

Ibid., p. 10.—"When the fathers of two young children have contracted them to each other in marriage, the contract is binding on them both; and if one of them should happen to die, the other would be entitled to share in the deceased's inheritance. If any other than the fathers of the children should contract them in marriage, and one of them should happen to die before arriving at puberty, the contract would be void, and both dower and the right of inheritance would fail."

Another passage states the law still more distinctly: Chap. 4, p. 294. "When a girl under puberty has been married by her father or paternal grandfather, her husband inherits from her, and she from him. So also, if two young children are married to each other by their fathers or paternal grandfathers, they have mutual rights of inheritance. But if they should be contracted in marriage by any other than their fathers or paternal grandfathers, the contract remains in suspense till assented to by the spouses themselves, after arriving at puberty and discretion; and if one of them should die before such assent has been given, the contract would be void, and there would be no right of inheritance. And the same would be the result though one of them should attain to puberty and assent to the marriage, if the other should die before puberty."

The extracts cited in the judgments below from the works of Macnaghten and Baillie relate, as their Lordships understand, to the doctrine of the Soonnees. These, and still more distinctly some passages in the Hedaya, certainly seem to indicate that by that law, a marriage between minors of the kind now in question, requires dissent to annul it, and that in the event of one of the minors dying, the marriage remains in force, and the incidents of inheritance and of dower attach, as upon a marriage between persons of full age. (Hedaya, book 2, c. 2, vol. 1, pp. 102-6.)

It is not, however, necessary to decide what would be the rights of the parties according to the Soonnee law; but their Lordships are led, by the evidence of the high priests and the authorities above cited, to the conclusion that, by the law of the Sheeah school, the present marriage, unless the assent of the girl after

attaining puberty can be shown, was imperfect, and could, if she died before such assent, create no rights or obligations.

It must, therefore, be ascertained whether such assent has been shown, or ought to be presumed.

It seems to be clear, according to the Sheeah doctrine, that the girl must have arrived at puberty, and also be of mature understanding when her assent is given. There is no evidence of the state of Ara Begum's understanding, but assuming her to have been by age and understanding capable of assenting, their Lordships think there is not sufficient evidence of the fact of her assent to satisfy the requirement of the law.

The law of the Soonnees appears to adopt a very stringent rule requiring the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Sheeahs seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent. This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage when it is brought to her notice, and is present to her understanding.

It appears by the extracts from Baillie, Part II, before cited, that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman who is not, must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the Sheeah school that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must, in all cases, be shown that the question of the marriage was distinctly propounded to the girl. They have no doubt that assent may, in some cases, be presumed from the conduct and demeanor of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognized and ratified, although no distinct assent could be proved. But in this case there is neither evidence of express assent nor of facts from which it may be presumed. The girl was taken to Arabia, far from her betrothed husband, and there is no proof that the marriage was ever brought to her attention, or that she by word or conduct in any way recognized or ratified it.

An attempt was made to prove a usage in the Royal and noble families of Oudh that a girl married as a minor could not reject the marriage, although her guardians, who had assented to it, might be of a lower degree than her father or grandfather; but the evidence entirely failed to prove a usage having the force of law. The utmost that the Mahomedan gentlemen who were examined proved was, that it would be unusual and unbecoming for a girl to reject such a marriage. But the question is not what Sooltan Ara Begum would have done, as a matter of propriety, if she had lived, and the question had been propounded to her, but what by law she had the power to do, if she chose to exercise it. All these witnesses acknowledged that they must be governed by the law as expounded by the high priests; and their evidence almost involved the assumption that the girl would have had a right by law to disaffirm the marriage, but that it would be unbecoming in her to avail herself of it.

For these reasons their Lordships, guided by what they conceive to be the doctrine of the Sheeah school, are of opinion that the evidence fails to show that *fazoolie* marriage had become perfect before Ara Begum's death, and consequently that the claim of Ushkurree Khan to inherit as her husband has not been established.

The Judges below rested their judgments principally upon passages cited from Macnaghten and Baillie, relating to Soonnee doctrines, and relied on these authorities in preference to that of the high priests of the Sheeah school. This

reliance, and their assumption that the appellants had contended that the marriage was illegal, explain the grounds of their decision. But their Lordships do not understand that the appellants so contended, or that the high priests so declared the law. The marriage was perfectly legal as far as it went, but did not become effectual for the want of the necessary ratification.

It now becomes necessary to consider the claim made by Pearee Khanum as the mother of Ara Begum. It appears that she at first filed a petition in the suit, disclaiming any right in herself, and confessing the appellants to be the heirs of her daughter, but she afterwards withdrew it, asserting in another petition that the disclaimer had been wrongfully obtained from her, whilst living in Mulka Jehan's house, and that she was entitled to inherit a share of her daughter's property.

Their Lordships agree with the Judicial Commissioner that she ought to be allowed to withdraw her first petition. The Civil Judge, after deciding in favor of the validity of the marriage, dismissed (to use his words) "the suit to cancel the marriage," and referred Pearee Khanum to a separate suit to prove her rights. The Judicial Commissioner, in his judgment dismissing the appeal, stated that in his opinion the objection to the mother's claim arising from her being a slave could not prevail, as her slavery ceased on the annexation of Oudh by the British Government, and that any transfer of her legal rights of inheritance ought, by the Mahomedan law, to be made by gift or sale.

The appellants appear to be the only parties interested in disputing the mother's claim. They have in fact brought this suit for the purpose of having their rights declared against her, as well as against the alleged husband; and it was their duty to have brought forward a complete case in support of the declaration of right they sought to obtain in their own favor, especially as the suit was directed to impeach two decisions of the Chief Commissioner, by which he had ordered a *Waseekah* pension of Rs. 32-11-8 per mensem, granted to Ara Begum, to be paid to her and the husband. The appellant, Mulka Jehan, had applied to reverse these orders, but the Commissioner refused to reconsider them adding, that she might apply to the Civil Courts for a declaratory judgment. His words are:—"As to the two points she raises, 1st, as to the legality or otherwise of Ushkurree Khan's title; and, 2nd, as to the legality or otherwise of Pearee Khanum's title, she (Mulka Jehan) may prove her case in the Civil Courts; and should she obtain a declaratory judgment, she may apply for a reversal of former orders."

The objections made to the title of the mother to inherit is, that she was a slave of Mulka Jehan, when her daughter Ara Begum was begotten. Now, although this is asserted, there really is no evidence whatever of it in the Record; and therefore the status of slavery which, it was contended, would by the Mahomedan law exclude her from inheriting, has not been in fact established.

It is not directly proved, and the circumstances rather repel than support the presumption, that this disqualifying status existed. It is admitted, on all hands, that Ara Begum was not treated as the spurious offspring of Mirza Humayoon Bukht, but as his lawful daughter, and as such entitled to inherit a share of his property.

This treatment of the daughter by the appellants affords a strong presumption in favor of the right of her mother to inherit from her.

It appears to be clear Mahomedan law that, if a man has a child by his own slave, the child, without marriage, is deemed to be lawfully begotten, and is entitled to inherit as a co-sharer with children born in marriage—the mother in such case becoming *oom-i-walad*, and entitled to emancipation on the death of her master. These consequences, however, according to some authorities, occur only in the case of a master having a child by his own slave, for it is said to be unlawful for a man to have connection with the slave of another, especially with his mother's slave, and that the parentage of a child born of such connection,

although begotten in error, cannot be established to belong to him. (See Macnaghten's Precedents, Case VII, p. 322; Hedaya, vol. i, p. 384, vol. ii, p. 20.)

It should be observed that the authorities just cited are of the Soonnee school, and that there is some authority for the proposition that among the Sheeahs a child begotten of a slave girl, of whom the true owner had parted with the usufruct to the father of the child, stands on the same footing as the child of a man by his own slave. (See Baillie's *Imameea*, pp. 53—56.) But, however this may be, the appellants have wholly failed to prove the status of Pearee Khanum, or that if she was the slave of Mulka Jehan, that the latter gave her over, for a time, to the embraces of her son. All that is proved with certainty is, that Ara Begum was treated as the legitimate child and one of the co-heirs of her father, and that Pearee Khanum is her mother, and therefore presumably entitled to inherit to her. The disinclination of the Mahomedan law to bastardize children has sanctioned the presumption from slight evidence of marriage or lawful consort. (See Macnaghten, Preliminary Remarks 23-4, cited with approval by this tribunal in *Khajah Hidayut Oollah v. Rai Jan Khanum*, 3 Moore, I. A. 316.)* There is no doubt an absence of direct evidence in the present suit to support the presumption, but the admission of the legitimacy of the daughter by the appellants, to be implied from their conduct, is amply sufficient, after the deaths of the child and her father, for the purpose, and stands in the place of proof against them. It is to be observed that there would be no insurmountable obstacle to such a presumption in this case, even if it had been proved that Pearee Khanum had been the slave of Mulka Jehan, for her mistress might have emancipated her for the purpose of making the relations between her son and the girl lawful. It is clear that Mulka Jehan, as the grandmother of Ara Begum, has in the strongest way recognized her as a legitimate child of her son. She was so brought up in the family, and the ceremony of her marriage with Humayoon Bukht was performed with much pomp and ceremony. After these acknowledgments, Mulka Jehan and the appellants who act with her ought, in their Lordships' view, to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence they think the presumption must prevail.

The conclusion at which their Lordships have arrived makes it unnecessary to consider what would be the effect of the British Acts relating to slavery upon the capacity of Pearee Khanum to inherit from her daughter, if it had been proved that she was a slave at the time of her daughter's birth.

The result of their Lordships' opinion is that Mulka Jehan, as grandmother, is not entitled to inherit, and that Pearee Khanum is entitled, as the surviving parent, to a third share of her daughter's property (see Baillie's *Imameea*, book 7, c. 1, ss. 3, 4, pp. 272, 273; Punjab Code, s. 4, cl. 8, 9; Macnaghten, ch. I, s. 4, cl. 62), and the appellants, the half-brothers and sisters of the deceased, to the residue.

Their Lordships think that as between the appellants and the first respondent, they should each pay their own costs in the Courts below.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and that of the Civil Judge; and, in lieu thereof, to order that it be declared that the marriage of Sooltan Ara Begum with the first respondent was imperfect and invalid, and that he is not entitled, as her husband, to a share of her estate, and that the respondent Pearee Khanum, as mother of Ara Begum, is entitled to one-third share, and that the appellants, other than Mulka Jehan, are entitled, so far as relates to any claims by the respondents (but without prejudice to any other claims) to the residue, and further to order that Pearee Khanum is entitled to her costs in the Courts below from the appellants, that the

* G W. R. P. C. 52; 1 Suth, P. C. R. 157.

appellants and the first respondent should each pay their own costs in those Courts, and that any costs which may have been paid by the appellants to the first respondent be refunded by him.

There will be no order as to the costs of this appeal.

The 25th March 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Sale of mortgaged property—Rights of purchaser—Enhancement of rent—Exemption—Reg. VIII of 1793 s. 51—Ryotty kudeemee tenures—Findings of fact—Interference by Privy Council—Pottahs—Title—Notices—Substituted service.

*On Appeal from the High Court at Calcutta.**

Ram Chunder Dutt

versus

Jughesh Chunder Dutt, heir of Romesh Chunder Dutt.

The purchaser at a sale under a decree by which a zemindary is ordered to be sold, in a suit by a mortgagee, can have no higher title to enhance the rent of the ryots than he would have had if he had been a purchaser from the former zemindar.

A claim to exemption resting upon the ground of a tenure being ryotty kudeemee, does not fall within Reg. VIII of 1793 s. 51, which relates to dependent talookdars properly so called.

A pottah may be a confirmatory grant only ; and there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed.

In cases of substituted service, it is not sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good, namely, that the person who ought to be served is keeping out of the way, has been first established to the satisfaction of the Court.

This was a suit brought by Romesh Chunder Dutt, who claimed to be the zemindar of a zemindary called Lot Porooe, his title resting upon a purchase at a sale by a Master of the late Supreme Court, under a decree by which the zemindary was ordered to be sold in a suit by the mortgagee. The present suit was brought to enhance the rent of the appellant, treating his tenure as one in which the rent was enhanceable. Romesh Chunder Dutt, as purchaser at the sale to which reference has been made, can have no higher title to enhance the rent than he would have had if he had been a purchaser from the former zemindar. The sale was not for Government revenue, and the title of the purchaser under it was no higher or better than it would have been under a conveyance direct from the zemindar. Therefore, the question comes to this, whether the respondent, as zemindar, had, as against the defendant in the suit, the right to enhance the rent.

The defence made to the suit is, first, that there was no notice to enhance, upon which some observations will hereafter be made, but the principal defence is that there was no right to enhance, based upon the contention that the lands of the defendant were held on kudeemee ryotty tenure. It was further alleged that

* From the judgment of C. Steer and E. Jackson, J.J., in Regular Appeal No. 3604 of 1864, decided 27th June 1865,—2 W. R., Act X. 47.

that tenure had been confirmed by a former zemindar by the grant of a pottah which, as it was said on the part of the defendant, was confirmatory only, and not a new grant. But the foundation of the case which has been put forward to exempt this land from an enhanced rent is that it was held on a kudeemee tenure which had existed more than twelve years before the decennial settlement.

The first question which arises is upon whom the onus of proof lies? Mr. Cowie contended that, upon the general principle running through the relations of landlord and tenant in Bengal, the liability to enhancement was the rule, and that those who sought to escape enhancement must prove their exemption. On the other hand, it was said by Mr. Leith that this case fell within s. 51 Reg. VIII of 1793, and that it lay upon the zemindar to bring the case within some of the conditions mentioned in that section. Their Lordships are disposed to think that this claim to exemption being rested upon the ground that the tenure was ryotty kudeemee tenure does not fall within s. 51, which relates to dependent talookdars properly so called; and they are not prepared to affirm what was said by the Judges in the case to which reference has been made, *Rajkishen Roy v. Bydonath Nundee*, in the *Sudder Dewanny Adawlut Reports* for the year 1858, page 902. It is there stated, "We think the analogy of the law, s. 51, extends to kudeemee ryots, which the defendants are." Now, arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a Statute, reasons founded upon analogies are scarcely applicable. However, assuming in this case that it lay upon the defendant in the suit to establish his claim to exemption, their Lordships have come to the conclusion that he has sustained the burden of proof cast upon him, and established a case which entitles him to be exempted from enhancement.

The earliest evidence which has been given is the proof of certain receipts for rent, of a date as long ago as the year 1771. There are receipts of that year which show that some of these lands were held by ryots at that date, paying the identical rent which has ever since been paid,—that is, upwards of a century. These receipts, however, cover a part only of the lands in question, viz., the lands in Bashoodebpore; and there are lands in three other mouzahs which are not included within them. With regard, however, to these lands they are all included in a jummaundee made as early as the year 1783—apparently for the purposes of the decennial settlement—which took place about 1790. That jummaundee, made seven years only before the decennial settlement, may not be sufficient in itself; it does not afford direct evidence in itself to satisfy the requirements of the law, that to escape enhancement there should have been a fixed rent for more than twelve years before the decennial settlement. But at the distance of time at which we are now arrived from the date of that settlement, it becomes absolutely necessary, for the purposes of justice and equity, that presumptions should be made. It may be that the jummaundee alone would be insufficient to found a presumption that these tenures were ancient tenures, and that this rent had existed for twelve years before the decennial settlement. But this case does not rest upon the jummaundee alone; the subsequent evidence which has been given in the cause, supports very strongly the presumption that these tenures were ancient at the time of the settlement; how ancient, it is impossible to say. It seems that the lands now held by the defendant had been divided into small jotes or holdings, and had been held by numerous tenants, whose names are found in the old receipts and the jummaundee to which reference has been made, and the rents there appearing are the same which have ever since been paid. These tenants from time to time sold their jotes, and they were purchased by a gentleman of the name of Tara Chand Bundhopadhya, to the extent of 236 beegahs. Tara Chand having thus acquired the property sold it to those under whom the present defendant claims, and at the time of that sale some transactions took place between Tara Chand and the purchaser, to which the zemindar was a party,

Their Lordships are of opinion that those transactions in the strongest way confirm the presumption that the lands at that time were held under an old tenure.

It appears that Eshan Chunder Chuttopadhya, who was then the zemindar, had become surety for Tara Chand; and that in order to relieve himself from the consequences, and also to obtain payment of a thousand rupees which Tara Chand owed to him, he became "the medium," as he himself says in his ikrar, of the sale from Tara Chund to Ram Chunder Dutt. But before that sale took place, there were some disputes respecting the property and the rent; and it was to show his acquiescence in the sale and to prove that all those disputes were at an end, that Eshan Chunder, the zemindar, gave an ikrar or agreement to Ram Chunder Dutt, the purchaser.

This ikrar bears date the 27th Maugh 1238; it was registered on the 25th November, A.D. 1832, and its terms are most important. The zemindar refers to his having given security, and that Ram Chunder Dutt had become the purchaser of the tenures by ten deeds of sale for a consideration of Rs. 10,078; that he had himself obtained a thousand rupees in satisfaction of the money due to him, and had been relieved from the liability which he was under as surety of Tara Chand. Then the most important part follows. The ikrar says:—"But a dispute about mutation of names having arisen between you and ourselves, you filed a petition against us in the Civil Court of Zillah, 'Howalee Shahur,' (suburbs of the town of) Calcutta, and a perwanna was issued calling for an answer from us. Thereupon we gave a pottah to you, after settling the rents according to the jummaabundee, by mutation of names." When the zemindar refers to settling the rent according to the jummaabundee, he was aware of the conveyances which had been made by Tara Chand to Ram Chunder; conveyances which describe not an ordinary holding of a ryot, but something much more,—a tenure which was of value, and hereditary.

The deeds of sale are set out, and are all substantially to the same effect. In the part which relates to the sale there are these words:—"I sell to you the said lands for a consideration of Rs. 2,255, which have been received by me in full and in cash. You taking possession of these lands in the manner held by me, and causing your name to be entered in the zemindar's sherista by expunging my name, and paying the rents according to the jummaabundee, continue to enjoy them happily, heir after heir. The power to sell those lands, or give away in gift, rests with you." These were deeds to which the zemindar was privy. He was, therefore, aware that the sale was of a tenure which was to be held by the purchaser and his heirs, heir after heir, at rents according to the jummaabundee; not any new rents, but rents according to the jummaabundee of 1783, under which the decennial settlement had been made. Now, with the knowledge of those conveyances, the zemindar, in his ikrar, says this:—"Thereupon we gave a pottah to you, after settling the rents according to the jummaabundee, by mutation of names." Why should he have acceded, in the year A.D. 1831, to a settlement of rents according to the old jummaabundee of 1783 if there had been at that time a power on his part to enhance? A very long time had elapsed since the settlement, and it can hardly be supposed that the value of the lands had remained the same. There is also the strong fact, which was brought to his knowledge, that the large sum of upwards of Rs. 10,000 had been given for these very lands, which, upon the hypothesis of the respondent, must have been immediately afterwards enhanceable by the zemindar himself.

Their Lordships think the above transaction, evidenced by the ikrar and the deeds of sale, affords very strong evidence of an acknowledgment on the part of the zemindar that the lands were held as ancient tenures. Reference is made by this ikrar to a pottah, and there can be no doubt that a pottah of some kind was executed at that time by the zemindar. Well, the appellant has produced

a pottah which, he says, is that which was granted, and, on the face of it, it certainly accords with the ikrar, and with the rest of the evidence in the case ; and if this be an old tenure, this pottah is entirely consistent with it. Confirmatory pottahs are common in India ; and this pottah, if it really was made in the terms of that produced by the appellant, must be taken to be confirmatory of the tenure which then existed.

But it was said that this pottah is not genuine, and undoubtedly the Courts below, the Principal Sudder Ameen, and the Zillah Judge have so found. It is not usual, and certainly it is not the desire of their Lordships to interfere with the concurrent findings of the Courts below upon a question of fact where the case depends entirely upon such a question ; but where it becomes necessary in the course of an appeal involving other questions for their Lordships to consider all the evidence, it may be essential that they should decide for themselves whether a particular document is a genuine one, or a particular fact exists one way or the other, for the purpose of satisfactorily disposing of the appeal. Their Lordships desire to say with regard to this pottah that they are not fully satisfied with the reasons on which it was rejected by the Courts below. They cannot but think that great weight is due to the evidence of the zemindar, Eshan Chunder ; for although he was unable from his blindness to see the document, yet when it was read over to him, he gave, without hesitation, his opinion that it was the pottah he had granted. It was an important pottah, not likely to have escaped his recollection ; and whether he recollected all the terms of it or not is immaterial, when he had the impression on his mind, if he is speaking the truth, that he had granted a confirmatory pottah of the mourosee rights of the tenants. However, their Lordships are of opinion that, even without the pottah, the evidence is sufficient to support the contention on the part of the appellant, namely, that these were old tenures in the nature of kudeemee tenures existing more than twelve years before the decennial settlement, and therefore not liable to enhancement on the part of the zemindar.

With regard to the 26 beegahs not included in the deeds of sale from Tara Chund, their Lordships think that the evidence proves, without the aid of these deeds, that they were kudeemee tenures of the same nature as those on which the larger quantity was held.

With regard to the judgment on the special appeal, their Lordships find that the High Court did not go into the evidence to ascertain whether there was an ancient tenure which might establish freedom from enhancement, although the pottah, which the Courts below had declared not to be proved, had never existed. No doubt the High Court was limited on the special appeal to the consideration of the law ; they were obliged to assume that the pottah, which had been found not to be genuine, was a document which could confer no title. But they appear to have founded their judgment upon the assumption either that the case had been put upon the pottah, and that no other case had been made, or that Ram Chunder Dutt by accepting a pottah had, as it were, attorned to the zemindar under that pottah, and acknowledged that he had no older title. Their Lordships think that is not the correct view. They have already said that, in their opinion, a pottah may be a confirmatory grant only, and that there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed. It seems to have scarcely been a sufficient reason for not going into the early title that Ram Chunder Dutt had taken a pottah, the terms of which the High Court were unable to ascertain.

Upon these grounds their Lordships think that the judgments of the Courts below must be reversed.

The conclusion at which their Lordships have arrived upon the right to enhance, renders it unnecessary to determine whether the notice was properly served or not. It appears that the Principal Sudder Ameen and Zillah Judge

differed upon that point, the first Judge finding that the notice was not well served, the second that it was. Their Lordships desire to say that they have great doubt whether the evidence sufficiently shows that the notice was properly served. If it had been necessary to determine that point, the evidence must have been narrowly looked at to see if any presumption could have been raised that Ram Chunder Dutt was keeping out of the way at the time that it was attached to his door. Their Lordships are of opinion that in cases of substituted service, that is, service substituted for the personal service which the statute requires wherever it is practicable, the Courts should take care to be satisfied that the condition, on which alone substituted service is good, exists, namely, that the person who ought to be served personally is keeping out of the way. It will not be sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good has been first established to the satisfaction of the Court.

In the result, their Lordships will humbly advise Her Majesty to reverse the decrees of the Courts below, and to direct that the suit should be dismissed, and that the appellant should have his costs in the Courts in India, and of this appeal.

The 27th March 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Lord Justice Mellish, Sir Robert P. Collier, and Sir Lawrence Peel.

Joint Hindoo family—Rights of auction-purchasers at a sale in execution of a decree against one member—Construction of s. 260 Act VIII of 1859.

*On Appeal from the High Court at Calcutta.**

Bodh Sing Doodhoooria and another

versus

Guneschunder Sen and others.

HELD, the provisions of Act VIII of 1859 s. 260 were designed to check the practice of making *benamie* purchases at execution-sales, *i.e.*, transactions in which one party secretly purchases on his own account in the name of another party. They cannot be taken to affect the rights of members of a joint Hindoo family, who by the operation of law, are entitled to treat as part of their common property an acquisition, howsoever made, by a member in his sole name, if made by the use of the family funds.

This was an appeal from a judgment of the High Court at Calcutta affirming two judgments of the Principal Sudder Ameen of Moorshedabad.

On the 30th August 1865, Brojomohun Sen (the father of Guneschunder Sen) and the other respondents brought a suit against the appellants and other parties claiming certain properties, among them an estate called Cossipore. This suit was subsequently divided into four. The plaint was declared to relate to Cossipore only, and the appellant, Bodh Sing, was made sole defendant. Another plaint was filed against both appellants by the same plaintiffs, claiming an estate called Shahjehanpore. The same issues were settled in both suits.

On the 20th February 1867, the Principal Sudder Ameen gave judgment on the Cossipore suit in favor of the plaintiffs, and on the same day he gave judgment in the Shahjehanpore suit, also in favor of the plaintiffs. On the 29th June 1868,

* From the judgment of Loch and Glover, *J.J.*, in Regular Appeal Nos. 250 and 251 of 1867, decided 29th June 1868.

Mr. Justice Loch and Mr. Justice Glover gave one judgment in the two suits on appeal, but separate decrees were passed affirming the judgments and decrees of the Principal Sudder Ameen.

The other facts appear sufficiently from the judgment of the Judicial Committee.

Mr. Leith, Q.C., and Mr. Doyne for the Appellants.

Mr. Cowie, Q.C., and Mr John Cutler for the Respondents.

Sir James Colville delivered the following judgment :—

On the 21st November 1864, the appellants became the purchasers, at an execution sale, of the right, title, and interest of one Ramsoondur Sen in two distinct estates, viz., Shahjehanpore and Cossipore. Both have been attached by one Inderchunder Doogur in execution of a decree which he had obtained against the representatives of Ramsoondur in a suit commenced against that person in his lifetime for what is admitted to have been his separate debt. The price paid by the appellants would have been adequate if the judgment-debtor had been the sole owner of the properties purchased. In August 1865, the respondents, representing themselves to be the persons who jointly with the sons of Ramsoondur, his brother Ramchunder, and one Benoderam Sen constituted a joint and undivided Hindoo family, and alleging that the properties so purchased formed part of the joint estate of that family, brought the suits out of which this appeal has arisen, in order to recover both estates minus the assumed shares of Benoderam, Ramsoondur, and Ramchunder therein. And the first question for their Lordships' determination is, whether there are sufficient grounds for disturbing the conclusion to which both the Indian Courts have come, viz., that the properties in dispute were, in fact, part of the joint family estate.

It is not disputed that Ramsoondur was a member of this joint and undivided family. The status, however, of the family was peculiar. Mr. Justice Loch says (and neither party has disputed the accuracy of the description), "The evidence of the witnesses and of those members of the family who have been examined, clearly shows that though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention render it impossible for us to look upon the family as a joint Hindoo family in the ordinary sense of the term, that is, as a family having all things in common; all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds and dealt with it as their own without reference to the other members of the family." Such a state of things may, in their Lordships' judgment, be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindoo law as to property in the name of one member of a joint family; and to throw upon those who claim, as joint property, that of which they have allowed their co-parcener, trading and incurring liabilities on his separate account, to appear to be the sole owner, the obligation of establishing their title by clear and cogent evidence. There can be no doubt that, if the evidence adduced by the respondents, the plaintiffs in the suit, be believed, there is enough to prove their case. And both of the Indian Courts have found in their favor. The two Courts have, however, differed considerably in their appreciation of parts of the evidence; and the decision of the High Court is based upon narrower grounds than that of the Principal Sudder Ameen.

The following are undisputed facts concerning the two estates: Shahjehanpore, or at least that portion of it which is in question in the suit, was the zemiudary of one Rajah Soorjnarain Sing. At various dates before 1859 he had granted a putnee of part, and several ijarahs of other parts, of this estate in the name of

Ramsoondur, and had assigned the rents reserved by these ijarahs, by way of security for certain advances ostensibly made to him by other members of Ramsoondur's family. On the 4th July 1859, the zemindary, which has been attached at the suit of other creditors, and put up for sale, was knocked down to Ramsoondur as the highest bidder. He was afterwards put into possession of it, and from that time until the date of his death, his name stood in the Collector's register as that of the sole registered proprietor. It has been admitted at the Bar that there is no question in this suit touching the putnee or other interests acquired in the name of Ramsoondur before this execution sale. The only question is, whether the zemindary interest, which was then sold, became, by virtue of that sale, the separate property of Ramsoondur, or part of the joint property of the family.

Of Cossipore, a four-anna share belonged to one Kissoreemonee Dossee, the remaining twelve annas standing in the name of Shihbram Dey, who has been called as a witness in the cause. In 1855 the four-anna share was purchased in the sole name of Ramsoondur Sen, and on his petition his name was substituted for that of the vendor as the proprietor of this share in the Collector's book. In April 1856, the interest of Shihbram Dey was, on the suggestion that it had been purchased by Ramsoondur, also transferred into his name, and he was thenceforward, until the time of his death, the sole registered proprietor of the whole property.

Ramsoondur died in December 1863, pending the suit in which the execution, which is the foundation of the appellant's title, issued, but before judgment had been recovered therein. He left as his heirs two infant sons, and on the 15th January 1863, his brother, Ramchunder, obtained a certificate of administration under Acts XL of 1858 and XXVII of 1860, empowering him to manage the estate of the deceased. In his application for this certificate, Ramchunder had stated that his brother's property, in debts, zemindaree, trade, cash, and Company's paper, was worth about Rs. 50,000. On the same 15th January, Benoderam Sen, the eldest member, and manager of the joint family, presented two petitions to the Collector of Zillah Moorshedabad, praying in the one that Shahjehanpore, in the other, that Cossipore, might be transferred into his name, on the allegation that each had been purchased by him in the name of Ramsoondur, and therefore that he was the true owner thereof. In February 1863, Ramchunder, as manager of Ramsoondur's estate, filed petitions admitting the title of Benoderam, and on the 26th May 1863, orders were made that the name of Benoderam should be recorded instead of that of Ramsoondur as that of the proprietor of both estates.

In June 1863 judgment was recovered against the estate of Ramsoondur in the suit of Inderchunder Doogur, and both estates were afterwards attached as part of the property of the judgment-debtor. It follows, from what has been just stated, that both when so attached stood in the name of Benoderam.

Thereupon Benoderam came in to set aside the attachments. His claims were dealt with separately according to the provisions of s. 246 of the Code of Civil Procedure. In each case he claimed to be the sole proprietor of the whole estate, and as such entitled to have the attachment removed. Both claims were dismissed by separate orders, dated the 20th September 1864, which directed the property claimed to be sold. The usual proclamations of sale were made on the 23rd September, and the execution sale took place on the 21st November 1864.

It may be well, before considering the grounds upon which the two Indian Courts have held the estates in question to be the property of the joint family, to dispose of a point taken by the appellants, which applies only to Shahjehanpore. The appellants contend that, whatever be the weight of the evidence as to the real nature of the purchase, the title of Ramsoondur to this estate as his separate property must prevail, by reason of his having purchased it at an execution-sale

held after Act VIII of 1859 (the Code of Civil Procedure) had come into operation; and by force of s. 260 of that Statute, which provides that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." Their Lordships will not enquire whether there is sufficient proof that Ramsoondur, who purchased at an auction sale, held a few days after the Act came into operation, did obtain a certificate under the Act, or of its terms, if he did obtain one; because, assuming him to have been the certified purchaser within the meaning of the Act, they are of opinion that the provisions of the Section do not apply to such a case as the present. They were designed to check the practice of making what are known as benamsee purchases at execution sales, *i.e.*, transactions in which A secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindoo family, who, by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds.

It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase-money of the property in question was derived, *i.e.*, whether it came from the common family chest at Koredha in Beerbhoom; or from the separate funds of Ramsoondur employed by him in carrying on his business, admitted to be separate, at Khagra near Moorshedabad. The evidence adduced by the respondents in support of their claim consisted mainly of a large body of oral testimony; of certain books and accounts kept at the family house at Koredha, being part of the joint family accounts; of the separate books and accounts of Ramsoondur kept at Khagra; and of letters purporting to be letters which had passed between him and Ramkristo the son of Benoderam being together at Khagra, on the one side, and Benoderam residing at Koredha, on the other. The Principal Sudder Ameen treating the whole of this evidence, whether oral or documentary, as trustworthy, came to the conclusion that the plaintiffs had established their case. The Judges of the High Court appear to have considered that the letters on which the Principal Sudder Ameen had relied were not admissible in evidence against the defendants, the appellants; to have found reasons for discrediting the accounts; but to have held that, nevertheless, the finding of the Lower Court was capable of being supported upon the oral testimony viewed by the light cast upon it by the conduct of the parties.

If it were clear that the Judges of the High Court were right in rejecting the letters, and in treating the accounts as untrustworthy, the correctness of their finding would, no doubt, have to be determined by the sufficiency of the grounds on which they have rested it. Even in that case their Lordships, though unable to adopt the inference which the learned Judges have drawn from the conduct of Ramchunder and Benoderam, or altogether to concur in other parts of their reasoning, would have felt great difficulty in disturbing their finding, inasmuch as both Courts are agreed as to the credibility of the plaintiffs' witnesses. Their Lordships, however, are of opinion that the letters, if proved as the Principal Sudder Ameen has found them to have been, were clearly admissible in evidence against the appellants who claim under Ramchunder.

It was said that the Judges of the High Court have treated these letters as not duly proven. But it appears to their Lordships that those learned Judges, thinking that the documents would not, if proved, be admissible against the appellants, never addressed their minds to the sufficiency of the proof. The judgment on that point of the Principal Sudder Ameen, a native Judge, dealing with letters in the native character, and purporting to have passed between natives, is,

in their Lordships' opinion, of very great weight. The letters, moreover, afford internal evidence that they have not been concocted for the purposes of this suit. And since those with which Ramchunder has been directly connected, by proof of handwriting or otherwise, clearly show that he and Ramkristo were acting jointly on behalf of the family in the purchase of Shahjehanpore; the letters of Ramkristo written in the course of the same transaction seem to be also admissible; and the whole correspondence affords the strongest confirmation of the statements made by the plaintiffs' witnesses.

Again, their Lordships are not satisfied that the objections taken by the Judges of the High Court to the accounts are such as ought to deprive them of the credit which the Principal Sudder Ameen (possibly a more competent Judge of native books of account than any European can be) gave to them. A distinction is no doubt to be taken between those accounts. The family accounts, taken by themselves, are admissible only as corroborative evidence. But the private accounts of Ramsoondur, produced by his brother from the Khagra Kotee, may, if genuine, be direct evidence, in the nature of admissions on his part, against the appellants. There are entries in the latter which strongly support the plaintiffs' title. And these are not open to some of the objections taken by the High Court to the family accounts, particularly to one which their Lordships may observe they do not consider to be by any means conclusive, viz., one to the effect that the last-mentioned accounts, or some of them, were produced by Benoderam in support of his claims to the sole ownership of the estates. Ramsoondur's grant to Surasuttee Dabee, at page 698 of the record, also affords some corroboration of the plaintiff's case as to Shahjehanpore.

Regarding Cossipore, it may be observed that although much of the plaintiffs' documentary evidence, and in particular the letters, have no bearing on the claim to this estate, the direct evidence of its having been acquired as part of the joint family property is stronger than that relating to Shahjehanpore. Shihbram Dey, who has been treated by both Courts as a witness deserving of credit, has distinctly sworn that the twelve-anna share in this estate which once stood in his name was purchased in his name with the family funds, and on account of the family; and that no consideration passed when it was transferred from his name into that of Ramsoondur. The High Court has found that, before this benamsee purchase, the family was interested as putneedars in this estate; and every probability is, therefore, in favor of the conclusion that the direct evidence given to prove that the purchase of the other four-anna share in the estate was also a family transaction is true.

Their Lordships are of opinion that the evidence so given on the part of the plaintiff is too strong to be outweighed by the inferences to be drawn from the conduct of Benoderam and Ramsoondur in the matter of the claims advanced by the former, or from the conduct of the family in allowing Ramsoondur, on the occasion of giving security to the Collector to state that these properties belonged to himself without co-sharers. Their Lordships will afterwards consider how far the representations involved in these last-mentioned transactions (if false) affect the right of the plaintiffs to succeed in this suit. In determining whether, in point of fact, the property was joint or separate, they can only be treated as in the nature of admissions inconsistent with the title now asserted; and viewed in that light, they do not seem to their Lordships materially to impair the strength of the case made by the plaintiffs.

On the whole, then, their Lordships, after full consideration of the arguments for the appellants, and notwithstanding the omission to call or account for Ramkristo, have come to the conclusion that the finding of the two Indian Courts, to the effect that both estates were purchased with joint family funds, and became joint family property, ought to be affirmed.

If this be so, the next question to be considered is, whether the plaintiffs have

forfeited their right to assert their title against the appellants by reason of their own conduct, or the acts of any of those with whom they are connected.

Those who set up such a defence are bound to show clearly both the facts on which it is founded, and that the legal consequences on which they insist necessarily flow from those facts. In the course of the argument there was some want of precision upon this point.

The mere fact that Ramsoondur, when trading on his separate account, was permitted by the family to appear to the world as the sole owner of the estates, and so, perhaps, to obtain a fictitious credit, can be no foundation for such a defence. It may be an unfortunate consequence of the Hindoo law touching the joint and separate property of members of an undivided family, but it is one of which all who deal with a Hindoo trader must take their chance. Nor can greater effect be given to the misrepresentation made by Ramsoondur, probably with the concurrence of the adult members of his family, when he gave security to the Collector. Such a misrepresentation might possibly have been used as an estoppel against the family, had any question in respect of the security arisen between them and the Collector. But it has no bearing upon the present suit except as an admission, in which light it has been already considered, or as an instance of tortuous dealing, which affects the general credit due to the plaintiffs. It was not upon the faith of that representation that the appellant purchased.

The foundation, therefore, of the defence is to be found, if anywhere, in the acts done after Ramsoondur's death, and before the sale.

The first of these was the transfer of the estates into the sole name of Benoderam, on his application, and with the consent of Ramchunder. Their Lordships think it desirable, before considering its effect, to state their view of the nature of this transaction. They cannot but regard it as a contrivance, between Benoderam and Ramsoondur at least, to put the estates beyond the reach of Ramsoondur's creditors, and therefore fraudulent as against those creditors. They do not impute to Benoderam or to Ramchunder any intention to defraud either the children of Ramsoondur or any other member of the joint family. But Ramsoondur was known to have died indebted; judgments against his estate, if not actually recovered, were imminent, and the only practicable mode of putting these properties wholly beyond the reach of his creditors was by treating them not as family property in which he would have a seisable interest but as the property of Benoderam alone. In furtherance of this scheme Benoderam, when the estates were attached, filed his claims. If those claims had been successful, the attachment would have been removed, and this execution altogether defeated. If, on the other hand, a claim had been made, according to the truth, on the ground that the estates were joint family property, the execution must have gone on, though with notice to all concerned that such a claim had been made. The dismissal of Benoderam's claims became final by his failure to bring a suit to establish his alleged rights within one year from the date of the orders. But the orders themselves do not state the precise grounds of dismissal; and though they negative the title set up by Benoderam, they in no way affirm that Ramsoondur was the sole owner of the properties. And the depositions of the three witnesses from page 412 to 416 of the record show pretty clearly that the case made by the decree-holders in resisting Benoderam's claim to Shahjehanpore was rather that the estate was family property in which Ramsoondur had an interest as coparcener, than that it belonged to him alone.

How then do these proceedings affect the right of the plaintiffs to assert against the appellants the title to the estates which they have been shown to possess. They might be estopped, if it were shown that they had represented Ramsoondur to be the sole owner of the estates; and that the appellants had purchased on the faith of that representation. But it is impossible from the proceedings in question to extract any such misrepresentation, even if the plaintiffs

on the record are to be held to be bound by every act and statement of Benoderam.

Again, is their right affected because, when Benoderam put forward a false claim, they did not formally prefer the true one? There is nothing in the Code of Procedure which made it imperative on them to do this; the claim, if made, could not have stopped the execution-sale altogether.

The highest ground on which the appellants can put their case is, that Benoderam misled them by his fraudulent attempt to defeat the execution; and that the whole family is bound by his acts. It is not necessary to decide how far Benoderam and Ramchunder, who are not parties to this suit, might be affected individually by these proceedings, if they were suing to recover their respective shares. On the present record it must be held that their shares have passed to, and are now vested in, the appellants. Their Lordships have felt some doubt whether the respondents, suing as members of a Hindoo family, still joint and undivided, for property which, if recovered, will presumably again fall again into the common stock of that family, might not have been shown to be bound by the acts of Benoderam, whether of omission or commission, and responsible for the consequences of them. But they are of opinion that a defence intended to be founded on such a joint responsibility should be far more clearly pleaded and proved than it has been in this case. How far the plaintiffs on the record have been parties to, or are affected in law by Benoderam's proceedings, and to what extent, if at all, the appellants were misled by those proceedings, are questions which have never been fairly raised or tried in the Courts below. This was so found, and, as their Lordships think, correctly found, by the Principal Sudder Ameen.

Their Lordships are, therefore, of opinion that the second point taken by the learned Counsel for the appellant is no answer to the suit, and they must humbly advise Her Majesty to affirm the decrees under appeal, and to dismiss this appeal with costs.

Agents for the Appellants: *J. and J. Hopgood.*

Agents for the Respondents: *Barrow and Barton.*

The 28th March 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Hindoo widow—Maintenance.

On Appeal from the High Court of Judicature at Allahabad.

Rajah Pirthee Singh

versus

Ranee Raj Kower.

A Hindoo widow does not lose her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity, or for any other improper purpose.

This was a suit brought by Ranee Raj Kower against Rajah Pirthee Singh to recover arrears of maintenance, and also to have a decree for future maintenance. Rajah Pirthee Singh was the adopted son of Rajah Petumber Singh, and the

plaintiff was the fourth or youngest of four widows left by the late Rajah. The Subordinate Judge gave a decree in favor of the plaintiff, which was appealed to the High Court, who supported that decision and increased the amount of maintenance awarded by it. From that decision there is an appeal to Her Majesty in Council, which we now have to consider.

The defence set up by the adopted son was that the plaintiff had been provided with maintenance so long as she lived with the family of her deceased husband, but that she had quitted his house for improper purposes. He says:—"The defendant provided the plaintiff with maintenance as long as she remained in Ava" (that was the family house) "according to the family custom. In 1861 the plaintiff, disregarding her husband's honor, left for Kotah with Bhola Nath, contrary to the terms of the will and the family custom, and became an abandoned character. This being so, she has lost her right. Even after this, the defendant, to avoid scandal and to oblige her, and relying on her promise that she would no more let Bhola Nath have any access to her, allowed her lodgings at Durriyapoor, and regularly took care of her maintenance. The plaintiff's claim for maintenance prior to the institution of the suit is therefore illegal, and her claim for interest is also illegal, the payment of which was never stipulated. The plaintiff has nevertheless not parted with Bhola Nath, *i.e.*, she has continued to act and behave contrary to her promise, disregarding the honor and custom of the family, and has not left off her former bad habits. She has, therefore, no right under the Hindoo law to have a maintenance fixed for her for the future." Now that defence on the part of the defendant has not been proved, and has been very properly given up. The plaintiff alleged that some dispute arose between her and the elder widow with regard to her jewels which she did not make out; and she has not made out any cause for leaving the residence of her late husband any more than the defendant has made out his defence. The question, therefore, comes to this: whether a Hindoo widow loses her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity, or for any other improper purpose.

Several cases have been cited upon this point, and it will be as well to refer in the first instance to a case which was decided by the Privy Council, as that is one of the highest authority. That was a suit by Cossinath Bysack and another *v.* Hurroosoondry Dossee and another, which was tried in the Supreme Court in Calcutta, in which the Chief Justice, Sir Edward Hyde East, gave judgment. The question was put to the Pundits whether a widow was deprived of her property upon the ground of her having left her deceased husband's residence. Sir Edward Hyde East says:—"Upon the last ground of error the Pundits have uniformly answered that the widow was not bound to live with her husband's relatives." The eighth question put by the Court to their Pundits was: If a widow from a just cause cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate? A. If a widow for any other cause but for unchaste purposes cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited." He certainly goes on to say here there was a good cause at the time, namely, the extreme youth of the wife, and no pretence was made of the prohibited cause. It was alleged that, having left the residence of her deceased husband, and having refused to reside with the family, she did not forfeit the property which she had taken. That case was appealed to Her Majesty in Council, and was decided on the 24th June 1826. The opinion of the Judicial Committee was delivered by Lord Gifford. He says:—"With respect to the last supposed ground of error in this decree which was assigned by the appellants, namely, that it was not ordered by either of the decrees that Hurroosoondry Dossee should reside with or under the care, protection, and guardianship of the appellants, who, as the surviving brothers of Bissonath Bysack, were alone entitled

to have the care, protection, and guardianship of his widow, the Pundits appeared to be unanimous in the opinion that a Hindoo widow is not bound to live with her husband's relatives." That is the principle laid down. Then says His Lordship:—"I will read the eighth answer to the eighth question put, which will explain what the Hindoo law is upon the subject, and in that it appears the other Pundits who were called in agreed, or at least they expressed no objection to the opinion pronounced. The question put is this:—'If a widow from a just cause ceases to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?' The answer is, 'If a widow from any other than unchaste purposes ceases to reside in her husband's family, and takes up her abode in the family of her parents, her rights would not be forfeited.'" Then His Lordship goes on to say:—"Now it was not pretended in the case that she had removed from the protection of her husband's family for unchaste purposes. She was only of the age of 14 years at the death of her husband. His brothers were young men, and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore it appears quite clear from the answers given by the Pundits that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; that they had no right to insist upon her not withdrawing from them in order to put herself under the protection of her mother, and therefore there appears to be no foundation to that extent for the appeal." The reasons given that she was only of the age of 14 years at the death of her husband, and that his brothers were young men, do not appear to be the reasons upon which that decision was founded. It was merely pointed out, as their Lordships understand the judgment, for the purpose of showing that the widow was not removing from her husband's house for unchaste or improper purposes.

It, therefore, appears that a Hindoo widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes.

That decision is quite in accordance with the Vyavastha which are quoted by Shamachurn Sircar in his book called Vyavastha Darpana. At page 370, Vyavastha, Nos. 199 and 200 are thus stated:—"Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, she is still entitled to maintenance. The widow, however, is not entitled to maintenance by residing elsewhere without a just cause, if she was directed by her husband to be maintained in the family house." The husband in this case left a will, but he did not impose any condition upon either of his widows to reside in his family house after his death. He wrote a letter to the Collector, in which he stated that he did not wish that his widows should have the management of his property, and put the property into the hands of a mookhtar, because, he said, it was of importance to maintain the reputation of his family. But it is no more than any other Hindoo gentleman would desire, that after his death his property should not be jeopardized, that the reputation of his widows should be maintained, and that they should not destroy the reputation of his family by destroying the reputation of themselves.

It has been held that the Hindoo law does not require a Hindoo widow, for the purpose of maintaining her reputation, necessarily to live with her husband's relatives. She does not injure her reputation by living with her own mother or her own father. It is laid down as a rule of law that she is not bound to live with her husband's relatives. The decision of the Privy Council was quite in accordance with those texts of the Hindoo law referred to by Shamachurn Sircar.

In the case of Shibasundari Dasi, the widow of Golackchander, cited in Baboo Shamachurn Sircar's book at page 381, in which Sir Lawrence Peel delivered a judgment, it appeared that Shibasundari Dasi, widow of one Golackchander, who died during his father Rammohan's lifetime, voluntarily left the family house (voluntarily, that is to say, without any cause except her own will and desire), and sued the defendants who were the surviving sons and representatives of the other sons of Rammohan for separate maintenance; a verbal reference had been made to three respectable Hindoos, Kashinath Maliik, Gobindachander Banarjea, and Rammohan Neoghi, who awarded Rs. 12 per month as a sufficient allowance to her, she being allowed apartments in the family house and food. Sir Lawrence Peel said:—"We think she is entitled to a separate maintenance. The words food and raiment being too vague and ambiguous an expression, we must refer it to the Master to enquire and report whether the amount offered was just and proper with reference to her situation in life." Then, in another case, "Srimati Mando Dari Debi, the eldest of the two widows of Tilakram Pakrasi, a Hindoo native of Bengal, filed a bill against his son praying that defendant may set forth a full, true, and perfect account of the property, and may be compelled by a decree to pay her the same." I believe it was not made a question about her having left the father's house, but in that case arrears of maintenance were awarded to her and future maintenance secured.

There was also the case of Jadumani Dasi *v.* Khettramohan Shil, reported at page 384 of the same book, in which Sir Lawrence Peel, having considered the whole question, laid down the law in a clear and explicit manner. Every one who is acquainted with Sir Lawrence Peel must have the highest respect for his opinion upon all questions of this kind. He delivered the judgment of the Court. He said:—"The question is whether a Hindoo childless widow, who, some time after the death of her husband, uncompelled by cruelty or ill-usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respects a proper one and her conduct unimpeached, forfeits her right of maintenance out of the property which was that of her deceased husband in his lifetime and which had devolved on his heirs." There the question was whether the principle which had been laid down in the case cited from the Privy Council, which was applicable to property inherited by a widow from her deceased husband, was applicable to a case of maintenance. Sir Lawrence Peel, after referring to some conflicting authorities, said:—"This state of the authorities has induced us to examine closely into the law on the subject. We should not hesitate to follow the decisions of the Sudder in preference to those of our own Court, if they appeared to us to be at once more just and more conformable to the Hindoo law. We have intended to follow the Privy Council. The Privy Council has, on the subject of the right of the Hindoo widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe. That Court says, 'It was not pretended that she had withdrawn herself for unchaste purposes. She was only 14 at the death of her husband: his brothers were young men, and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death: therefore it appears quite clear from the answers given by the Pundits that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them, in order to put herself under her mother's protection.' The decisions of that Court must of course give the law to all Courts here. The answer of the Pundits which the Privy Council adopts is, that if a widow, from any other cause than unchaste purposes, ceased to reside in her husband's family and takes up her abode in her parents' family, her rights are not forfeited." Then he says:—"In the Privy Council the question was

whether the Hindoo heiress forfeited her estate, by selecting without impropriety her father's roof for her residence. But it is to be observed that the opinion of the Pundits was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow, not to an heiress as to one who inherited," meaning to say, that the rule which had been laid down was equally applicable to a case of maintenance as it was to the case of property which the widow had inherited; that is to say, that she was entitled to a freedom of choice, and that unless she left the residence of her deceased husband for unchaste purposes she could not be deprived either of the property which she had inherited from him, or be deprived of maintenance which the Hindoo law requires the heirs of her husband to provide for her.

We are therefore not now deciding the question for the first time. We are not now for the first time laying down a rule upon this subject. In the case of *Surno Moyee Dasse v. Gopal Lall Doss*, reported in the first volume of Marshall's decisions in the High Court, page 497, the widow sued for maintenance, and it was held that she was entitled to that maintenance notwithstanding she had left the residence of her deceased husband. The Court said:—"In this case a widow sues for maintenance. The defendant, who is her step son, objects that she resides in the house of her father, and alleges that she is, therefore, not entitled to maintenance. The widow alleges that she left the family home because she was tortured or rendered uncomfortable, but did not prove that allegation. We find, however, that it is laid down in the *Vyavastha Darpana* of Shamachurn Sircar, the learned interpreter of the late Supreme Court, vol. I, page 319, s. 160, that 'should a woman, without unchaste purposes, quit the family house and live with her parents or own relations, yet still she is entitled to maintenance;' and in s. 161, 'The widow, however, is not entitled to maintenance by residing elsewhere without a cause, if she was directed by her husband to be maintained in the family home.' We think, therefore, that the widow is entitled to retain the decree for maintenance which she has obtained, and dismiss the appeal."

In this case their Lordships are of opinion that there was no direction by the husband's will which rendered it necessary for the widow to reside in her husband's house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different. All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance unless she is guilty of unchastity or other disreputable practices after she leaves that residence.

The case was tried by a Subordinate Judge, in this instance, who was a Hindoo, and therefore must be acquainted with the habits, usages, and religion of Hindoos; and he thought that the widow having left the husband's house, was still entitled to her maintenance, and he awarded her the sum of Rs. 150 a month, with a sum of money calculated at that rate for the years during which she had not been allowed maintenance. The case was appealed to the High Court, and that Court thought that, having regard to the amount of the husband's property, the widow was entitled to a larger sum; and they awarded her maintenance at the rate of Rs. 200 a month. Their Lordships do not think it necessary to disturb that decision. The amount of maintenance, it is stated in the *Vyavastha* 197 in Shamachurn Sircar's book, should be fixed with reference to the proprietor's estate. Now in this case the deceased husband left property to the extent of two lacs, or £20,000 a year. It does not appear to their Lordships to be excessive, even though he left four widows, that each of those widows should have at the rate of Rs. 200 a month, equal to £240 a year. Looking to the state in which a

widow is bound to live, and the religious duties which she is called upon to perform, it does not appear to their Lordships, having reference to the property of the deceased husband, that this widow ought to receive a less sum than that which has been awarded to her by the High Court, namely, Rs. 200 a month.

Some question was made as to the right of the widow to recover past arrears. A case was cited from the Madras High Court, in which arrears were awarded. In the case also in which Sir Lawrence Peel gave that elaborate judgment to which I have referred, arrears of maintenance were awarded to the widow as well as a decree in her favor with regard to future payments.

Under these circumstances their Lordships are of opinion that the decision of the High Court is correct, and they will, therefore, humbly recommend Her Majesty that that decree be affirmed with the costs of this appeal.

The 2nd April 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith, and
Sir Robert P. Collier.

Local investigations—Thakbust proceedings—Boundary disputes.

*On Appeal from the High Court at Calcutta.**

Protab Chunder Burrooah

versus

Ranee Surnomoyee and others.

The question to be decided was whether certain plots, delineated on a map, belonged to appellant's zemindary, or to that of respondent in whose possession they had been since 1852, when in certain thakbust proceedings, they were determined to lie within his estate of Bahur Bund in Zillah Rungpore, and not within appellant's estate in Zillah Goalparah. Appellant sued to impeach the thakbust award and to recover possession. In the course of litigation, the case was remanded by the High Court upon the issue, which of two given lines was the old bed of the river Sunkosh, when a Sudder Ameen was deputed to make a local investigation, which proved to be in favor of the appellant. The case was finally dismissed by the High Court in appeal.

The Privy Council held that the report of the Sudder Ameen failed to establish the line of the old Sunkosh, and that, even if it had embodied conclusions from what had been found and observed on the ground, it would be reasonable to prefer the thakbust proceedings, which were an earlier local investigation since which the features of the locality may have changed, and evidence of possession lost.

The question which their Lordships have to determine on this appeal is whether the plots Nos. 1, 2, 3, and 4 of chur land delineated on the map which, in the judgments of the Courts below, and throughout the argument at the bar, has been called map No. 3, belong to the appellant's zemindary Jumeera, or to the respondent's zemindary Bahur Bund. The suit originally embraced the land marked as plot No. 5 on the same map; but that parcel was claimed by the appellant (the plaintiff in the suit) as a reformation on the site of a diluviated village called Chalitabarree; and it is now admitted that he failed to identify the site in question as that of his lost village, if the latter ever existed and formed part of his zemindary.

The lands which remain in dispute are admitted to have been in the respondent's possession since the year 1852, when, in the course of certain thakbust

* From the judgment of Bayley and Macpherson, *J.J.*, in Regular Appeal No. 65 of 1864, decided 6th February 1866.

proceedings, which will be more particularly considered hereafter, they were determined to lie within the limits of Zillah Rungpore and the estate of Bahur Bund, and not within the limits of Zillah Goalparah and the estate of Jumeera. The correctness of this determination, and the anterior possession of the lands, are questions contested in the cause.

The difficulty, and it is always considerable, which their Lordships feel in determining appeals of this description, is, in this particular case, increased by the conflicting opinions concerning the title to the land in dispute which have been expressed in India. This suit to impeach the thakbust award in favor of the respondent, and to recover possession of the lands, was commenced by the appellant in May 1855. For some unexplained reason, it was not brought to a hearing until October 1863, when Mr. Fowle, the Zillah Judge, made a decree dismissing it. In March 1865, a Division Bench of the High Court, consisting of two Judges, reversed that decree, and remanded the cause for retrial on certain specified issues, with a direction that there should be a further local investigation. The Sudder Ameen, who was deputed to make that investigation, made, on the 10th June 1865, a careful and elaborate report, which was in favor of the appellant as to the four plots now in dispute, but against him as to the fifth. Mr. Robinson, however, who had succeeded Mr. Fowle as Zillah Judge, did not adopt or act upon that report; but, coming to the conclusion that the plaintiff had failed to establish a title to any of the parcels claimed, again dismissed the suit by a decree dated the 8th July 1865. The appeal against his decision came before the Judges of the High Court who had directed the remand, but they were divided in opinion; and according to the then existing practice of the Court in such cases, the decree under appeal was affirmed. For the appellant, therefore, we have the officer who made the last local investigation, and one of the Judges of the High Court; whilst for the respondent, we have the other Judge of the High Court, the two Zillah Judges, and the officers who conducted the thakbust proceedings.

Their Lordships now proceed to consider more particularly the case made by the appellant. He does not claim all the four plots of land by precisely the same title. It appears that, as early as 1810, the then zemindars of Jumeera and Bahur Bund, and a third party, the zemindar of Bheetur Bund, were all litigating the title to a large chur which had formed between two branches of the Burrumpootur.

The facts found in the case, as shown by the report in 2 S. D. A. Reports, p. 269, and the rude map thereto annexed, which in these proceedings has been called map No. 1, were the following:—The Burrumpootur flowed on all sides of the disputed land; the plaintiff's zemindary (Jumeera) lay on the east and north sides thereof, and on the west side extended as far south as the river Suntose (in these proceedings called Sunkosh); the zemindary of Bahur Bund extended from the river Sunkosh to the river Isamuttee; and the zemindary of Bheetur Bund, from the river Isamuttee to the southward beyond the limits of the contested chur. The Judge who tried the cause in the first instance declared his inability to decide with certainty from whose lands the chur had been formed; and accordingly made what he termed, an equitable division of it between the contending parties.

His ruling is stated in the report as follows:—"He was, therefore, of opinion that the most equitable mode of decision would be to give to the parties respectively the land adjoining to their respective estates; and ordered that the land to the northward of a line drawn east and west from the river Suntose to the plaintiff's boundary should be taken by the plaintiff (the zemindar of Jumeera); that the remaining portion to the southward of that line should be divided by a line drawn from north and south; and that the land to the eastward of that should belong to the plaintiff, and that the land to the westward should be taken by the zemindars of Bahur Bund and Bheetur Bund, according to their respective

boundaries." This decision, after going through all the Courts, was finally affirmed by the Sudder Dewanny Adawlut on the 9th September 1818.

This decree, though admitted to be a binding adjudication of right, failed to determine the disputes between the parties. We find them in 1827 again disputing as to the direction and position of the boundary lines defined by the decree. And in that year, Dr. Scott, a gentleman holding a high civil office in the Zillah of Goalparah, went upon the land, laid down the boundaries as he conceived them to run according to the decree, and put the parties in possession accordingly. On that occasion he also made a map, of which that produced by the appellant, and marked No. 7, purports to be a true copy. The correctness of this copy is, however, disputed by the respondent, and has not been proved. According to map No. 7, a considerable change has taken place in the course of both the Sunkosh and the Burrumpootur between the years 1818 and 1827; the western branch of the latter having travelled considerably to the eastward.

It is, however, clear that, whatever were the precise boundaries laid down by Dr. Scott, plots Nos. 1 and 2 are the only parcels of the land now in dispute which formed part of the land which was apportioned by him, and was the subject of the decree of 1818. For both parties are agreed that what was in 1818 the western branch of the Burrumpootur, and, therefore, the western boundary of the chur then in dispute, is shown on map No. 3, by the old channel running from A to B; and we have therefore now to consider what is the title which the appellant asserts to lots Nos. 3 and 4.

The zemindary Jumeera contains two mouzahs called Takeemaree and Patwamaree. Bahur Bund contains two mouzahs called Balar Hat and Konearmutty. In 1832 or 1833, a dispute arose between the then zemindars whether certain chur land ultimately ascertained by survey and measurement to consist of 1,478 beegahs, 15 cottahs, and 5 doors; which had been thrown up by the river Sunkosh, was a reformation of parts of the two former, or of the two latter mouzahs; and, therefore, whether it belonged to Jumeera or to Bahur Bund.

This question was, in the first instance, fought in the Fouzdary Courts, and the result of the proceedings there was that the Magistrate, on the 17th July 1835, made an award in favor of the appellant, which was affirmed by the Commissioner on the 31st of December following. The map No. 6, which is in evidence in this suit, was made in the course of those proceedings. In 1843 the zemindar of Bahur Bund brought a suit in the Civil Court to set aside the Magistrate's award, and recover the land comprised therein; the map No. 5 was made on the occasion of a local investigation ordered in that suit; and, on the 20th March 1845, a decree was made in the plaintiff's favor by the Principal Sudder Ameen. That decree was, however, reversed, and the suit dismissed by a decree of the Sudder Dewanny Adawlut on the 26th September 1847. The result, therefore, of that litigation was to affirm the title of the zemindar of Jumeera to the land in question in that suit, whatever it may have been. And in this suit the appellant claims lots Nos. 3 and 4 as the land so decreed to him in 1847.

By the decree of the High Court directing the remand, against which neither party appealed, the title to all the four plots of land was made to depend on the determination of a single issue; and, in order to see how that came about, it is desirable to consider briefly the judgment of Mr. Fowle and the first judgment of the High Court.

Mr. Fowle found that the whole face of the country had been changed since 1818 or 1810, when the decision, on which the title to plots Nos. 1 and 2 rests, was passed; that the statements of neither party in respect of the different changes were supported by any evidence worthy of credit; and, consequently, that the only thing for the Court to do was to compare the different maps, and on that comparison, he came to the conclusion that the plaintiff (the appellant) had failed to prove his case. Both parties, however, seem to have admitted before him (or if

not before him, before the High Court on the first appeal) that, whatever had been the changes in the course of the Sunkosh, its true channel in 1810 or 1818 was identical with that which is traced on maps Nos. 5 and 6 as its dry channel, and the southern boundary of the land then in dispute. From this admission it followed that, if the true site of that channel could be ascertained, it would determine the title to all the four plots of land, since all that was north of that line would belong to Jumeera, and all that was south of it to Bahur Bund. And their Lordships think that both parties must be taken to have agreed to be finally bound by the finding on the issue directed by the High Court, viz., whether the line F G or the line P P on map No. 3 was the old bed of the Sunkosh.

It does not, however, appear to their Lordships that the effect of the remand was to shift or affect the burden of proof, or to prevent a failure to determine the true line of the old bed of the Sunkosh, if such should take place, from being fatal to the appellant, who had to make out his title to disturb the possession of the respondent.

The earlier judgments in this cause, and their own examination of the maps, have satisfied their Lordships that the attempt to determine the issue above stated by a mere comparison of these so-called maps is hopeless. None of them, unless it be map No. 4, have been made by scale or compass. They are rather rude diagrams than maps in the proper sense of the term. To fix by a comparison of them a disputed line in a country of which the face had never changed, would not be easy. But it is admitted that, during the half century which they cover, the locality embraced in them has been the subject of frequent, and more or less violent, changes, and has probably been affected by almost every annual flood. And their Lordships must express their surprise and regret that suitors in India, who obviously do not shrink from carrying on litigation of this kind at enormous cost, should not be at the pains of causing the maps, which are supposed to be essential to its right determination, to be prepared on something like a scientific principle.

The cause went back after the remand. A Sudder Ameen was deputed to make the local investigation directed to be made; he filed his report; and the argument of the learned Counsel for the appellant may almost be summed up in the proposition that it was the duty of the Courts below, and will be the duty of their Lordships, to adopt and act on that report.

The Sudder Ameen, after admitting that, by means of the alteration in the features of the country, it had become "most difficult to arrive at any correct conclusion in the matter," reported that, on a careful comparison of the maps with the disputed locality, he had come to the conclusion that F G was the old bed of the Sunkosh, and then proceeded to give in detail the grounds on which he had come to that conclusion.

It is obvious that the special value of his opinion must depend on the degree in which the comparison of the maps has been aided by actual observation of the locality, and of undisputed landmarks within it. So far as it rests on mere comparison of maps, or inferences drawn from former proceedings, it is of less weight than the judgment of the Judge, who is, presumably, as competent as the Sudder Ameen to compare the maps, and must speak with greater authority as to the effect to be given to the documentary evidence in the cause.

The reasoning contained in his first ground seems to depend almost wholly on a comparison of the maps, particularly maps Nos. 2, 5, and 6; on the assumed admission by the respondent of the correctness of the two latter maps; and on the effect to be given to the replication of her predecessor in title in the suit of 1844.

The correctness, however, of map No. 2, as a copy of that from which map No. 1 was made, has been directly impugned in this suit, and has not been established by the appellant. The delineation therein of Chalitabarree, of which there is no trace in map No. 1, certainly casts considerable suspicion upon it.

And even if it were authentic, it would, in one important particular, fail to support the appellant's case. For it places the confluence of the Sunkosh with the western branch of the Burrumpootur north of Kaladangah, which is marked as north of Bullabhur Kas ; and even a little to the north of the Konearmutty Dara, or, at all events, in the immediate vicinity of that dara. And so far it seems to be in favor of the proposition that P P, rather than F G, indicates the site of the old bed of the river.

Again, the principal argument founded on maps Nos. 5 and 6 is that both place the Konearmutty Dara considerably to the north of that which each represents to be the old bed of the Sunkosh forming the southern boundary of the land then in dispute. But it is admitted that the place assigned by these maps to the house of Neemchund Sircar (an undisputed landmark) cannot be reconciled with the place assigned to the Konearmutty Dara ; and the Sudder Ameen assumes that the maps are accurate as to the site of the dara, but inaccurate as to the site of the house. It seems, however, to their Lordships that, if inaccuracy in one of these particulars is established, little dependence can be placed upon the maps. It is mere matter of speculation whether one site or the other is misplaced ; it may be that both are misplaced.

Of these two maps, it is further to be observed generally, 1st, that, where they differ (and the Sudder Ameen has found that they do differ from each other in some respects), greater credit should be given to the Magistrate's map No. 6 than to the Ameen's map No. 5, because the final decree of the Sudder Dewanny Adawlut in 1847 upheld the Magistrate's award against the Ameen's report ; and, 2ndly, that the principal question then in controversy, and with reference to which these maps were made, was not so much what was the southern boundary now in dispute, as whether the Sunkosh, higher up in its course, had not shifted its bed, so as to give the present appellant (the plaintiff in that suit) a right to claim land to the west of the then flowing river as parcel of his village Takeemaree—a question which was ultimately decided in his favor.

The latter observation affords an answer to the argument of the Sudder Ameen, which is founded on the statement made by the plaintiff in that suit in his replication to the effect that the river Sunkosh had not changed its course for thirty to thirty-five years. For the question here is not what case the respondent or her predecessors in title may heretofore have put forward, but where, in fact, was the old bed of the river ; and the final decree of 1847 is inconsistent with the proposition that the Sunkosh had not then shifted its course, and must be taken to be a finding against it.

Map No. 4, so far as it bears upon the present question (a point which will be afterwards considered), is treated by the Sudder Ameen as being in the respondent's favor.

In his second ground the Sudder Ameen relies on a supposed admission in the answer of the respondent in this suit. But Mr. Kay showed, as their Lordships think successfully, that this argument of the Sudder Ameen is founded on a misconstruction of the term "the western stream of the Burrumpootur mixed up with the Sunkosh," which he treats as indicating the actual point of confluence of the two rivers ; whereas, it may, and probably does, mean merely the course of the Burrumpootur after it has received the waters of the Sunkosh.

Another part of the Sudder Ameen's report, which is extremely unsatisfactory, is his attempt to explain the great difference between the quantity of the land comprised within plots 3 and 4, viz., 5,431 beegahs, and that decreed to the appellant in 1847, viz., something less than 1,479 beegahs. This fact affords a strong argument against the identity of the two parcels. Yet almost all that the Sudder Ameen says of it is :—"Moreover, there seems no reason why the lands to the northward of the line F G should not belong to the plaintiff because they exceed the quantity before," by which he probably means the quantity formerly

claimed. Again, the Sudder Ameen has either failed to identify the Isamuttee of the decrees of 1810 and 1818, or he has placed its site so near the line F G as to make it difficult to see how, between the confluence of the Sunkosh and that of the Isamuttee with the western branch of the Burrumpootur at that time, there could have been lands of Bahur Bund *ex adverso* to the disputed chur sufficient to support the assignment to Bahur Bund of so much of that chur as the decrees of 1810 and 1818 gave to that zemindary. This circumstance was strongly pressed by the learned Counsel for the respondent, and there appears to their Lordships to be much weight in the argument.

A more material consideration is the following:—It is clear, as the Zillah Judge, Mr. Robinson, has pointed out, that whether the old bed be at P P, or at F G, the true line, if prolonged nearly due west, ought to strike the northern extremity of the boundary line drawn (speaking roughly) from south to north, by Dr. Scott, in 1827. Therefore, how far that boundary line extended in a northerly direction is a question most material to the determination of the present issue. And it is upon that point that the report of the Sudder Ameen seems to be most directly in conflict with the result of the earlier local investigation in 1852. Their Lordships cannot but think that a strong case is required to destroy the effect of those thakbust proceedings. The investigation involved the fixation of the boundaries not merely of the two zemindaries, but of two conterminous zillahs, Rungpore and Goalparah. It appears to have been made by the Revenue department with considerable care, the Collectors of both zillahs being parties to it. Their award seems to have been the subject of appeal to the Board of Revenue, which confirmed it; but the grounds of that appeal, which might have thrown some light on the present controversy, are not found in the record. Mr. Bedford's map, No. 4, is by far the most scientific of those produced. He appears to have gone upon the ground, to have mapped it, to have ascertained what lands were in dispute between the rival zemindars, and to have referred those disputes to the Collectors of the two zillahs. Several parcels of land, beside those in question in the cause, were then in dispute. The two Collectors went upon the spot and determined the boundary wherever it was disputed. Their investigation was treated in the argument as perfunctory, but their Lordships do not think it deserves that character. They seem to have examined the ryots on the ground; and as to one of the disputed points (not however one of those now in question), they differed in opinion, and had to refer that case for determination to higher authority. The remarkable thing is that, according to the concurrent statements of both Collectors, the zemindar of Jumeera almost gave up his case as to the parcels of land which are the subject of this suit. It was argued that the suit itself is an answer to those statements. But it seems to their Lordships to be more probable that the zemindar should, as an after-thought, have determined to disavow his agents, and try the chances of a civil suit, than that the Collectors should have so grossly misapprehended what had passed before them. The result of these proceedings was that the boundary was fixed by prolonging the admitted boundary line of Dr. Scott to the north-east, as is shown in map No. 4. Again, from the Collector's report it may be inferred that evidence was thus forthcoming to show that the zemindar of Bahur Bund was actually in possession of the land in question. And this is confirmed by the finding of Mr. Fowle (Appendix, p. 1053) on the evidence before him as to the anterior possession.

Their Lordships are of opinion that the report of the Sudder Ameen made 13 years afterwards does not afford a sufficient answer to their thakbust proceedings. They are not satisfied of the correctness of his assumption that the tree which he found standing, whether asoodh or pykar, marked the northern extremity of Dr. Scott's boundary line. It may have been merely a point in that line, and the Revenue officers may have been correct in prolonging that line as they did.

Their Lordships have not been insensible to the difficulty, so strongly urged

by Mr. Joshua Williams in his reply, of finding any land to correspond with C in map No. 1, consistently with map No. 4. But considering that C was in 1810 the extreme portion of a chur surrounded on all sides by the Burrumpootur, they do not think that its disappearance in the course of half a century would be altogether unaccountable. Nor can they lay much stress on the attempt of the respondents' mookhtar to identify it with kaem land. A native mookhtar is very apt to clutch at a false explanation, rather than admit his inability to explain a circumstance which seems to militate against his case.

On the whole, their Lordships have come to the conclusion that the report of the Sudder Ameen fails to establish that the line of the old Sunkosh was at F G. They do not feel that, in coming to that conclusion, they are departing from what has been laid down in other cases touching the weight to be given to a report made by an officer deputed to make a local investigation, and stating conclusions drawn from what he has actually found and observed on the ground. Enough has been said to show that the report of the Sudder Ameen, in this case, is not exactly of that character. But if it were, their Lordships, in treating it as insufficient to destroy the effect of the thakbust proceedings, would be only applying in favor of the respondent *ratio decidendi* which was applied in favor of the appellant by the Sudder Dewanny Adawlut in 1847, viz., that, where the results of two local investigations are conflicting, the earlier is to be preferred. The principle is reasonable; since in the interval between the two investigations, the features of the locality may have changed, and evidence of possession may have been lost.

If it were necessary for their Lordships, in dealing with this voluminous record, to determine affirmatively where the line of the old Sunkosh was, they would be disposed to prefer the line P P to that of F G. But it is not necessary for them to do this. It is sufficient for them to hold with Mr. Justice Macpherson that the appellant has failed to establish that F G was the true line, by evidence on which a Court of Justice ought to disturb the possession which the respondent has had of the lands in question; certainly since 1852, and probably for a much longer period.

Being of this opinion, they will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 2nd April 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

Joint family property—Arbitration award—Limitation.

*On Appeal from the High Court at Calcutta.**

Runjeet Ram Panday

versus

Goburdhun Ram Panday.

A Magistrate's order declared appellant to be in possession of three mouzahs, *K*, *H*, and *M*, and the respondents in possession of a mouzah called *D*. This led to two suits, one by appellant to obtain possession of *D*, and a confirmation of his title to *K*, *H*, and *M*, as well as three other mouzahs; and another suit by the respondents to obtain possession of *K*, *H*, and *M*. Appellant claimed to be

* From the judgment of Bayley and Macpherson, *J.J.*, in Regular Appeals Nos. 337 and 338 of 1867, decided 4th March 1869.

entitled to a mokurruree lease of the mouzahs ; respondents asserting that the mouzahs were ancestral property belonging to the family, and that the mokurruree had been granted to appellant on behalf of the family, and not on his own account. Before the proceedings in the suit had gone far, the parties agreed to refer the dispute to arbitration, and an award is said to have followed. The appellants, however, asserted that the documents proving the agreement and award were spurious. The Lower Courts found that there had been an award, which was confirmed.

Going into the question of the authenticity of the award, the Privy Council agreed with the findings of the Courts below, and concluded that the mouzahs were joint property, and were partitioned in the way declared in the award, and on the question of limitation also they found in favor of the respondents.

This is an appeal from decrees of the High Court of Calcutta affirming the judgments of the Principal Sudder Ameen in two cross suits relating to some mouzahs in Zillah Gya in Behar. A Magistrate's order had been made prior to the suits, which dealt with four of the mouzahs referred to in them. The effect of that order was to declare that the appellant was in possession of three mouzahs, Khyra, Hussra, and Moojooratro, and that the respondents were in possession of a mouzah called Dalla Kullan. It appears that the immediate reason for requiring the intervention of the Magistrate was some disputes with reference to Dalla Kullan. A man had been murdered in the course of an affray in that mouzah, and the evidence given before the Magistrate appears to have related principally to it. There appears to have been little or no evidence given before him as to the other mouzahs ; but undoubtedly his order is that the appellant should remain in possession of Khyra, Hussra, and Moojooratro, and that the respondents should remain in possession of Dalla Kullan.

The Magistrate's order led to the two suits which gave rise to the judgments under appeal.

The appellant, Runjeet Ram, brought the first of these suits to obtain possession of Dalla Kullan, and a confirmation or declaration of his title with regard to the three mouzahs, Khyra, Hussra, and Moojooratro ; and he included in the latter part of the suit, that is, in the prayer for confirmation, three other mouzahs. One of those mouzahs, Rutnagh, was in the suit declared to belong to him, and no question arises in the appeal respecting that mouzah, or with respect to the two other mouzahs, Dhajabun and Kantee, for which he sought a confirmation of title.

The second suit was brought by the present respondents, and that suit was to obtain possession of the three mouzahs which the Magistrate's order had declared to be in the possession of the appellant. Therefore the questions which arise under the two suits in the present appeal are the same with reference to the four mouzahs, Dalla Kullan, Khyra, Hussra, and Moojooratro ; first, the question of title, whether they belong to the appellants or the respondents ? and next, the question arising on the statute of limitations.

The first question to be considered is the main one, namely, the title. The dispute between the parties arose in this way. The appellant, Runjeet Ram, claimed to be entitled to a mokurruree lease of the mouzahs, which undoubtedly had been granted to him, and in his name only, as his own self-acquired property. The respondents asserted that, though the mokurruree had been granted to him, the mouzahs contained in it were old ancestral property belonging to the family, and that the mokurruree was granted to Runjeet Ram on behalf of the family, and not on his own individual account. That dispute had been brought into a Court of Justice ; but before the proceedings had gone far in the suit, the parties, it is said, agreed to refer the question to arbitration, and it is said that an award followed upon the agreement.

Now, on the part of the appellant it is asserted that the documents which appear upon the record,—which undoubtedly, if they are genuine, show that there was an agreement to refer, and an award confirmed by an order of Court,—that all those documents are spurious and fabricated. The main question is, whether that contention is established or not ?

It may be observed in the outset that the Principal Sudder Ameen of Gya and the High Court have given concurrent judgments upon it. They have come to the conclusion that there was a submission to arbitration, and that the award set out in the record has been proved; and they are also of opinion that the order of the Civil Court confirming that award was proved.

The respondents have given some evidence that before the submission to arbitration the property included in the mokurruree pottah granted to Runjeet Ram had been held by his father and his grandfather. And it does appear from the receipts given in evidence in the cause that this was so, which certainly negatives what is put broadly forward by Runjeet Ram that he acquired this mokurruree for the first time by his own exertions. However, the evidence before the date of the submission to arbitration is not very strong.

The agreement to refer appears to have been made in January 1834. It is an agreement made by the then members of the family. It states that "a suit arising from contention about shares amongst us is pending in Court, and is now entered on the special board for trial;" and then it goes on to say:—"We have constituted" . . . four persons, one of whom is Gunnesham Singh, . . . "and undertake in writing that we will, without demur, abide by and be governed by the decision with regard to the allotment of shares which these arbitrators may pronounce." If genuine, it is a perfectly good submission to the arbitration of these four persons.

Now this agreement is proved to have been executed by the testimony of Gunnesham Singh, one of the arbitrators, and it is authenticated by the signature of Mr. Smith, the Commissioner of Patna, who also signed the mokurruree lease; and it may be observed that Runjeet Ram, who was examined before the Magistrate, does not deny that such a submission was made, although he says that no award followed it. The evidence, therefore, of the ikrarnamah, or agreement to refer, seems to their Lordships to justify the findings of the Courts below that it is a genuine document.

It appears that two days after the date of the ikrarnamah a mokurruree pottah was granted by the Maharajah Domurnath Sahee, who is described as owner and mokurrureedar of Pergunnah Beeloucha, of the mouzahs now in dispute and of several other mouzahs to Runjeet Ram, to be held from generation to generation at an annual rent of sicca Rs. 258. Runjeet Ram's claim arises from this pottah having been executed in his own name, and the pottah, no doubt, is consistent with his case, that it was self-acquired. But it bears date two days only after the submission to arbitration, and the two documents appear, when regarded by the light of the subsequent award, to have been made contemporaneously, for the purpose of having the property placed in the name of one of the family as a convenient form for vesting the mouzahs in the family upon a clear mokurruree title.

The next document to which reference should be made is the disputed award itself. That of course is the most important document in the case, for it is the evidence of the title set up by the respondents. The award is very full in its statement. It sets forth the substance of the claims advanced on both sides, and then declares the course which the arbitrators themselves took to arrive at a proper decision upon the question referred to them. It states:—"As by enquiries from the neighbours, and from the deposition of the witnesses, such as the putwaree, jeth ryot, and cultivators of the contested mouzahs, and shareholders, also on a reference to some papers of a suit in a Court of Justice, filed by the opposite party, the fact of the aforesaid mouzahs having been acquired by the ancestors of the parties while together, and that they remained in joint possession of the shares as alleged by the opposite party, has been proved and established." Therefore, if this be genuine, these four arbitrators decide that these mouzahs had been in the family, and had been acquired by the ancestors of the parties, and that they

had remained in joint possession. Then the ordering part of the award is, "That the claim of the first party, that is, Runjeet Ram, to the entire 16 annas of the contested mouzah be disallowed." It thus appears that he had put forward his claim, as he does now, and it was after this investigation disallowed. It goes on:—"The first and opposite parties shall remain in possession of the whole of the property in dispute in equal moieties, as per detail subjoined to this award." Then the detail is given, and certain mouzahs are allotted to Runjeet Ram, including Mouzah Rutnagh; and certain other mouzahs are allotted to the predecessors in title of the respondents, which include the four mouzahs, which were the subject of the Magistrate's order, and are those in question in the present appeal.

It is important to observe that the award refers to the mokurruree pottah, and provides for the mode in which the mokurruree rent shall be paid. The mode in which that is provided by the award is this:—the rent is divided, and it is assumed that one half of it, or Rs. 129, would be payable equitably according to the allotment by those whom the respondents now represent; but for convenience it was provided that the whole rent should be paid by Runjeet Ram; and certain mouzahs, or the produce of certain mouzahs, were given to him in order to compensate him for the share of the rent which he was to pay for them. In consideration of having the produce of those mouzahs, he was to pay the whole rent and to indemnify the other branch of the family from the one half of it. That accounts for his continuing to pay the rent, which appears to be the same as the Government revenue, and accounts for all the receipts for the rent being in his own name and for the fact that none appear in the names of the respondents.

The authenticity of this award has been very strongly disputed. It was produced in the Courts below, where the Judges were much better able to decide upon the view of it than their Lordships can be as to its genuineness; and those Courts, having seen the document, and having heard all the evidence, came to the conclusion that the document was genuine. It would be contrary to their Lordships' usual practice to find that an instrument of this description was spurious and fraudulent against the concurrent findings of the Courts below. Undoubtedly there may be cases where the inference is so strong from the evidence that that might be done, but it is evident that such cases must be extremely rare. Their Lordships find no evidence which leads them to the conclusion that the Courts have come to a wrong finding upon the authenticity of this award. On the contrary there are two circumstances, independently of the general history of the case, which appear to their Lordships to be very strong in its favor. The first is, that one of the arbitrators, the only surviving one, Gunnessham Singh, was examined as a witness, and distinctly stated that, although he could not recollect the substance of the award, yet that an award was made. Therefore the assertion of Runjeet Ram that no award followed the submission is clearly disproved by one of the arbitrators themselves; and if any witness is to receive credit in India, there can be none entitled to higher credit than those whom the parties have selected to settle their disputes, and to whose position and respectability they have therefore both borne practical testimony. But again, if this was not the award, Runjeet Ram might have proved that fact. He might have said this award is not that which was made by the arbitrators, and have stated circumstances which would have enabled the Court to decide upon this assertion, if it really had been a true one. But he abstains altogether from going into the witness box to deny the authenticity of that which he asserts upon his pleading to be a spurious and fabricated document.

Their Lordships, therefore, are unable to come to any other conclusion than that it is their duty, so far as this instrument is concerned, to agree with the findings of the Courts below.

Another document appears upon the record, which undoubtedly is open to the

strong observations which have been made upon it very ably by Mr. Doyne. That is a proceeding in the Civil Court of the district of Behar, which professed to be a confirmation of the award in a suit brought for that purpose. It is dated the 15th April 1837. It, no doubt, on the face of it, is an order which recites that a suit was brought upon the award for the purpose of having it confirmed and enforced; and it concludes in this way:—"It is, therefore, ordered that without the arbitrators being cited and without hearing their depositions, the arbitration award in this case; as the claim is admitted, be confirmed." Various objections to this order arose from improbabilities appearing on the face of it. They are set out in the judgment of the High Court. The High Court, admitting that these improbabilities exist, and are strange and irregular, still think that they may be accounted for upon the reason that, at the time when the order was made in 1837, the proceedings of the Courts were characterized by some irregularities. Their Lordships think that if the case had depended on this document alone, it would have required very great consideration on their part before they could have acceded to the view taken by the High Court regarding it. But in the view they take of the case, they do not think it necessary to give any opinion of their own upon its genuineness; for, assuming it not to be a genuine document, still the award to which they think they are bound to give credit remains; and that award is sufficient to establish the proposition for which the respondents contend, namely, that these mouzahs belonged to the family as joint property, and that the mokurruree pottah was granted to Runjeet Ram, not for himself only, but on behalf of the joint family, and therefore that at the time of this award he held the whole of the mouzahs contained in the pottah for the benefit of the family. No question of time arises under Reg. VI of 1813; for this is not a proceeding to enforce the award in a summary way, but it is a regular suit founded upon the original joint title and the subsequent partition; and the award and the proceedings which led to it, are used only as evidence in proof of that title, and to show that the mokurruree pottah was granted for the benefit of the family.

Their Lordships have, therefore, come to the conclusion already in effect stated, namely, that these mouzahs were joint property, and were partitioned, or were awarded to be partitioned by the award in the way in which that instrument declares them to be allotted.

With regard to limitation, an objection is made to the right of the respondents to recover in the suit which they have brought for the recovery of the three mouzahs, Khyra, Hussra, and Moojooratro; and the same objection is made to their title to hold Dalla Kullan, upon the ground that the possession since the award has been with Runjeet Ram, and not with them. The objection turns upon the statute of limitations, and must be dealt with as one under the statute. This question has occasioned some difficulty to their Lordships in consequence of the manner in which it has been dealt with by the Courts below. The award, which must now be assumed to be valid, directed that the mouzahs should be allotted, some to the appellant and some to the respondents; and from the time of the award, undoubtedly the possession, to be in accordance with it, should have been the separate possession by the different parties of the several mouzahs allotted to them. The Principal Sudder Ameen and the High Court have held that the possession of Runjeet Ram would be the possession of the rest of the family, treating him as the holder of the mokurruree grant as a trustee for them. Neither Court appears to have considered the question of the possession in fact of these mouzahs, but they have rather assumed that if the possession was with Runjeet Ram it would still be, under the circumstances, the possession of the whole family, and not an adverse possession by him against them. Their Lordships are not prepared to agree with that view, because undoubtedly that is not the case which is set up by either of the parties, and it is not consistent with what might presumably be expected to have followed the award. Their Lordships, therefore, have been

obliged to look at the evidence, unassisted by any findings of the Courts below upon the fact of possession. They have had to consider whether they were able to form a judgment upon the evidence as it stands for themselves, or whether it would be their duty to send the case down for further investigation and enquiry. The latter course is clearly undesirable, as it would necessarily involve a new enquiry at great expense, and at a distance of time when the evidence might have disappeared, and witnesses who might at an earlier stage have been called were gone. They have, therefore, felt that they would best administer justice between the parties by deciding this question for themselves.

Now, first of all, with regard to Dalla Kullan, their Lordships have looked very carefully at the evidence, and they think that, with regard to that mouzah, the evidence is tolerably clear that the possession was with the respondents before the Magistrate's order. The Magistrate has so found, and his attention was certainly called to that mouzah from the circumstance already adverted to ; and there is very strong evidence in the record that it was in the possession of the respondents. It is also to be observed that Gunnessham Singh, the arbitrator, says that it was in their possession at an earlier time after the award.

Their Lordships, therefore, think that it is established that Dalla Kullan was in the possession of the respondents within twelve years before the commencement of the suit ; and if it was in their possession at any time within that period, the statute cannot be set up as a bar against the title, which must now be assumed to be in them. Their Lordships cannot fail to observe that if they are right in the conclusion that Dalla Kullan has really been in the possession of the respondents, that fact very strongly supports the contention that the award is a genuine instrument,—because, undoubtedly, that mouzah is included in the mokurruree pottah, and no suggestion has been made as to how it came into the possession of the respondents, unless under the award which gave them title to it, notwithstanding the apparent title of the appellant by reason of its being included in the mokurruree grant.

With regard to the other three mouzahs, Khyra, Hussra, and Moojooratro, the evidence is more conflicting. There is evidence on both sides. There are several witnesses who say that those mouzahs were in the possession of the appellant ; but there are several others who speak very distinctly to the possession of the respondents. The last-named witnesses speak to a possession for a considerable period of time. Some of them say they themselves cultivated the land in the mouzahs, and shared the produce with the respondents. It is, of course, extremely difficult to come to a conclusion which is satisfactory to the mind upon evidence of this kind. The Magistrate's order with regard to those mouzahs has certainly not the weight which it has with regard to Dalla Kullan. He does not appear to have taken evidence with regard to them.

Mr. Doyne relied upon certain mortgages which had been made of one of the mouzahs, Moojooratro. It appears that in 1838 that mouzah was mortgaged to Gunput Sahoo. Various proceedings were taken, and time given ; and ultimately in 1862 there was an acquittance, in which it appears that the mortgage debt was included with other sums, and discharged. It is to be observed that there is no evidence whatever that the mortgagee took possession of the property mortgaged to him, or that the mortgage itself was in any way brought to the knowledge of the respondents.

In 1852 there was a mortgage of Dalla Rutnagh, which is said to have included Dalla Kullan, to Koonjbehary Lall, who was the heir of Gunput Sahoo, which does not appear to have been connected with the former mortgage. The mortgage itself does not appear to have been disclosed to the respondents ; but Mr. Doyne relies upon the circumstance that in 1862 there was an attachment preparatory to a sale, which, he says, must have given the respondents notice of the mortgage, and that they did not then intervene ; and he derives an argument

from their abstention to do so. But it must be observed that the attachment was not followed by a sale ; for, within a week after its date (the 10th July 1862), viz., on the 17th July, part of the money was paid off, and further time given, and all proceedings on the attachment were stayed. It appears, however, that three years later, in 1865, an order for sale was made ; and that order for sale being made, and there being apparently an intention to act upon it, on the 20th September 1865 the respondents intervened, and petitioned, stating their title to the mouzahs they now claim precisely in the way they put it forward in this suit. They stated also that the appellant had improperly included their mouzahs in this mortgage by the general term *Dalla Rutnagh*, which was the name of the mehal ; that he had not separated his own mouzahs from theirs, but had mortgaged the whole by the general term *Dalla Rutnagh*. Upon the intervention of the respondents effect was given to it, not apparently by a decision of the Court, but by the acquiescence of the creditors, who allowed these mouzahs to be excepted out of the order which was made for sale. It seems to their Lordships that the intervention by the respondents at that time is strong evidence of an assertion of title, which could hardly have been made if they had really been out of possession from the time of the award.

In the midst, therefore, of this conflicting evidence their Lordships think it right to consider whether there is any presumption to be derived from the other parts of the case in favor of the one side or the other. Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary ; but where there is strong evidence of possession, as there is here, on the part of the respondents—opposed by evidence, apparently strong also on the part of the appellant,—their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded ; and that, with the aid of it, there is a stronger probability that the respondent's case is true than that of the appellant.

It may also be observed that their Lordships are not disposed to give great credit to the evidence brought forward by the appellant, inasmuch as his case, which rested upon the theory that he had acquired this property for himself, has been found to be wholly untrue.

In the result their Lordships will humbly advise Her Majesty to affirm the judgments of the Courts below, and to dismiss this appeal with costs.

The 4th April 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Robert P. Collier.

Ancestral property—Execution sale—Rights of adopted son.

*On Appeal from the High Court at Calcutta.**

Rajah Debendro Narain Roy

versus

Coomar Chundernath Roy.

* From the judgment of Couch, C.J., Loch and Hobhouse, J.J., in Regular Appeal No. 284 of 1869, decided 25th August 1870.

Plaintiff came into Court to follow into the hands of the defendant certain property to which the latter had by transfers acquired the title of the purchaser at an auction held in June 1843. The ground of his claim was that the late owner, who died before the sale, had left his widow a permission to adopt a son, and thereupon in 1856 she had adopted plaintiff. His contention was that the sale was of the widow's interest merely, the permission to adopt having given to her, in the event of an adoption, a life-interest in the property; and that upon her death in 1865 his interest accrued.

Held that, as the proceeds of the execution sale were not applied to satisfy only a liability incurred after the owner's death, but also decrees for other debts for which the estate was liable, there was no substantial ground to impeach the long title acquired by the respondent.

It is not necessary for their Lordships to express at any length the grounds on which they think that this appeal must be dismissed. The plaintiff comes into Court to follow into the hands of the defendant, who by intermediate transfers has acquired the title of the purchaser at an auction-sale, which took place so long ago as the 10th June 1843, the property which was then sold. The grounds upon which he does this are, that the late Rajah Shib Prosad Roy, who died some time before the sale, was the undoubted owner of the property; that Rajah Shib Prosad Roy left an unnoomuttee puttro, by which he authorised his widow to adopt a son; and that in the year 1856, more than twelve years after the sale, she exercised that power in favor of him the plaintiff. However, nothing turns upon the point of time. His contention is that the sale must be taken to have been a sale of merely the widow's interest, and that upon her death, in the year 1865, his interest for the first time accrued, and that he was therefore entitled to commence this suit for the purpose of recovering the property in July 1868. The nature of the unnoomuttee puttro was peculiar, in that it did not leave the widow's estate to be defeated immediately by the adoption, as in the ordinary case, but gave to her, in the event of an adoption, a life-interest in the property. Hence the interest of the appellant did not commence until the widow's death. If this suit were successful, it certainly would be a flagrant instance of the extreme inconvenience which arises so often from the limited nature of a Hindoo widow's estate, and from the confusion which is introduced into the devolution of estates by authorities to adopt which for a considerable time are not acted upon. But of course if the facts supported the contention of the appellant, it would be their Lordships' duty to apply the law without regard to such inconveniences, or to the hardship upon the purchaser at the execution sale, and those who claim under him. It appears, however, to their Lordships that in this case there are no reasons whatever why they should apply that harsh law. If the only execution under which the property was sold, and the only liability which the proceeds of the sale were applied to satisfy, had been that incurred after the death of the Rajah Shib Prosad Roy, in the proceedings taken ineffectually to contest the foreclosure of the mortgage, and the recovery of the mortgaged property, it might still be a question whether that were not a liability which bound the inheritance, inasmuch as it was incurred by the Court of Wards as representing the whole estate, and with the *bond fide* object of protecting the whole estate. It does not seem, however, to their Lordships to be necessary to rest their decision upon that ground, since the view taken in the able judgment of the High Court affords a more satisfactory ground upon which to place it, that ground being that the property had in fact been also attached in satisfaction of decrees for other debts for which the estate of the Rajah was beyond all question liable; and that although the sale was had under the attachment issued in the suit of the mortgagees, the property was in fact sold in satisfaction of all the decrees that had been recovered affecting the property, the proceeds of the sale being paid in the usual way into the Collectorate, and there applied among the decree-holders, some of whom most unquestionably had subsisting and valid claims against the estate of the Rajah.

Under these circumstances their Lordships fully concur with the High Court in thinking that the appellant has no substantial ground upon which he can impeach the long title acquired by the respondent under the execution sale. It is,

therefore, wholly unnecessary for their Lordships to consider whether the evidence supports the conclusion of the High Court upon the question whether Anund Moyee Dabea had abandoned the world before her death, or whether the Court of first instance was correct in holding that that case had not been established.

Their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal. The costs of course ought to follow the result.

The 7th May 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Burden of proof—Julkur—Rights of auction-purchaser—Tenure created before the perpetual settlement—Local investigation—Delegation of main point in dispute to an Ameen.

*On Appeal from the High Court at Calcutta.**

Forbes

versus

Meer Mahomed Hossein.

Where an auction-purchaser brought a suit to obtain possession of certain julkurs, which he alleged formed part of his zemindary of S, the defendant being in possession thereof, and his possession having been confirmed in an Act IV case, HELD, that the burden of proof rested on the plaintiff to show that the julkurs in dispute formed part of the assets of the zemindary at the time of the perpetual settlement; and also that the plaintiff not having objected before the High Court to the Court of first instance having delegated the decision of the main point in the case to an Ameen, could not take that objection before the Judicial Committee.

This was an appeal from a judgment of the High Court of Calcutta, dated the 31st March 1865, affirming a decree of the Principal Sudder Ameen of Zillah Purneah, dated the 26th May 1864, and dismissing the suit with costs.

In addition to the facts of the case referred to in the judgment of the Judicial Committee, it may be stated that the question was whether certain julkurs formed part of the assets of the zemindary of Sultanpore, which the plaintiff claimed as assignee of the rights of an auction-purchaser, or whether they were a parcel of an istemraree holding of the respondents. The respondents had been in possession for a long period of years, and having been ousted by the plaintiff had recovered possession by Act IV proceedings. Neither the settlement of the zemindary with the plaintiff's predecessor in title, nor the sunnuds of the respondent's predecessors in title, contained any mention of the julkurs in dispute. None of the witnesses were examined before the Principal Sudder Ameen, who had ordered a local investigation by an ameen, and had directed the ameen, among other things, to ascertain in whose possession the julkurs in dispute were at or anterior to the decennial settlement. The ameen's report contained the following passage:—
“From the depositions of the neighbours produced by the defendant, who spoke from their own knowledge, and from information derived from their ancestors, it appears that Meer Syud Ally, the ancestor of the defendant, was, anterior to the decennial settlement, having acquired the istemrar, in possession of the julkurs in dispute.”

* From the judgment of Bayley and Phear, J.J., in Regular Appeal No. 325 of 1864, decided 31st March 1865.

In the memorandum of appeal to the High Court no objection was taken to the ameen's report.

Mr. Leith, Q.C., and *Mr. Bell* for the appellant contended (1) that the burden of proof was on the respondent (*Wise v. Bhoobunmoyee Dossia Chowdrain*,* 10 Moore's Indian Appeals 165); (2) that even if the burden of proof were on the appellant, there was evidence to support his case; (3) that the Principal Sudder Ameen acted irregularly in delegating the decision of the main point in the case to an ameen. [*Sir J. Colvile* said that as this objection had not been taken before the High Court, their Lordships could not entertain it.]

Mr. John Cutler for the respondent was not called upon.

Sir J. Colvile delivered the following judgment:—

The appellant in this case is the zemindar of Sultanpore. Sultanpore, though now a separate zemindary, appears to have been at the time of the decennial settlement part of a larger estate called Pergunnah Havilee, which was then settled with a lady, styled Ranee Indrabutty. When the separation took place does not very clearly appear, but what is clear is that, in the month of July 1850, Sultanpore was put up for sale for arrears of Government revenue; that it was then purchased by one Protab Singh; and that in the following April he sold it to the appellant, who thereby acquired all the rights which by virtue of that auction-purchase had been vested in the vendor.

The respondents may be taken to represent the holders of an istemraee or jagheer tenure which, at the time of the perpetual settlement, existed under a grant or sunnud from the Government, but was then settled as part of Havilee, or, as one may take it, of Sultanpore in the nature of a dependent talook. It appears that, shortly after the auction-purchase, Mr. Forbes found that the holders of this tenure, which is admitted to be a tenure which he as auction-purchaser has no right to destroy, inasmuch as it existed before the decennial settlement, were in possession, and had long been in possession of certain julkur or rights of fishery. He seems to have attempted by the strong hand, or otherwise, to dispossess them of those fisheries; but on their suit, the Magistrate by an order dated the 4th December 1852, and made in an Act IV case, affirmed their possession, and on appeal that order of the Magistrate was confirmed by the Sessions Judge on the 9th April 1853.

It further appears by the proceedings that these julkurs, or rights of fishery, are of several kinds. Mr. Justice Phear, in his judgment, says:—"The most important of them is a river, which, for portions of its course, lies wholly within lands of the plaintiff, and for other portions wholly within the jagheer or istemraee lands of the defendant; and thirdly, in other parts, divides the lands of the plaintiff and defendant." There seem to be also some which do not strictly fall within either of the above descriptions. I mean those which are connected with the Seetadhar stream, and partially, at least, consist of rights which during the time of flood are exercised over the appellant's admitted land.

It does not, however, appear to their Lordships to be necessary, at present at least, to examine very particularly into the distinction between these different rights of fishery, because if the Act IV proceeding which has been referred to, and which is found at page 10 of the record, be examined, it will be found that they were all then in question—that the respondents were then found to have been in possession of all of them for a long time anterior to the dispute; and it is even stated in the judgment of the Sessions Judge that the defendant did not deny that possession in fact. They appear to have been all claimed by the respondents as held by the same title, that title being that they had been so held from a date previous to the decennial settlement, and, as an incident, to the tenure of which it is admitted the respondents or their ancestors were the undoubted holders. The right of possession, or the fact of possession, having been thus found by the

* 3 W. R. P. C. 5; 1 Suth P. C. R. 563.

Act IV proceedings, Mr. Forbes took no steps to impeach that finding until the year 1860, when he instituted this suit.

Now the first question which their Lordships have to determine is whether the Indian Courts have been correct in throwing upon the appellant the burden of showing that the julkurs which he claimed by his plaint formed part of the assets upon which the settlement of his zemindary was made? For that purpose it seems necessary, although the thing is common learning, to go back to first principles, and to consider upon what the stringent rights which the law gives to a purchaser at an auction-sale really rests.

It cannot be disputed that, if there had been no auction-sale, it would have been impossible for the zemindar to question, at the time this suit was brought, either the possession or the title of the respondents. There had been, in the year 1844, a previous Act IV case between one of the former zemindars and these parties, in which, as in the later proceeding of that kind, the possession of the respondents had been affirmed, and, of course, after that it would have been essential for the zemindar to prove that, within twelve years of bringing his suit, he had been in possession of those julkurs, and at the time this suit was brought, twelve years had elapsed even from the date of the award of 1844.

It is conceded that, by virtue of the purchase from the purchaser at the auction-sale, immediately after the sale, and at a time when he cannot be taken to have waived any rights which that transaction may have given him, Mr. Forbes, the appellant, acquired the same rights which he would have acquired had he been the actual purchaser at the revenue sale. But what are those rights? The first is no longer here disputed. It is that, in the case of an auction-purchaser, the cause of action must be taken to have first arisen at the date of the purchase, and consequently that the defendants cannot plead their long possession as an absolute bar to the suit. The statutory title, however, which the law gives to an auction-purchaser, is that, for the protection of the revenue, and in order to ensure its due payment by him, and to avoid the necessity of repeated sales of the property, he is remitted to all those rights which the original settler at the date of the perpetual settlement had; and may, in consequence of that, sweep away or get rid of all the intermediate tenures and encumbrances created by preceding zemindars since that date. In the assertion of this right, the auction-purchaser is, no doubt, in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burden of proof on his opponent. That presumption, however, is founded not so much upon the principle which I have just mentioned, as upon the principle that every beegah of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions, and that the right of the zemindar to enhance rent is also presumable until the contrary is shown. Accordingly, in many cases which may be found in the books, a very heavy burden of proof has been placed upon the defendants whose tenures have been questioned by auction-purchasers; and they have had to prove, in circumstances of great difficulty, that their tenure did really exist at the date of the perpetual settlement, or even twelve years before, in order to escape the consequences of the claim.

It is, however, to be observed that the course of modern legislation, and also of modern decision, has, if not in the case of lakheraj lands, at least in the case of under-tenants, to a considerable degree modified the rules laid down in the earlier cases, by giving force to the contrary presumptions arising from proof of long and undisturbed possession. In the present case the respondents are almost admitted to have given proof of possession for a period of nearly fifty years. But, if they had not done so, this particular case would, in their Lordships' opinion, stand clear of the presumptions which the appellant invokes in his favor; for the respondents are claiming these julkurs, or rights of fishery, as an incident to a tenure admitted to be incapable of being disturbed by the zemindar, a tenure which

existed before the date of the perpetual settlement. The question, therefore, resolves itself into one of parcel or no parcel—whether the julkurs are parcel of the old estate of the under-tenant, or whether they have been granted by an act of the zemindar for the time being subsequent to the perpetual settlement. Therefore, it seems to their Lordships that there is nothing to relieve the appellant from the ordinary rule which the law imposes on a plaintiff, namely, that of establishing his own title affirmatively, and indeed of making out a strong title in order to disturb a possession of very long duration. Their Lordships are, therefore, of opinion that the Courts below were right in holding that the burden of proving that these julkurs did form part of the assets upon which the settlement was made, and that his means of meeting the revenue had been diminished by the alienation of them by means of acts subsequent to the date of the perpetual settlement, lay upon the appellant. It remains to be considered whether they were also right in holding that he had failed to establish that case. The distinction between the different classes of julkurs in dispute has already been noticed; and it may be admitted that, although the respondents would presumably have the right of fishing in waters lying wholly within the limits of their dependent talook, they would not presumably have the exclusive right of fishing in the waters dividing their lands from those of the appellant, or any right of fishing in places wherein the property in the soil is wholly in the appellant. The proof, however, of the long possession of the respondents applies equally to all the julkurs claimed. And that julkur, or the right of fishing, may exist in India as an incorporeal hereditament and a right to be exercised upon the land of another, is shown by the case of *Lutchee Dasse v. Khatima Beebee*, reported in the second volume of the *Sudder Dewanny Adawlut Reports*, at page 51. In that case *A* had purchased at a public sale by the Collector the julkur of certain jheels. One of them became dry, and it was determined that *A*'s purchase of the julkur only did not convey any property in the lands, which belonged to the proprietor of the jheel. But the julkur was held, so long as the land was covered with water, to exist as a separate right, and a right belonging to the purchaser. The case went through all the Courts, and was ultimately decided by high authority; for it was decided by the Sudder Court with the concurrence of Mr. Colebrooke.

Again, the issue to be established by the appellant was purely one of fact. It was first tried by the Principal Sudder Ameen, who dismissed the suit and found in favor of the respondents, and that after a local investigation. The cause then went by appeal to the High Court. The High Court thought that some further light might be thrown upon the question by the production of certain documentary evidence, and remanded the suit for retrial on that ground. It was retried, and the Principal Sudder Ameen again found in favor of the respondents. There was then a second appeal to the High Court, and both the learned Judges who formed the Division Bench of the High Court thought that there was no ground for disturbing the decision of the Principal Sudder Ameen. Therefore there has been a complete concurrence of all the Courts which have dealt with this case in India in favor of the respondents, and against the contention of the appellant. It has been urged, however, upon their Lordships that the High Court in particular has mistaken the effect of two documents, namely, a copy of the quinquennial register and the return of the surbarakar during the time in which the Pergunnah Havilee or Sultanpore was in the custody of the Court of Wards. But it appears to their Lordships that the learned Judges of the Court below addressed their minds to those two documents, and were satisfied that they failed to establish the appellant's case. The learned Judges in India are far more competent than their Lordships here can be to form an opinion of the credit due to documents of that kind coming from the Collectorate. Their Lordships do not deny that there may be found here and there a name in those documents which raises some doubt whether the julkur of Seetadhar may not have been returned

as part of the assets of the zemindary ; but, considering what confusion there often is in the nomenclature of villages and other localities in India, their Lordships think that, even if the authority of the documents were upheld, they would not conclusively prove that the plaintiff was entitled to any of the julkurs claimed in this suit. It is quite clear that there is considerable confusion as to the julkurs belonging to the estate, since the plaint originally included julkurs which were afterwards found and admitted to be in the appellant's possession.

On the whole, their Lordships have come to the conclusion that, if they were to reverse the repeated decisions in favor of the respondents, they would be departing, without any reason, from the rule which they have prescribed to themselves respecting concurrent findings of the Indian Courts upon questions of fact, and that therefore the decree ought to be affirmed. Their Lordships also desire to state, through me, that they come to this conclusion the more readily, because they observe that, when this Board granted special leave to appeal in the year 1866, it did so upon the representation (and without that representation, it seems very doubtful whether it ever would have done so) that this case involved a question of great public importance and of general application—a representation which, in their Lordships' opinion, the argument at the Bar has entirely failed to support.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the decision under appeal, and to dismiss this appeal, with costs.

The 8th May 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Lawrence Peel.

Religious endowment—Alienation by widow—Mortgage—Foreclosure—Limitation—Documentary evidence.

*On Appeal from the High Court at Calcutta.**

Maharanee Brojosoondery Debea

versus

Ranee Luchmee Koonwaree and others.

In November 1867, *G*, as shebaet of the idol Shyamsoonder Thakoor, commenced a suit against *L K* and others to recover a zemindary alleged to have been improperly sold by plaintiff's grandmother *K*, widow of *B*.

It appears that about 1799, the zemindary was sold for arrears of Government revenue, and the name of the purchaser was entered as Shyamsoonder Thakoor "by the pen of *R N*." In 1802, *B S* conveyed the property (though it does not appear how he got it) to *R N* as the gomastah of the idol for full consideration which was provided by *B*, the shebaet. Later a deed was executed by *R N* conveying the property to the idol and the shebaet. Both the above deeds were registered. *B* then mortgaged the property to *K L*, who was subsequently paid off by *B*'s widow *K* (who had been appointed by *B* manager and owner) with funds borrowed from *W* and *J* on mortgage of the property. *W* and *J* ultimately foreclosed, and were put in possession, 47 years before the commencement of the present suit :

HELD that, as the idol was not set up for the benefit of public worship, no priests appointed or brahmins having a legal interest in the fund, the property was not an endowment by *B* for the benefit of the idol so as to be perpetual and inalienable.

HELD that *K*, as widow, was entitled to alienate the property (as she did) for the purpose of paying off her husband's debts.

HELD that the suit was barred by limitation.

The duty of observing the High Court Circular of 1867, regarding the reception of documentary evidence, enjoined.

* From the judgment of Norman and E. Jackson, *J.J.*, in Regular Appeal No. 132 of 1868, decided 5th January 1869,—11 W. R. 13.

This suit was commenced on the 11th November 1867. It was brought by Maharajah Govindnath Roy, who was the grandson and heir, through adoption, of Maharajah Ramnauth, *alias* Biswanath Roy.

The suit is against Ranee Luchmee Koonwaree and others. It was brought by the plaintiff as the shebaet of the idol Shyamsoonder Thakoor, to recover a certain zemindary in Zillah Rajshahye, which, he contends, was improperly assigned and sold by his grandmother Maharanee Kristomonee, the widow of Biswanath Roy.

The two important questions in this case are, first, whether the property was endowed for a religious purpose; and in the next place, whether the suit is barred by limitation.

With reference to the endowment, it appears that on the 17th Joistee 1206, about the year 1799, the zemindary was sold for arrears of Government revenue. It was purchased for Rs. 5,005, and the name of the purchaser was entered as Shyamsoonder Thakoor, that is the idol, "by the pen of Rughoonath Nundee." It does not appear who Rughoonath Nundee was, but he merely signed on behalf of the idol as the purchaser. Where the Rs. 5,005 came from does not very clearly appear, but there can be no doubt from the whole of the case that the money was supplied by the Maharajah Biswanath.

On the 18th August 1802 there was a bill of sale executed by Brojokishore Shaha, said to be a purchaser of the zemindary, in favor of Rughoonath Nundee, but how Brojokishore Shaha got the property does not appear. How the idol, who had purchased at the auction, transferred his property, or by whom the property was transferred on behalf of the idol, does not appear; but it appears that Brojokishore Shaha reconveyed or conveyed the property to Rughoonath Nundee as the gomastah. Rughoonath Nundee is described (I do not know whether it is very material) merely as the gomastah of the idol, whereas the Maharajah is described as shebaet. Whether there is any material distinction between a gomastah and a shebaet, I am not aware, nor is it, I think, very important. Now the bill of sale says:—"In the course of business by Brojokishore Shaha, son of, &c., in favor of Rughoonath Nundee (gomastah of the most worshipful Shyamsoonder," that is, the idol. "Having failed to clear and prepare, and pay the Government revenue of our purchased zemindary Pergunnah Soojanuggur Sirkar Bhuggo Korat, within Chakla Bhadorea, the sudder land revenue of which said pergunnah, as per allotment, is recorded at Rs. 4,742 4 annas, 14 gundas; and whereas there is no possibility of our doing so next year, we do of our own will and accord, in full possession of our reason and senses, in health of body, and without compulsion, sell to you," that is, to Rughoonath Nundee, "the pergunnah aforesaid, for a full consideration of Rs. 5,901." Where that money came from does not appear, but there is no doubt that it was the money of the Maharajah. A certificate of that sale was put in evidence, which does not carry the case any further, and the deed was registered.

On the 24th Choitro 1211, a deed was executed by Rughoonath Nundee, conveying the property to the idol and the Maharajah shebaet. He says:—"This deed of agreement is executed in the course of business. Being appointed in the office of gomastah,"—there he calls himself again "gomastah,"—"on the part of the idol, I have purchased in the name of the god pergunnah Soojanuggur, from Tikhum Roy and Brojokishore. I having myself caused the bill of sale to be executed, my name is recorded in the bill of sale, certificate of sale, and bill of mutation of names as gomastah on the part of the god. And I now present the bill of sale, &c., under the hand of the Roy and Shaha before you, to enable you to present a petition to have the said pergunnah entered as a zemindary in the name of the god and your own name recorded as the shebaet thereof; and I accordingly agree and write this to the intent that you may have the names of the Roy and Shaha struck off from the Collectorate in respect of the said pergunnah, and have your own inserted in the office as a zemindary in the name of

the god, and yourself as the shebaet thereof." That document was also registered, and therefore anybody could have discovered that the deed had been executed.

But the question is whether there is any evidence of an endowment properly so called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmins who have any legal interest whatever in the fund. It is not like a temple endowed for the support of Brahmins, for the purpose of performing religious service for the benefit of any Hindoo who might please to go there. It is simply an idol set up by the Maharajah, apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship, but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharajah intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharajah appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favor of the idol.

In the case of Mahatab Chund and another, in the 5th volume of the Sudder Dewanny Adawlut Reports 268, which was a very similar case, it was held that when an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindoo law.

It appears, therefore, to their Lordships, upon the authority of that case, and upon the principle of endowments, that this was not an endowment by the Maharajah in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be the property of the idol for ever and that nobody could alienate it. Suppose the Maharajah had established the idol in his house, would anybody pretend that he could not sell his house? Well, then, what would become of the idol's temple in the house? He could sell the house, notwithstanding he had put an idol there; and what would become of the idol itself? Here there was no endowment, no priest, no public, no one legally interested in the worship of this idol, except the Maharajah himself, and nothing to show that the Maharajah intended to establish it for the benefit of his sons or heirs, or anybody else, in perpetuity.

If there was not an endowment, the case appears to be very clear. The Maharajah having purchased the property in the name of the idol, mortgaged it to Komul Lochun Nuudee for a sum of Rs. 32,000. Komul Lochun, not having been repaid, took steps to foreclose the estate, and the period of foreclosure was about to elapse when, the Rajah having died, and having appointed his widow Kristomonee, the manager and owner of the property, she came in and made an arrangement with Komul Lochun to extend the period; and she afterwards borrowed from Rajahs Woodmunt Singh and Janokeram Singh Rs. 46,400, with which Komul Lochun was paid off. The conditional sale was to pay off a debt due from her husband to Komul Lochun. Now, as a widow, she was entitled to alienate the property for the purpose of paying and discharging her husband's debts. After that the period for the repayment of the money to Woodmunt Singh and Janokeram Singh having elapsed, they foreclosed the estate against the widow Kristomonee, and brought a suit and recovered possession of the land, and were put into possession 47 years before the commencement of this suit.

The defendants claim under Rajahs Woodmunt Singh and Janokeram Singh. Rajah Janokeram Singh died, leaving Rajah Woodmunt Singh his heir; and the

whole property then became established in him. He died, leaving two sons, and the sons conveyed the property to the defendants. It is unnecessary, however, to enter into the title of the defendants.

The question is, has the plaintiff any right to recover this property? The widow made a valid sale of it; and, even without the statute of limitations, the defendants are entitled to it.

The Courts below have both held that there was no actual endowment. The Principal Sudder Ameen (although possibly all his reasons may not be correct) says:—"It is simply this, that the grandfather of the deceased purchased the property claimed in the name of the idol." Then he held that there was not an endowment, and that the property was the private property of the grandfather. The High Court say:—"No evidence has been given to show that there ever was any formal dedication of the property to the idol. It is a mere purchase in the name of the idol. From the time of the purchase of the property, Rajah Biswanath Roy appears to have dealt with it as his own."

In the case of Gossain v. Gossain,* 6 Moore's Indian Appeals, it was held that if a Hindoo purchase property in the name of his son, the property is not vested in the son, but remains vested in the father who purchased; and so with regard to an idol. If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it. The High Court say:—"From the time of the purchase of the property, Rajah Biswanath Roy appears to have dealt with it as his own. In 1802 it was conveyed or mortgaged to one Bheekum Roy, and in 1812 it was mortgaged apparently for the Rajah's purposes. There is no proof that either the first or the second mortgage was executed in any way for the purposes of the worship of the idol, or for the performance of any trust connected with it. For all that appears the money was raised for the private purposes of the Rajah. No evidence has been given to show that the revenue of the property was expended for the purposes of the idol, and the pleader for the appellant, when arguing the case before us, was not prepared to go into evidence upon that point. We do not mean to rest our decision of the case on that point. But we may observe that we do not see any reason to doubt the correctness of the decision of the Principal Sudder Ameen that there was no real endowment."

Now both the Courts below have found that there was no real endowment, and their Lordships entirely concur in that finding. There was, therefore, nothing to deprive the purchaser of the power of alienation.

It is scarcely necessary to advert to the question of limitation. In this case 47 years have elapsed since those under whom the defendants claim purchased the property *bonâ fide*, under the belief that the foreclosure in favor of Rajahs Woodmunt Singh and Janokeram Singh was a valid title in those parties, and they purchased the property for a valuable consideration. The property has been out of the possession of the Maharajah's family for upwards of forty-seven years, and limitation is clearly a bar to the suit.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decision of the High Court with the costs of this appeal.

Their Lordships desire, in disposing of this appeal, to advert to the very large portion of the printed record which is occupied with unnecessary papers. From page 16 to page 360 the record consists of mere entries in books, the principal part of which have nothing at all to do with the case. A large expense must necessarily have been incurred in printing all that matter, not one item of which has been referred to in the argument before us. It was wholly unnecessary, and merely encumbered the case, encumbered the Court, and brought a heavy useless expense upon the parties,

* See p. 13 ante.

A circular order was issued by the High Court in 1867,* before this suit was commenced, pointing out to the Judges of the Subordinate Courts their duty in this matter. And I will read a portion of the order of the High Court, because it is essential, in their Lordships' opinion, that the subordinate Courts should act according to this rule, so that all such unnecessary expense may be saved to the parties. Speaking of the Code of Civil Procedure, the rule says:—"S. 132 repeats the direction contained in s. 39, that if the exhibit (or document) be an entry in any shop-book or other book, the party on whose behalf such book is produced shall produce a copy of the entry, which copy shall be endorsed as aforesaid and be filed as part of the record, and the book shall be returned to the party producing it; and the Court ought, doubtless, in these cases, as under s. 39, to mark the document, *i.e.*, the entry in the book, for the purpose of identification, before returning it. It will be observed that the words as to the return of the book are imperative, and that the party has not the option (as under s. 39) of delivering the book to be filed instead of the copy of the entry. From inattention to this rule it has been matter of frequent occurrence for great numbers of account and other books to be received and actually filed in the subordinate Courts, and to be afterwards sent up to the Appellate Courts, to the serious inconvenience of the Courts themselves, and probably of the parties, except in those cases where the books have been prepared *pro re natâ*, a thing which occasionally happens. But the inconvenience reaches a climax when the importance of the suit and the determination of the parties bring about an appeal to England. It then becomes *primâ facie* necessary to translate and to print the whole of the contents of these voluminous books and other papers, and the resulting costs are frequently enormous. This Court is occasionally, at very great trouble to itself and to the pleaders engaged, able to apply some check to the evil; but in many cases the check has not been applied, and in consequence the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from this country. The answer of this Court on these occasions has been, that the evil is one with which the Appellate Courts can but imperfectly cope, and that the effectual remedy must be applied in the Courts of first instance. And it is very much with a view to obviate these particular complaints, and to remove this just reproach from the Procedure of the Courts in India, that the present instructions are issued."

Those instructions were sent to all the subordinate Courts before this suit was commenced. Their Lordships think it will be highly beneficial if the High Court will take care that this Circular Order is enforced, and that similar unnecessary proceedings shall not continue to form part of the records transmitted to Her Majesty in Council.

The 16th May 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Lawrence Peel.

Execution—Alienation of Attached property—Striking off of Attachments.

On Appeal from the High Court at Calcutta.†

* Circular Order No. 9, dated 26th February 1867.—7 W. R., Civil Cir., 4.

† From the judgment of Raikes and Pundit, *J.J.*, in Regular Appeal No. 299 of 1860, decided 30th May 1863.

Puddomonee Dossee and another
versus
 Roy Muthooranath Chowdry and others.

The prohibition against alienation which is involved in an attachment, avoids the conveyance only as against the execution-creditor, or some person entitled to claim under him.

A conveyance executed by the judgment-debtor after one attachment has been permanently struck off and before a new attachment is issued is valid.

The striking an execution proceeding off the file in India is an act which may admit of different interpretations according to the circumstances ; but when a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained.

The suit out of which this appeal has arisen was brought by the late Rass Monee Dossee, and her appeal has been continued by two ladies who appear to be her heirs and representatives.

The suit was brought for the purpose of cancelling a bhaug pottah set up by the defendants, the Chowdrys, and recovering from them the possession of a parcel of land upon which a bazaar had been built, with mesne profits, the title on which Rass Monee Dossee sued being that of a purchaser at an execution sale.

That was the object of the suit as stated in the plaint. When the Chowdrys put in their answer, they not only relied upon the bhaug pottah, but also set up the second, which we may call the mooroossee pottah ; and the validity of that being called in question by the replication, one of the issues settled in the suit put in issue the validity of both pottahs, being in terms whether they had been granted *bonâ fide* to the defendants, or whether they were collusive or illegal.

The title of Rass Monee Dossee to the right, title, and interest of the execution debtors, a joint family which may be described as "the Sirkars," is not disputed ; the only question is what were the extent and nature of their interest in the property sold at the date of the sale. It is necessary, however, in order to see how this question arose between the parties, to recapitulate, as shortly as may be, the facts of the case.

The proceedings go back as far as the year 1830.

In August of that year one Bhoyrub Sein recovered a money decree for an inconsiderable sum against the Sirkars. In execution of that decree, the land in question was attached on the 27th February 1832, and the usual proclamation of attachment was issued on that occasion. Bhoyrub Sein died, leaving (as it is said, and their Lordships will assume correctly said) only minor heirs.

Nothing further was done between the date of this attachment in 1832 and the year 1844, when the case in execution was struck off the file, the judgment being still unsatisfied. It appears that within one year after that was done Rass Monee Dossee became mortgagee of the land under instruments executed by the Sirkars. There were two mortgages for Rs. 500 each. They seem to have been ordinary Bengal mortgages operating as mere pledges of the land ; and she subsequently instituted proceedings to enforce those securities. Pending her suits, and apparently before she obtained a decree, the heirs of Bhoyrub Sein took fresh proceedings to enforce their judgment. A new attachment issued in June 1848. The order for sale was made on the 30th March 1849, and Rass Monee Dossee became the purchaser for a small sum, Rs. 1,400, of the property. This sale was founded upon the second attachment, to which objections were taken and disposed of before the order for sale. One-fifth of the property originally attached was released as not being subject to the attachment, on the objection of some of the Sirkars. Rass Monee Dossee also came in as an objector, alleging her mortgage interest, and the result of that was that, by the lotbundee, the property was put up expressly as subject to her mortgage. All therefore that she bought at the execution sale was the equity of redemption remaining in the Sirkars subject to the mortgage to her. She then took proceedings to recover

possession of the land; but she was met by the defendants, the Chowdrys, who alleged that they held the land under pottahs granted by the Sirkars. After this she seems to have slept upon her rights for seven or eight years, at the expiration of which period she commenced the present suit.

The title so set up by the Sirkars was of this kind. The commencement of it was alleged to be a bhaug or share pottah, dated the 17th April 1833. From that instrument (of which a copy is set out at page 19 of the record, and which was afterwards produced to the High Court) it appears that the land was granted to them for the purpose of having a bazaar erected upon it at their expense, the arrangement between the Sirkars who granted the land and their lessees being that the latter were to pay a 2 annas and 10 gundahs share of the profits of the bazaar, retaining 13 annas and 10 gundahs for themselves. The duration of this tenure is, upon the face of the bhaug pottah, somewhat indefinite. It was evidently intended to be of an hereditary character, because heirs are mentioned; but there is a stipulation towards the end of the pottah that if the lessees wished to give up the bazaar they should be at liberty to do so, and that in that case the lessors would either purchase the huts and other things incident to the bazaar which had been erected on the land, or allow the lessees to dispose of them elsewhere. And there is also a stipulation that if the lessors wished to transfer their right in the land, they would give the lessees information of their intention to do so, and would give the latter a right of pre-emption.

The case of the respondents, however, goes further than this. They allege that, on the 2nd October 1836, the Sirkars executed to them a 'permanent mooroosee pottah, which materially altered the relation of landlord and tenant. The effect of that was to give them in terms a perpetual mooroosee pottah, in consideration of a salami of Rs. 1,000 and a reserved rent of Rs. 600 per annum, commuting the share of the profits to which the lessors had been previously entitled for that rent of Rs. 600.

This is the second of the deeds of which the validity is in question in this suit.

I have not alluded to a third deed, which appears to have come out in the course of the proceedings, and to have been first produced in the High Court, because it was only a second bhaug pottah, which does not appear to relate to the property in question in this suit, but rather, as their Lordships understand it, to the one-fifth of the land which had been released from the execution. It was in nearly the same terms as the original bhaug pottah, and there is no issue directed to try the validity of that deed in this suit.

That being the state of the case, the two principal questions which have been argued upon this appeal are, first, whether, as represented by the plaintiff, these deeds, or either of them, were or was fraudulent and collusive, and a contrivance between the Sirkars and the Chowdrys to defeat the creditors of the former, or whether they were *bond fide* documents; and, secondly, whether, if admitted to have been *bond fide* conveyances, they are not void as against Rass Monee Dossee by reason of their having been executed whilst the first attachment was still subsisting and in force.

Their Lordships propose to deal with the first of these questions in the first instance, and without going at length into the evidence. The Principal Sudder Ameen seems to have found that the first bhaug pottah had not been formally or properly proved before him. He also thought that the second pottah was a collusive document, and had not been proved to be a genuine one; but he seems to have admitted, by the very form of his judgment, that in some way or other the respondents had been *bond fide* in possession of the property; that they had, under and by virtue of the arrangements (whatever they may have been) which subsisted between them and the Sirkars, laid out large sums in establishing this bazaar, and that, by reason of that expenditure, they were entitled to be allowed

one-half of the wasilat, or mesne profits, of which Rass Monee Dossee, by her suit, had claimed the whole.

The High Court, on the other hand, has found that both the documents must be taken to be genuine, or at least that they had not been shown to be collusive documents, and that the long possession of the respondents had been held under them and by virtue of the title which they conferred, and that the suit ought to be dismissed.

Their Lordships, upon the evidence, cannot feel any doubt but that under the share pottah there has been a *bond fide* possession during many years on the part of the respondents. The possession in fact, they think, cannot be disputed. There is nothing to which they can attribute it, except the title commencing with that document. They therefore do not quarrel with the finding of the High Court upon that point.

Then, as to the second mooroosee pottah, the objections seem to be, first, the inadequacy of the consideration stated; and secondly, that although in the course of the proceedings in the suit of Ramruttun Roy the bhaug pottah was there put forward and apparently proved, no mention was made of this second or mooroosee pottah. Their Lordships do not deny that these circumstances cast some suspicion upon this document. On the other hand, looking to the whole of the *res gesta*, and to the statement made by the Sirkars on the occasion of the revenue settlement to the effect that the Chowdrys were in possession under a permanent mooroosee tenure, their Lordships do not feel at liberty to say that the finding of the High Court in favor of the second pottah was wrong, or one which they would be justified in now disturbing.

There was certainly evidence upon which the Court might come to that conclusion. Besides the evidence of one of the subscribing witnesses, there was that of two other witnesses, of whom one was a member of the family of the Sirkars. No doubt the Judge of first instance was not disposed to act upon this testimony. On the other hand, the High Court finding it corroborated by the circumstances to which I have referred have accepted it as true. Their Lordships cannot say that they were wrong in so doing. If the mooroosee pottah were executed when it bears date, the whole of the respondents' title was completed before the grant of the plaintiff's mortgage, and when there was no adequate motive for the commission of a fraud. If, on the other hand, this document were concocted at a later date, and to defeat the plaintiffs' claim (of which there is no proof), the parties would hardly have assigned to it a date which exposes it to the objection next to be considered.

That objection is whether, supposing the documents to be neither fraudulent nor collusive, they were void as against Rass Monee Dossee, by reason of the date at which they were executed, viz., whilst the first attachment was subsisting.

On that point we have been referred to a great many authorities, and it may be admitted that there is some difficulty in reconciling all the cases on the construction of the prohibition against alienation which is involved in an attachment under the new procedure, and seems to have been equally involved in an attachment according to the old procedure. But it appears to their Lordships that one point at least has now been conclusively settled, viz., that the prohibition against alienation avoids the conveyance only as against the execution creditor, or some person entitled to claim under him.

Again, it follows from the first case, which was cited by Mr. Leith (Gobindhun Singh, appellant, Meer Mushun Alee and others, respondents, Bengal S. D. A. Reports for 1855, p. 244), as in fact he admitted, that if an attachment has been permanently struck off and a new attachment has become necessary, a conveyance which is executed by the judgment debtor between the two attachments will be valid. And one result of that rule, when applied to the present case, is that the conveyances by which Rass Monee Dossee acquired her interest as mortgagee

must be taken to have been valid, notwithstanding the old attachment which had been issued in 1830.

It may, however, be argued, that although a conveyance executed between the striking off of the first attachment and the issuing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution creditor and those who claim under him. That seems to be a point which is not touched by the authorities cited. Their Lordships, however, are of opinion that in this case *Rass Monee Dossee* cannot claim the benefit of any such rule, if it exists. Her case is peculiar. After the first execution was struck off she became mortgagee. When the second attachment was taken out she intervened in the proceedings as an objector. The result of that was that the property was put up for sale as subject to her mortgage. She therefore bought only the equity of redemption, and presumably paid a smaller price than the property would have realized if it had not been sold subject to her mortgage. She did not buy the subject which was originally attached, viz., the whole property free from mortgage, but the mere equity of redemption. She cannot be allowed to say that the original attachment ceased to be operative so as to give her the power of acquiring the mortgage interest subject to which she has purchased, and yet to claim the benefit of it, in order to defeat conveyances which would unquestionably have been binding between the *Sirkars*, the judgment debtors, from whom she took her mortgage, and the respondents in this case, if there had been an end of the execution altogether.

Their Lordships moreover are not prepared to say that in this case it would, under any circumstances, have been competent to the judgment creditor, or any person claiming under him, to say that conveyances executed pending the first attachment were absolutely null and void. It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained.

Their Lordships desire to add that the extraordinary and unexplained delay which has taken place in the conduct of this suit would have increased their regret at finding themselves compelled, if they had been compelled, to give way to the objection that these instruments were null and void by reason of the date at which they were executed. The effect of allowing this appeal would be to disturb a possession, now found to be a *bond fide* possession, which has endured for 40 years.

For much of this delay *Rass Monee Dossee* and the appellants are responsible. It has been stated that seven years elapsed between the first assertion of the respondents' title and the institution of the suit, and it appears that this appeal had been some ten years in the country before it was brought to a hearing.

For the reasons above stated their Lordships have come to the conclusion that it is their duty to advise Her Majesty to affirm the judgment of the Court below, and to dismiss the appeal.

As it has been heard *ex parte* there will be no order as to costs.

The 17th May 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo law—Self-acquired property—Son's consent.

*On Appeal from the High Court at Calcutta.**

Rajah Bishen Perkash Narain Singh

versus

Bawa Misser and others.

Under the *Mithila* law, self-acquired property can be given by its owner at his pleasure.

The *Mitacshara* law requires the son's consent; but the fact of the son's being in debt does not incapacitate him from consenting.

The facts of this case and the law which arises upon them may be very shortly stated. Dabee Dutt Misser, shortly before his death, executed an instrument, whereby he gave to his only son, who was considerably in debt at that time, his ancestral property. His self-acquired property he gave to his grandsons and to his then second wife, afterwards his second widow. At the same time he made his son the guardian of these grandsons during their minority. It was contended in the first place that he had no right to make this disposition of his property, and secondly that this deed was fraudulent; the intention of Dabee Dutt being that, although upon the face of the deed the property was given to the grandsons, it should really belong to the son, and that the transaction was not a real but a colorable one. The Principal Sudder Ameen appears to have adopted this view, but their Lordships are of opinion that there was no sufficient evidence to support it. The only evidence at all pointing in the direction of that finding would be that, after the death of Dabee Dutt, the son remained in possession of the property, but inasmuch as the grandsons were minors and he was appointed their guardian, that possession was not inconsistent with the deed.

The High Court reversed the decision of the Principal Sudder Ameen, finding that the transaction was a real one and not merely a colorable one, a finding in which their Lordships concur.

It only remains then to be decided whether or not by law Dabee Dutt was enabled to make this disposition of his property. The transaction occurred within the Mithila District, and the Mithila law would prevail. Of that law the principal authority is the *Vyavada Chintamana*, in which it is laid down in very plain terms, without qualification, that self-acquired property can be given by its owner at his pleasure, and subsequently it is stated that "the father has full dominion over the property of his father, which being seized, is recovered by his own exertions, or over that which is gained by him through skill, valor, or the like. He may give it away at his pleasure, or he may distribute it." In their Lordships' view this dictum would apply.

But it has been argued that, under the *Mitacshara* law, the father could not dispose of the property away from his son without the son's consent. The *Mitacshara* law appears to be referred to undoubtedly by the learned Judges of the High Court as applying to this case. But assuming what it is not necessary to decide, that the *Mitacshara* law applied, and assuming the *Mitacshara* law only to admit of the father making such a disposition with the consent of his son,

* From the judgment of Kemp and E. Jackson, J.J., in Regular Appeal No. 83 of 1868, decided 21st August 1868,—10 W. R. 287.

in this case the consent of the son was given. It was indeed argued that because the son was in debt he could not consent, but their Lordships are of opinion that there is no foundation for that argument. The consent of the son was given, and in either view Dabee Dutt exercised a power which by law appertained to him.

On these grounds their Lordships are of opinion that the decision of the Court in India was right, and that this appeal must be dismissed with costs, and will humbly advise Her Majesty to this effect.

The 22nd May 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Ejectment—Onus probandi.

*On Appeal from the High Court at Calcutta.**

Ranee Surnomoyee

versus

Watson and Co. and others.

Where a party seeks to turn out another in possession of chur land, which plaintiff claims as a part of a mehal purchased by him from Government, the suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. It is immaterial in such a case to consider whether or not the land is the property of the defendant; because, unless it is proved to be the property of the plaintiff, the latter is not entitled to turn out the former.

If ever there was a clear case, this is one which falls within that description. The suit is brought to recover 15,000 beegahs of chur land to the east of Chilmarce Dara. It is claimed by the plaintiff as part of a khas mehal purchased by her from the Government of Bengal on the 15th January 1864.

The defendants are in possession of the land, and were found by the Magistrate in a proceeding under the Code of Criminal Procedure to be in possession. The plaintiff seeks to turn them out. The suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of her own title, and not upon the weakness of that of her adversary. It is immaterial, therefore, in this case to consider whether the land is the property of the defendants or not, because whether it is their property or not, unless it is proved to be the property of the plaintiff, she is not entitled to turn them out; nor is it necessary to consider whether it ever was the property of Government or not, because unless the plaintiff can make out that, being the property of the Government, the Government conveyed it to her, she is not entitled to recover. The question depends upon what was sold by Government, and what was bought by the plaintiff. The certificate of sale is in these words, signed by the Collector:—"I do hereby notify that the under-mentioned Government khas mehal in the district of Moorshedabad, at a public sale held in the Collectorate of Moorshedabad under orders of the Board of Revenue, has been purchased on the 15th January 1864 by Ranee Surnomoyee," that is the plaintiff, "as *sebit* of Luckhee Narain Deb Thakoor." The description is: "No. of towjee, 560;" "name of mehal, Chur Doomreah Island,

* From the judgment of Seton-Karr and Macpherson, J.J., in Regular Appeal No. 6 of 1867, decided 11th February 1868,—9 W. R. 259.

Pergunnah Goas," "sudder jumma, Rs. 2,409-13-11." That is, whatever the plaintiff bought as Chur Doomreah Island was to be subject to a sudder jumma payable to the Government of Rs. 2,409.

It is important to remark that what the Government sold and what they professed to convey by the certificate was a khas mehal. The question is whether the khas mehal which the Government sold included the 15,000 beegahs which the plaintiff claims in this suit. It was necessary to go into evidence to show of what the khas mehal "Chur Doomreah Island, towjee No. 560," mentioned in the certificate of sale, consisted.

Going then into the evidence, we find that in the agreement which the plaintiff signed for the purchase of the estate (page 8 of the second supplemental record, No. 11) the land is described in the same way as it is in the certificate of sale, but with this addition, viz., that the quantity of land is stated to be beegahs 10,377-10-2. Now it is not disputed that the plaintiff has got as much as 10,377 beegahs: but she claims to have 15,000 beegahs to the east of Chilmaree Dara in addition as included in her purchase. It would require very strong and very clear evidence to satisfy the minds of a Court of Justice that, under a description of an estate said to contain 10,377 odd beegahs of land, the Government officers were so negligent of their duty as to sell, and the plaintiff so fortunate as to purchase, 25,000 beegahs, more than double the quantity expressed. If the plaintiff could satisfy us that she did buy, and that the Government did sell, and had the right to sell, that quantity, she would make out her case.

Now, the way in which the plaintiff attempted to make out that she did purchase the 15,000 beegahs of land claimed is this. It is said that the number of the towjee is described as 560, and that the survey map of 1853 includes the whole of the land claimed as the 15,000 beegahs, and that at the foot of the map there is an entry "No. of the towjee 306 of the former resumption, and No. 560 of the present;" consequently it is said that the lot sold to the plaintiff being No. 560 in the towjee included the whole of the land claimed, and that it cannot be cut down by showing that in the agreement signed by the plaintiff she admitted that what she purchased was 10,377 beegahs odd.

But let us see whether the entry in the map shows that No. 560 of the towjee at the date of the conveyance on the 5th February 1864 did include the 15,000 beegahs of land claimed. Assuming for the sake of argument that No. 560 of the towjee in 1853 did include the land claimed, it does not necessarily follow that No. 560 of the towjee on the 5th February 1864, when the certificate was signed, also included it.

Now, in order to see what was included in the certificate of sale as Chur Doomreah Island, we must refer to the proceedings which took place before Mr. Octavius Toogood, the officiating Deputy Collector of Zillah Moorshedabad, on the 30th January 1856. He says:—"It is evident from a perusal of the papers of the settlement record of Chur Doomreah resumed by the Government, comprised within Pergunnah Goas, that, from the investigation held by the former Collector of this district, it was found that 25,000 beegahs of land having been thrown up in the vicinity of Doomreah, by the rivers Pudma and Mohanunda, were held possession of by Rajah Oodwund Singh, the zemindar of Hoodda Anyepore, when the said Collector, in conformity with the directions of the members of the Sudder Board, dated the 24th January 1826 A.D., preferred a claim to the said lands on behalf of Government under Reg. II of 1819. Upon which an itlanamah having been served on the possessor, defendant calling upon him to adduce evidence, and the said defendant having produced his documentary evidence, &c., the claim of the Government was dismissed on the 26th September 1828, and the papers of the record forwarded to the said Board. Subsequently the duties of the Revenue Board having become dischargeable by the Revenue Commissioner, the Revenue Commissioner dissatisfied with the decision of the

said Collector, preferred an appeal therefrom to the Court of the Special Commissioner at Calcutta. Whereupon the said Special Commissioner having found that out of the lands in dispute, 6,723 beegahs all around which the rivers Pudma and Mohanunda flow, were regarded as new accretions under the designation of jazeera, reversed the decree of the Collector, and gave a decree in favor of Government, forwarding the resumption decree to the Commissioner of Revenue." From this it appears to have been found that, out of the lands in dispute, 6,723 beegahs formed an island, which, under Reg. XI of 1825, belonged to the Government. It then went on to show that 6,179 beegahs of the said land were settled in ijara or lease to Mr. Dalrymple, at an annual jumma of Rs. 2,294 for a term of ten years, and that before the expiration of the said term, Mr. Abercrombie, the Collector, went into the mofussil, and that he then found that a portion of the lands which had existed at the time of the lease to Mr. Dalrymple were diluviated, that new accretions had formed, and that some portions had been settled with ryots. It goes on thus:—"The former ijaradar (that is Mr. Dalrymple) having been desirous of entering into an ijara settlement at the old rate, a report was submitted to the said Commissioner, asking for specific directions as to whether a settlement of the said mehal should be entered into with the former ijaradar at the old rate, or whether a settlement thereof should be made *after making a fresh measurement and assessment of rent*. In reply thereto the said gentleman forwarded a letter, No. 50 of the 18th December 1854, *directing a fresh measurement and jumma bundee (rent-roll) to be made*, and the said Collector, accordingly, with the sanction of the Commissioner, conveyed in his letter of the 27th January 1855, appointed Bissonath Dutt, ameen, together with a mohurrir, to make a fresh measurement and jumma bundee."

There was an express direction that the land to the east of the Chilmaree Dara was not to be measured or included in the ijara. It appears that the ameen subsequently measured the mehal and found it to contain 11,381 beegahs odd, including waste, land under water, roads, &c., and that a fresh ijara settlement was entered into with Mr. Dalrymple, the former ijaradar, for a term of ten years, commencing from the 1st May 1855, at an annual rental of Rs. 2,409-13-11.

It is perfectly clear from the proceeding referred to that the ijara to Mr. Dalrymple, which was to commence from the 1st May 1855, did not include the land to the east of the Chilmaree Dara. It is also clear from the plaintiff's own petitions and from her plaint that she never considered that she had purchased anything more than what was included in Mr. Dalrymple's ijara.

In the petition which the plaintiff presented to the Collector after the expiration of Mr. Dalrymple's second ijara, she says by her agent, "I purchased the above mehal," that is, the mehal called Chur Jazeera Doomreah, "on behalf of the above-named thakoor," that is the idol, "in the month of Pous 1270 B.S., and I did not receive possession thereof till the 30th April 1865, on account of the ijara settlement of Mr. Dalrymple. On the expiry of the term of this settlement I prayed for possession." She never thought of claiming possession of anything until Mr. Dalrymple's ijara came to an end, and then she thought her title had accrued to receive possession of the land included in the ijara to Mr. Dalrymple. Then, again, in the petition presented under s. 318 of the Criminal Procedure Code, the plaintiff, by her agent, said, "Mr. James Dalrymple took a conditional ijara of the said mehal from the Collectorate of this zillah on the part of the Government." There, again, showing that what she was seeking to recover was the mehal of which Mr. Dalrymple took an ijara.

Then in the plaint she says:—"The Island Chur Doomreah, a Government khas mehal, recorded No. 560 in the rent-roll of the Collectorate of this city of Moorshedabad, was purchased by me at a Government sale on the 15th January of the year 1864, in the capacity of a *sebait* of the aforesaid idol, and I have obtained the bynamah (certificate of sale). The Government concluded successive

temporary farming settlements of the *said* mehal with Mr. Dalrymple. The term of the farming lease expired on the 30th April in the year 1865. I held the proprietary right from the date of my auction-purchase up to the expiration of the ijara lease, and on the expiry of the term of the ijara lease I obtained khas possession through the nazir and ameen under orders of the Collector of this district."

It is clear that the Government merely intended to sell, and that the plaintiff intended to purchase, the khas mehal which was held by Mr. Dalrymple under the ijara, and that on the measurement of the lands included in the ijara those to the east of the Chilmaree Dara were expressly directed to be excluded. The plaintiff can have no title to those lands whether they belonged to Government or to the defendants. The authorities which have been cited are not applicable to the facts of this case. The plaintiff has made out no title to the land which she has claimed.

It is said that the question was never raised on the pleadings, but it is clearly raised, not only in the pleadings, but in the issues. In the written statement of the defendants, Robert Watson and Co., at page 3, paragraphs 2 and 3, the question appears to be raised distinctly. They say:—"As to the claim to obtain possession of about 15,000 beegahs of land lying within the boundaries specified in the *thak* map of the year 1853, on the allegation that the said lands are jazeera (island) Chur Doomreah; these lands are not included in the said island." The same defence was also set up in the written statement of Messrs Jardine, Skinner, and Co. in the third and fourth paragraphs at page 5.

There was also a distinct issue whether the 15,000 beegahs were part of the jazeera, and whether the plaintiff, in virtue of her auction-purchase, could claim and obtain possession of the disputed land or not. The defence set up was that the plaintiff, by virtue of her auction-purchase, was not entitled to the 15,000 beegahs, and distinct issues were raised as to whether she was entitled to them or not. The High Court came to the conclusion that she was not entitled, that she never intended to purchase, and never did purchase, and that the Government never intended to sell, and never did sell, to the plaintiff any portion of the 15,000 beegahs to the east of the Chilmaree Dara.

Their Lordships entirely concur in the opinion of the High Court. It is not necessary to go into all the reasons expressed in the judgment of Mr. Justice Seton-Karr, which have been commented upon in the argument at the Bar, but their Lordships concur entirely in the opinion at which the learned Judges arrived, namely, that the plaintiff, by reason of her purchase, never got a title to the 15,000 beegahs which she claims on the east of the sota.

Under these circumstances, their Lordships will humbly recommend Her Majesty to affirm the decision of the High Court, with the costs of this appeal.

The 29th May 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Mahomedan law—Divorce—Marriage—Evidence.

*On Appeal from the Sudder Court at Calcutta.**

Khajah Gouhur Ali Khan

versus

Khajah Ahmed Khan.

Although writing is not necessary to the validity of a divorce under Mahomedan law, yet where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage, and are affected by the divorce, the parties, for their own security, may be expected to have some document affording satisfactory evidence of what they had done.

If a Cazee was present at a marriage which is disputed with a show of probability, he should be called as a witness when the marriage is to be proved.

This is an appeal in a suit originally brought in the Civil Court of the City of Patna by the present appellant, Khajah Gouhur Ali Khan, who was the nephew and one of the heirs of Mahomed Ibrahim Khan.

The suit was brought by him as one of the heirs, together with a lady Fatimatoonissa, who was the mother of Mahomed Ibrahim Khan, against Khudijah Begum, who claimed to be the widow of the deceased Mahomed Ibrahim Khan. After his death she, claiming as his widow, obtained, in a summary suit brought in the Civil Court at Patna, possession of one-fourth of his property, under the provisions of Reg. XIX of 1841. It appears that there was an appeal in that summary suit to the Sudder Court, which affirmed the order.

The present suit was brought in regular form to set aside those summary orders and to obtain possession of the one-fourth of the property which Khudijah Begum had retained under them, upon the allegation that she had been divorced by Ibrahim Khan; and the only question raised which it is now necessary for their Lordships to consider is whether Khudijah Begum was divorced or not. It was alleged by the mother and the nephew that a divorce had taken place in the year 1845. The Judge of the Civil Court of Patna decided in favor of the claim of the widow. There was an appeal to the Sudder Dewanny Adawlut, but no decision was given by that Court upon the present issue. It appears that in a former suit, where the legitimacy of Khajah Gouhur Ali Khan, as the nephew of Mahomed Ibrahim Khan, was in issue, a decision had been given against his being the legitimate nephew; and the Sudder Dewanny Adawlut, on the appeal to them in this suit, affirmed the decision of the Judge of the Civil Court of Patna, not upon the ground upon which he had decided, but on the ground that the appellant had not proved himself to be the legitimate nephew.

The case, therefore, comes before their Lordships substantially on appeal from the decision of the Civil Court Judge. The question is entirely one of fact, and their Lordships are unable to come to the conclusion that the Judge of the Civil Court of Patna was wrong in holding that the divorce was not proved. The claimant was the wife of Mahomed Ibrahim Khan. She had been married a considerable number of years to him, but undoubtedly there had been a separation as early as the year 1827, and in that year suits had been brought both by the husband and the wife. The husband brought a suit in the nature of a suit for restoration of marital rights against the wife; and she brought a suit against him to recover her dower, or so much of her dower as was prompt; and in both these suits, which were continued about five years in the Courts, decrees were given for the plaintiffs; one in the year 1831, and the other in the following year, 1832; that is, the husband obtained a decree for the restitution of conjugal rights, and the wife obtained a decree for the share of her dower which was prompt. It seems that from 1832 down to 1845, no steps were taken to enforce the decrees on either side. There is no evidence as to the terms upon which the husband and wife were living in that interval of time, but it would seem that they were living apart.

* From the judgment of Colvin, Sconce, and Torrens, Judges of the late Sudder Dewanny Adawlut, in Regular Appeal No. 236 of 1855, decided 2nd December 1857,—S. D. A. Reports for 1857, page 1861.

In July 1855 both parties presented petitions in their respective suits, praying that satisfaction might be entered upon the decrees. The petitions alleged that they had compromised the suits, and desired to abandon any rights that they might respectively have under their decrees. Those petitions clearly indicate that, up to that time, no divorce had taken place. Although there had been a separation, although these decrees had been obtained and the parties had lived separately, yet no dissolution of the marriage by divorce had at that time taken place. Indeed, it is not contended on the part of the appellant that a divorce had then been effected, but it is said that a short time afterwards Mahomed Ibrahim Khan went to the house of his wife, and that there was a formal divorce, or the commencement of a formal divorce; that words of divorce were then spoken by him and assented to by her, and that this formal divorce was repeated on two other occasions, at intervals of a month between each formal act.

The question is, whether their Lordships can rely upon the evidence of the witnesses who say that such a transaction took place. The same witnesses who are called to prove the divorce assert that, shortly after this alleged divorce, Khudijah Begum married a Mahomedan of wealth and rank of the name of Mahomed Hossein, and lived with him openly in the city of Patna. The plaintiff asserts not only the divorce, but the second marriage,—that the second marriage took place in the lifetime of Mahomed Ibrahim Khan, and shortly after the divorce.

Now, it is to be observed in the first place, that there is no writing whatever produced to prove that the divorce took place, or to corroborate the statement of the witnesses. It is quite true that writing is not necessary to the legal validity of a divorce under Mahomedan law, but where a divorce takes place, as in this case, between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, one would certainly expect that the parties, for their own security, would have had some document which should afford satisfactory evidence of what they had done. In the suit for restitution of conjugal rights, Mahomed Ibrahim Khan himself spoke of the necessity of such a document when the wife alleged that he had before that suit divorced her, which shows that in his contemplation (although he was wrong in supposing that it was necessary) it might be expected that amongst persons in his position such a document would have been executed. However, there is no such document; there is no writing whatever referring to the divorce, and therefore the case depends entirely upon the credit to be given to the witnesses who say that they were present during the transaction, and who also say they were present at the second marriage. Of course, if the second marriage during the lifetime of Mahomed Ibrahim Khan had been satisfactorily proved, it would of itself have been cogent evidence of the fact of the divorce, but that marriage is even less satisfactorily proved than the divorce itself. The witnesses who deposed to both transactions being the same, the divorce derives no substantial confirmation from the evidence which has been given of the subsequent marriage.

The Judge of the Civil Court of Patna heard these witnesses. They were all examined in his presence, and it is impossible not to consider that the Judge who hears the witnesses is really the best person, and very often the only person, who can judge of the credit to be given to them, because he not only hears what they have to say, but he observes the manner in which they say it. He is also much more conversant with the general position of the persons who come before him than any Court of appeal can be. What he says of the witnesses is that their depositions are unworthy of any credit. He further says that, with the exception of one or two, the whole were illiterate and low people, and they certainly seem to be so.

Then, on which side is the balance of probabilities? The case on the part of the appellant is that this lady, in the lifetime of her first husband, married and

lived with Mahomed Hossein in the City of Patna, and one or two of the witnesses, when asked how they knew it, say that it was impossible for a man of the rank and wealth of Mahomed Hossein to be married without the people in the city of Patna knowing it. If this be so, it certainly seems a most improbable circumstance that Mahomed Hossein, a gentleman of position in Patna, should have allowed his wife to come forward in the Court of Patna and claim a share of the estate of Mahomed Ibrahim Khan, upon the assumption that she was his lawful wife down to the time of his death. That is, in their Lordships' view, a very strong improbability.

Then, with regard to dower; if she had been divorced she would have been entitled to her dower, not only to the prompt dower but to the whole of it; but she neither sued for her dower, nor is there any arrangement satisfactorily proved with regard to her remission of it.

One or two witnesses say that she did, behind the curtain, use the words that she had remitted the dower, but only one or two of the witnesses venture to say that, and it does seem incredible that, if she was entitled to a large dower, she should have given it up without the husband obtaining from her some writing or other authentic evidence of her having so released it, particularly as she had once before sued for the prompt dower and had obtained a decree, and that suit was very formally compromised by the petition to which reference has already been made.

There is an improbability referred to by the Judge of the Civil Court with regard to the ceremony alleged to have taken place on the second marriage. It appears that the lady was of the Soonee school, and Mahomed Hossein of the Sheeah, and the Judge says what appears to be well founded, viz., that the ceremony would usually be according to the school to which the husband belonged. In this case it was the other way. That is an improbability, and it may be that these witnesses, who, many of them, were ignorant persons, were not aware, when they gave their evidence, that it would be open to the observation that it was an improbable story they told.

It is to be observed that, according to some witnesses, the Cazee was present at the second marriage. If this be true, the Cazee should have been called as a witness; but he was not examined, nor his absence accounted for.

Their Lordships think it unnecessary to go at any detail into the evidence. They see no reason for coming to a different conclusion from that at which the Judge of the Civil Court of Patna has arrived, and they do not feel justified in saying that he is wrong when he has recorded that the witnesses who came before him were, in his opinion, unworthy of credit. If they are unworthy of credit, as the whole case depends upon their testimony, and the onus is upon the plaintiff to prove the divorce which he alleges, the case necessarily fails.

Although, in their Lordships' view, the decree of the Sudder Court ought to be affirmed, their opinion proceeds upon the ground on which the Civil Judge of Patna dismissed the suit, and not upon that on which the Sudder Court affirmed his decision. The affirmance of this decree will not, therefore, prejudice the status of the appellant as the nephew of Mahomed Ibrahim Khan.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Sudder Dewanny Adawlut, which is the judgment appealed from, and to dismiss the appeal with costs.

The 12th June 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Mohunts—Muths—Endowments—Tirpungal—Benares.

On Appeal from the High Court at Agra.

Kashi Bashi Ramling Swamee

versus

Chitumbernath Koomar Swamee.

The mohunt of the muth at Tirpungal, Zillah Tanjore, in the Madras Presidency, sued the mohunt of the muth at Benares in the Civil Court of Zillah Benares, for the right to manage as proprietor the muth and chuttur affairs at Benares and the temple of Sri Kedareshur, and to recover property belonging thereto, and to have an account of receipts and disbursements relative to the same; such relief being claimed by virtue of his proprietary right as mohunt and guddee-nasheen of the head-quarters muth at Tirpungal, under whose jurisdiction and power the chuttur institution at Benares had continued from time immemorial. The defendant denied plaintiff's claim to the immoveable property and endowment which he represented as acquired by his ancestors, the mohunt's guddee-nasheens at Benares, and himself. He denied that he was an agent, and claimed to be the real proprietor in possession and occupation by right of succession to his ancestors.

The first Court decreed plaintiff's claim. The High Court modified the decree, giving plaintiff possession of certain chuttur and gardens built or purchased out of funds remitted from Madras, and declaring him entitled to an account of a sum admitted to have been remitted from Tirpungal, but holding that he had failed to make out possession of the muth, temple, or other property.

HELD that the original foundation having been admittedly at Benares, which is the holy place, and the object having been to afford, to persons either residents in the south of India or making pilgrimage to Benares, facilities for worship and religious duties there, raised a presumption that the establishment at Tirpungal was subordinate to that at Benares. And that it was not shown that any change had been effected in the original constitution of the community.

HELD that the nature of the relations between the muths at Tirpungal and Benares was that he former fed the establishment at the latter, the object of which was to afford facilities to pilgrims and others wishing to pay their devotions at Benares. The result was that the establishment at Tirpungal collected alms and remitted them to Benares, producing complicated exchange transactions between the two establishments.

HELD that plaintiff had failed to establish either that he was the proprietor of the property at Benares, or that defendant was his mere agent, and that the High Court was right in limiting the relief to what was included in its decree.

This appeal has come before their Lordships *ex parte*. This is a disadvantage in every case, and it might be peculiarly so in one like the present, in which questions are raised the determination whereof depends, not so much upon the general law of property, as upon the rules—whether defined by writing, or to be inferred from evidence of long usage—that regulate a particular religious community. Had their Lordships thought there was any real difficulty in the case, they would have taken time to consider their judgment, and would have gone carefully over the evidence contained in this voluminous record before they decided in favor of the appellant; but for the reasons which I am about to state, they are clearly of opinion that he has failed to make a sufficient case for disturbing the decree against which he has brought this appeal.

The appellant being the mohunt of the muth at Tirpungal sued the mohunt of the muth at Benares in the Civil Court of that Zillah, his claim, as stated in the plaint, being the right to manage and superintend as proprietor the muth and chuttur affairs at Benares, and also to manage and superintend the temple of Sri Kedareshur, to recover certain moveable and immoveable property belonging to the said muth, chuttur, and temple, and to have an account of the receipts and disbursements relative to the said temple and chuttur, and the landed property claimed from the 15th October 1864 up to the date of suit, together with subse-

quent profits and proceeds ; such relief being claimed by virtue of his proprietary right as mohunt and guddee-nasheen of the "head-quarters muth of Tirpuntal, Zillah Tanjore, in the Madras Presidency, under whose jurisdiction and power the chuttur institution at Benares, &c., had obtained from time immemorial, by removal of the possession and superintendence of the defendant, who had been acting as agent."

The plaint further stated that the particular cause of action arose on the disobedience of the defendant, on the mismanagement of the affairs entrusted to him, on the non-submission of the accounts contrary to a practice of old standing, on his acting unlawfully and dishonestly and inconsistently with the dignity of the muth, and on the assertion of his right to possession as proprietor of the chuttur, &c., at Benares, as appeared from a petition which he had filed in the criminal proceedings.

The written statement of the plaintiff somewhat amplified the case made by the plaint, and stated that "by the aid of the Rajahs of the Deccan, the custom of establishment of chuttur or charitable institutions by the Tirpuntal Kashi muth in various parts of India has existed for a very long time. The proprietor or the installed person always remains at the Kashi muth in Tirpuntal, which is the head-quarters. His duty has been to carry on the business of all other places by appointing agents to send money for necessary expenses to every one of the chuttur, and to test and keep a watch over the account of every kind of income (including the money sent by himself) derivable from the moveable and immovable properties appertaining to the muth, chuttur, temple, &c., in each of those places, as well as other matters appertaining thereto. For Benares also, where the foundation of a chuttur was first laid, agents have successively been appointed for a long time; and it is now unnecessary to mention all the agents or managers nominated during the period of several centuries back." The plaintiff then states certain changes in what he calls the agency, and what on the other side is called the succession of the mohunts at the establishment at Benares, and then proceeds to state the non-render of the accounts, and the acts of failure of duty by the defendant as his agent.

The written statement of the defendant, after stating that the plaintiff was wrong in claiming as his property the immovable property and the estate situated in the chuttur (sacred place), and the endowed property, contains the following passage:—"Those properties were acquired by and belong to the mohunts' guddee-nasheens at Benares, the ancestors of the defendant, and the defendant himself. He holds deeds and documents of Courts in proof of this." The defendant is not an agent or manager: he is the real proprietor and guddee-nasheen, and in possession and occupation by right of succession to his ancestors." It then states certain facts as to the original foundation of these religious establishments, which seem to be admitted by both parties, and which will be considered hereafter.

Upon the case thus raised between the parties the Judge at Benares framed three issues. The first issue, which was as to the question of limitation, it will be unnecessary to consider, since it is now out of the case. The second issue was, "Who is the proprietor of the property situate in Benares?" and the third was, "Whether the defendant was the agent of the plaintiff or not?" The Judge of first instance, who tried the case, decided the two last issues in favor of the plaintiff, and gave him a decree for all that he claimed. The defendant then appealed to the High Court, and that Court modified the decree of the Judge below. Their decree found that the plaintiff was entitled to the possession of certain chuttur and gardens, which, though situate at Benares, had, as the defendant had admitted, been built or purchased out of funds remitted from Madras; and accordingly decreed the possession of those properties to him. It also found him entitled to have an account of the expenditure of the sum of Rs. 45,777, which was admitted to have been remitted from Tirpuntal to the

defendant since October 1864, and "to have an account of all rents and profits received from the chuttur and garden land aforesaid from that date ;" but it held that he had failed to make out that he was entitled to possession of the muth and temple at Benares, or of any property other than that of which possession was thereby decreed to him.

Against that decree the present appeal is brought, and, there being no cross-appeal, the question is reduced to this—whether the High Court was right in limiting the relief given to the plaintiff to that just stated, or whether they ought to have gone on further and to have decreed that he was entitled to the possession of the whole of the property claimed, and as an incident or a step to that relief, to the removal of the defendant from the office of mohunt at Benares.

It is admitted by both parties that the original establishment of this community was at Benares, that it took place some 300 years ago, that 150 years afterwards the establishment at Tirpuntal was set up, and that from that time the two were in communication together; but the dispute between them is whether the mohunt of Benares was in any sense the agent of the mohunt of Tirpuntal, or in any and what degree inferior to him and subject to his orders. Of the constitution of the original foundation, or of the terms upon which it was set up at Benares, there is really no evidence whatever. Nor is it shown by any direct evidence what alteration was introduced into the constitution of the community at the time at which the migration from Benares of part of the community to Tirpuntal in Tanjore took place, or what was then settled as to the relation of the two mohunts. What proof there may be on these points, is left to be collected from the voluminous correspondence which has been filed in the cause, and from the acts of the parties on the occasion of the different changes in the office of mohunt at the one place or the other.

The undisputed facts that the original foundation was at Benares, that Benares is the holy place, and that the object of the foundation was to afford to persons, either resident in the south of India or making pilgrimage to Benares, facilities for carrying on their worship and performing their religious duties there, seem to their Lordships to raise a presumption that the establishment at Tirpuntal was subordinate to that at Benares, rather than that the ancient foundation became subordinate to that at Tirpuntal. Such a presumption may no doubt be rebutted by evidence of the facts, but the question is whether there is in this case sufficient evidence to rebut it. It may be here observed that the persons who form this community appear to be more or less connected with establishments in places other than Benares and Tirpuntal, and particularly with one in the south of India, which was the place of residence of the person termed the gooroo, the history of whose interference on the occasion of one of the elections has some bearing on the direct questions raised in this cause.

It is further to be observed that, even if the story of the plaintiff as to the first establishment of the muth at Tirpuntal were correct, it would by no means follow, in the absence of evidence to that effect, that the mohunt who migrated from Benares to Tirpuntal had power to alter the original constitution of the community, or to say that Tirpuntal should thenceforward be its head-quarters, and that the person in possession of the foundation at Benares should be the inferior, or mere agent of the mohunt at Tirpuntal. The change, and the authority by which it was effected, should have been distinctly proved. But of what facts is proof really to be gathered from the correspondence?

The correspondence set out in the record begins in 1843. At that time one Soke Ling was the mohunt at Tirpuntal, and the earliest letters relate to the appointment of a mohunt at Benares in the room of one Ayarub, deceased. The person appointed was Saminada; the respondent being then appointed to the second rank in the muth,—and, on the death of Saminada in 1846, he became mohunt of the Benares muth. It certainly appears that Soke Ling, being the

elder man and possibly the person whose disciple the respondent had been, was regarded with a high degree of reverence and respect by the respondent, and that the letters which were addressed by him to Soke Ling were rather the letters of an inferior to a superior than the letters of one upon equal terms with his correspondent. But Soke Ling fell ill, and wished for the appointment of a successor; and it results, in their Lordships' opinion, from the correspondence, that the successor, whose name was Gunput, was appointed by Soke Ling, with the concurrence of the respondent, the then mohunt at Benares, and that that concurrence was treated as essential to the validity of the appointment. And when Soke Ling died and Gunput became the mohunt actually in possession of Tirpuntal, the character of the correspondence is very much changed. The character it then assumes is that of a correspondence between a mohunt at Tirpuntal who felt himself to be in some degree the inferior of the mohunt at Benares, looking up to him and seeking instructions from him, much as the respondent had previously sought instructions from Soke Ling. Again, Gunput's reign was a short one, and when he died, the present appellant, then a young man of about 21, was appointed; and it is perfectly clear from all that preceded and accompanied that appointment that the respondent, as the mohunt at Benares, was looked to as the person whose concurrence was necessary, and whose advice in all the difficulties attending that appointment was sought, and that for several years after Ramling got into possession, he looked to the mohunt of Benares rather as his superior than (as is represented by the plaint) as his agent and a person simply subordinate to him. There were great difficulties at the time of that election, because a third party, the gooroo, came in and set up a claim to put in his candidate as the mohunt of Tirpuntal. There was an appeal to the civil authorities, and not only did Ramling, the appellant, bring his claim before them, but at his instance and on his invocation the respondent came forward and made a representation in support of that claim. And what he then stated in his letter to the Collector and Magistrate of Koombhone seems to their Lordships to embody that which is fairly to be inferred from the correspondence as the true condition of things, and the true account of the constitution and relation of the two muths and their respective mohunts. He says in that letter:—"I respectfully beg to state that since a long series of years there have been two muths, one at Benares, and the other at Tirpuntal, Zillah Koombhone, in the Madras presidency, to which are attached landed property for their support and two mohunts to manage them respectively. From the income of the landed estates of and the donations of several Rajahs of Deccan to each muth, its expenditure is defrayed, establishment is maintained, and the revenue of Government paid by its respective mohunts. But it has been the usual custom that, when the mohunt of either muth is to nominate a deputy or successor to himself, he is obliged to secure the consent of that of the other, as will be seen in the case of the late Soke Ling Swamee, who, while confined to his sick bed, invited me over to Tirpuntal to make arrangements about the muth thereat, and choose and nominate a successor to him." And then after stating what was done on the occasion of the appointment of Gunput, he goes on to say with respect to the appointment of the appellant:—"Gunput Tumbran, having been ill for the last two months, requested my permission to entertain Ramlinga Tumbran as his assistant during his lifetime, and his successor after him. On my intimating through a letter my compliance with his request, Ramlinga was chosen his assistant and successor since the 5th November 1853, on condition that he (Ramlinga) should serve under my direction. Further, Gunput Tumbran begged me hard to grant a formal deed of appointment to his assistant and successor" (Ramlinga Swamee), "which I have sent him in English on stamped paper, dated 28th November 1853, and attested by credible witnesses." That deed is not produced, but its existence is fully admitted by the plaintiff himself in his letter

of the 16th December 1853 to the respondent, in which he confirms the respondent's statement of the relation between them and gives an account of the proceedings before the Collector. That letter contains the following passage :—"I replied also that the Swamee in Kashi, having made me the 'malik' of this place, had sent a letter to me, and the Collector desired me to produce that letter. I produced it, and the Collector having inspected it, caused the letter inside the envelope to be fully read out to him. He afterwards enquired where was the deed of permission in my favor, which appeared from the purport of your letter to have been received by me from Kashi, and I replied that it was with my man, and the above-named tehsildar, having snatched it from him, gave it to his man to take it to Alganath Swamee."

Whether this deed of appointment could have been produced in this suit, or why, if it could have been produced, it has not been produced by the appellant in whose custody it would naturally be, has not been shown. But in their Lordships' judgment the passages of the correspondence which have been cited, and indeed its whole tone, are altogether inconsistent with the appellant's contention that the mohunt at Benares was merely the agent of the mohunt at Tirpuntal, or that the latter was the real proprietor of the foundation at Benares, and therefore negative the title set up in his pleadings.

That there may have been, and that there ought to have been, accounts between these establishments their Lordships see no reason to doubt. The nature of their transactions appear to be of this kind. The muth at Tirpuntal fed, as it were, the establishment at Benares, the object of which was to afford facilities to pilgrims and others who wished to pay their devotions at Benares for so doing. The result of the system was that the establishment at Tirpuntal collected the alms of the faithful in the south of India, and remitted from time to time considerable sums to Benares. Many of these sums had a special destination. They were directed to be applied to particular purposes, such as throwing the ashes of Rajahs who had died in the south of India into the Ganges at Benares, or the performance of special services to the idols there, or to the establishment of special charities. This state of things produced complicated exchange transactions between the two establishments; and the correspondence shows that there was very often a considerable deficiency of funds in each of them; each at times having to borrow money as it best could. There was, therefore, necessarily an account current between them; the one having to keep the other instructed as to the funds in hand, the funds required, the liabilities incurred, and the like particulars.

It has, however, been argued that from certain items in the accounts produced, which relate to the rents of property at Benares, and to the expenditure of moneys upon the pushta and other things belonging to the temple at Benares, it is to be inferred that the whole of the property at Benares was held by the mohunt at that place subject to the orders and as a mere agent for the mohunt at Tirpuntal.

Their Lordships do not think that this is a necessary or fair inference from those items of account. They may, in their Lordships' opinion, be accounted for by supposing that they were inserted in order to show what was the state of funds at that time in Benares, and what the available means of the mohunt at that place. Their Lordships cannot infer from them, against all the evidence afforded by the correspondence, that the relation of the two mohunts was that of principal and agent.

Now, this being their Lordships' view, it seems to them that the plaintiff, who had to make out his case, has wholly failed to establish the affirmative of either of the two issues settled, and to prove either that he was the proprietor of the property claimed at Benares, or that the defendant was his mere agent; and, therefore, if they had been trying the case in the first instance, they would

have had serious doubts whether the suit, being misconceived and founded on an alleged title which the evidence failed to support, ought not to have been wholly dismissed. It was proved, however, that in the year 1865, the appellant being dissatisfied at not receiving regular accounts, went to Benares, and that the respondent, who appears to have then become somewhat old and ill, and at one time not unwilling to retire altogether from office, executed an ikrarnamah, by which he agreed to render accounts, and the High Court acting upon that has decreed that there should be an account of the moneys remitted from Benares since that date. Also the respondent appears to have made in the course of the trial an admission that certain of the chutturs claimed had been erected out of moneys remitted from Tirpuntal, and the High Court considered that this was sufficient to give the mohunt at Tirpuntal a right to the possession of those chutturs.

It is not necessary for their Lordships, as there is no cross-appeal, to consider whether a title to disturb the possession of those chutturs was properly established, a question on which they intimate no opinion; but they have come to a clear conclusion that the plaintiff has wholly failed to make out any title to the general property of the muth at Benares, and that, therefore, the High Court was at all events right in dismissing the rest of his suit and in limiting the relief given to that which is included in its decree.

Mr. Leith also argued that the High Court ought on its own principles to have gone further, and directed that there should be a change of possession of any other lands or houses which might be found to have been purchased by means of the money of which an account was directed. Their Lordships are disposed to think that all the relief to which the appellant may be entitled, consistently with the decree or as consequential thereon, may be had in working out the account. But in any case, taking the view which they have already expressed of the rights of the appellant, and considering the danger of interfering with the management of the affairs of this religious community upon such imperfect information of its nature and constitution as is given by the record, they are not disposed to recommend any additions to the decree.

Under these circumstances their Lordships think it will be their duty to advise Her Majesty simply to affirm the decree of the High Court, and to dismiss this appeal.

The 26th June 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Alluvion—Proprietary rights—Reg X of 1825 s. 4.

Case No. 40 of 1869.

*On Appeal from the High Court at Calcutta.**

Ranee Surnomoyee
versus
Jardine, Skinner and Co. and others.

* From the judgment of Loch and Mitter, J. decided 12th and 30th April 1869.

Case No. 44 of 1870.

Ranee Surnomoyee

versus

Robert Watson and Co.

Though an island, or land thrown up and surrounded by a river may become vested in Government under the provisions of Reg XI of 1825 s. 4 cl. 4, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accretion within the meaning of cl. 1.

These appeals, which were consolidated and have been heard together, arose out of four suits instituted by the plaintiff; two of them against Messrs. Jardine, Skinner and Co. and others, and two against Messrs. Robert Watson and Co.

One of the suits against Messrs. Jardine, Skinner and Co., No. 87 of 1866, was to recover possession of 2,428 beegahs 6 cottahs and 4 gundahs of land, claimed by the plaintiff as a part of a khas mehal, called Chur Doomreah Jazeerah, No. 560 on the rent-roll of the Collectorate of Moorshedabad, purchased by her at a Government sale in the year 1864, and also to set aside an order of the Joint Magistrate, made on the 14th October 1865, under s. 318 of the Code of Criminal Procedure, for maintaining the defendants in possession of a portion of the said lands.

The other suit against Messrs. Jardine, Skinner and Co., No. 88 of 1866 (Record, page 955), was to recover damages for crops alleged to have been sown by the plaintiff on 1,918 beegahs of the said lands, and to have been wrongfully taken possession of by the defendants.

The two suits against Messrs. Robert Watson and Co. were similar to those against Messrs. Jardine, Skinner and Co., No. 86 of 1866, being to recover possession of 752 beegahs of other land, alleged by the plaintiff to be a portion of the same khas mehal, and also to set aside an order of the Joint Magistrate, made on the 21st of December 1865, for maintaining the defendants in possession of the said land; and the other of the said suits, No. 89 of 1866 (Record, page 133), being to recover damages in respect of the crops alleged to have been sown by the plaintiff on 569 beegahs of the said land and to have been wrongfully taken possession of by the defendants.

The lands which form the subject of these appeals, so far as they relate to the suits numbered 86 and 87 of 1866, are portions of the dried-up bed of the River Pudma, and the main question to be considered is, did they form any part of the khas mehal Chur Jazeerah Doomreah purchased by the plaintiff from Government.

The principle upon which the High Court acted in the two suits for possession was to exclude from the decrees in favor of the plaintiff all the lands which formed the bed of the river, and were not included in the measurement made by Bissonath Dutt, prior to the *ijarah* granted to Mr. Dalrymple (see page 977). Their Lordships are of opinion that the High Court was right in acting upon that principle.

If the lands in dispute had been annexed by gradual accretion to the estate granted by the *ijarah* to Mr. Dalrymple, they would, by virtue of the Bengal Reg. II of 1825, have become part of his tenure, and would have passed to the plaintiff under her purchase of the khas mehal. But it was held by the High Court that the lands were not gained or annexed to the island by gradual accretion caused by the recess of a river, but consisted of the dried-up bed of the river which formerly flowed to the south of the island, and which gradually dried up, in consequence of its having become closed at the east and west ends thereof. Their Lordships concur in that view. Indeed, it was scarcely contended by the learned Counsel for the appellant that the land was gained by gradual accretion to the island by the recess of the river.

The plaintiff must recover upon the strength of her own title, and cannot turn the defendants out of possession upon the ground that they have failed to prove their title.

The Government survey of Mouzah Chur Jazeerah Doomreah, made in 1853, included not only the land, but the river on the south of the island; and on the map the southern bank of the river was shown as the northern boundary of the zemindaries to the south, and the whole of the mouzah was stated at the foot of the map to be "No. 306 of the former, and No. 560 of the present, Chur Jazeerah." In the same statement, however, the quantity of land included in the mouzah was represented to be 28,974 odd beegahs.

It was contended that the map of 1853 proves that that part of the bed of the river, which was then covered with water and has since dried up and now forms the lands in dispute, formed part of the khas mehal Chur Jazeerah Doomreah purchased by the plaintiff. It is clear, however, that the lands in dispute in this appeal were not included in the survey or measurement made by Bissonath Dutt prior to the renewal of the ijarah to Mr. Dalrymple on the 29th April 1856.

Their Lordships have already held, in appeal No. 16 of 1868,* that nothing was sold to or purchased by the plaintiff beyond what was included in the ijarah granted to Mr. Dalrymple on the 29th April 1856, at the sudder jumma or annual revenue of Rs. 2,409-13-11, the amount stated in the certificate of sale to the plaintiff. Acting upon that principle their Lordships held in that appeal that the 15,000 beegahs to the east of the Chilmaree Dara, and which formed part of the 28,974 beegahs included in the map of 1853, and were claimed by the plaintiff in her suit No. 89 of 1866 against the present defendants, formed no part of the khas mehal purchased by the plaintiff. The opinion expressed by the High Court is in entire accordance with the view taken by their Lordships in that case.

The argument of the High Court, with reference to the survey map of 1853, appears to their Lordships to be unanswerable. They say (page 950) :—

"There can be no doubt that the lands in dispute were thacked, or surveyed, in 1853 as within the boundary of Jazeerah Doomreah; but it may be observed that that survey included not only those lands, but also a large chur to the eastward, and separated from Doomreah by a running stream as part of the Jazeerah. This chur clearly formed no part of the lands settled with Mr. Dalrymple in 1855; and by a judgment of this Court, dated 11th February 1868, reported in 9 W. R., page 259, it has been definitely settled that it was not included in the plaintiff's purchase, and that she had no claim to that land. So in the present case it is evident that, though at the time of the survey the bed of the river was included within the boundary of the Jazeerah, yet when the subsequent survey was made by Bissonath Ameen, on whose enquiry the settlement was made, the bed of the river, though partly dried up and in the possession of the defendants, was excluded from that settlement; so that there is no better reason to conclude that these lands are part of the island, on the ground that they have been surveyed as part of it, than there was in the other case."

The judgment to which reference has been made by the High Court in the passage above quoted, is that which formed the subject of the appeal to Her Majesty in Council, No. 16 of 1868,* and in which their Lordships have already expressed their entire concurrence.

It appears that, in point of fact, a portion of the bed of the river which had dried up before Bissonath Dutt's survey was included in his measurement; but that does not affect the argument of the High Court as to that portion of it that had not then dried up and was not included in his survey or field-book.

Their Lordships remark that in these suits, as in the suit in which Appeal No. 16 of 1868 was preferred, the khas mehal held by Mr. Dalrymple under the ijarah, and the mehal which the plaintiff purchased, are shown by the plaint to

* 20 W. R. 211; and p. 879 ante.

be identical. The plaintiff says :—" During the khas possession by Government, defendants held the said mehal on an ijarah settlement. The term of the ijarah settlement expired on the 30th April 1865 " (Plaint, Record, p. 1).

The island itself, as appears from the proceeding of Mr. Toogood (p. 123 of the Record, in Appeal No. 16 of 1868) was resumed by Government under the provisions of Reg. XI of 1825 s. 4 cl. 4. That section, however, vested in the Government only the island which was thrown up, or, in other words, the land surrounded by water, and not the unfordable channel of the river by which the island was formed. Though an island, or land thrown up and surrounded by a river, may be vested in Government, it does not follow that, if the river which separates the island from the main land dries up after the island has been resumed by Government, the bed of the river becomes the property of Government in cases in which the bed of the river is not gained as an accretion to the island by gradual accession within the meaning of the first clause of s. 4 of Reg. XI of 1825.

Their Lordships have not sufficient materials before them to enable them to determine whether that portion of the bed of the river which was covered with water and was not included as part of the khas mehal granted by the ijarah to Mr. Dalrymple, became the property of Government upon its subsequently drying up. Nor is it necessary to do so for the purpose of these appeals, for in the opinion of their Lordships it was not included in the sale to the plaintiff.

It was, however, contended that the bed of the river was included in the ijarah to Mr. Dalrymple, and was part of the khas mehal sold to the plaintiff. It was argued that the words of the ijarah, " You are entitled to the revenue which you will be able to assess on the waste lands of the said mehal up to the end of the period of the ijarah," were sufficient to entitle Mr. Dalrymple to the waste land subsequently formed by the drying up of that portion of the river which was not included in Bissonath Dutt's survey of the khas mehal.

Their Lordships cannot assent to that view of the case, for, at the time of Bissonath Dutt's survey and measurement, that part of the bed of the river which has since dried up and is now in dispute was under water, and no part of the revenue of Rs. 2,409 reserved in the ijarah to Mr. Dalrymple, and in the sale to the plaintiff, was calculated or assessed in respect of it.

The quantity of land in dispute in the suits under appeal is, no doubt, very much less than the 15,000 beegahs which were the subject of the decree from which the appeal No. 16 of 1868 was preferred. But the construction of the ijarah to Mr. Dalrymple, and of the sale to the plaintiff, cannot depend upon the quantity of the land claimed in excess of Bissonath Dutt's measurement. Even if the bed of the river upon its drying up became the property of Government, a point upon which their Lordships are unable upon the evidence in the cause to form an opinion, it would be an innovation in the manner of construing grants of this nature to hold that that part of the bed of the river which was not in the possession of Government, and had not even been resumed or assessed to the Government revenue, and was not included in the survey and measurement made preparatory to the grant of the ijarah, was intended to be included in the ijarah or in the sale of the khas mehal, under each of which the revenue reserved was fixed upon the basis of the survey.

It should be remarked that the words of the ijarah are " the waste lands of the said mehal." Those words cannot include waste lands which were no part of the mehal and were excluded from the survey measurement and report upon which the revenue settlement was made. It must be borne in mind, as remarked by their Lordships in Appeal No. 16 of 1868, that what was granted in ijarah to Mr. Dalrymple, and what was sold to the plaintiff, was a khas mehal, a term which could not include lands which had never been in the possession of Government, or ever resumed or included in the estate which was assessed to the public revenue.

The proceedings of Mr. Toogood, and the field-book of Bissonath Dutt, contain a complete description of the lands included in the khas mehal. The proceedings are headed "particulars of the origin and reason of the settlement of, and the right which the Government has in, the said mehal" (p. 124 of the Record, in Appeal No. 16 of 1868). They contain a description of the lands of the mehal, and amongst other things, a statement of lands at present not fit to pay, &c.; and under this head there is the following statement:—

"Within this mehal there are beegahs 120-6-0-16½ gundahs of road land, and beegahs 372-12-0-3¼ gundahs of sandy unculturable waste lands, and beegahs 255-8-0-7½ of unculturable land covered with water; in all beegahs 748-7-0-17½ gundahs of land on which no rent has been assessed, the reason being that those lands are not fit to be assessed (pp. 126 and 128 of same Record).

Those 748 odd beegahs were included in the 11,381 odd beegahs upon which the annual revenue of Rs. 2,409-13-11 was assessed; and are sufficient to satisfy the words "the waste lands of the mehal" as used in the ijarah, by the terms of which Mr. Dalrymple was to have the benefit of all waste lands included in the estate which was assessed and granted to him in the same manner as every zemindar under the permanent settlement has the benefit, without any increase of revenue, of all waste lands which at the time of the settlement were included as part of the zemindaree.

The proceedings then contain a statement of the rates prevalent in the mehal for each description of land (page 126), a statement of the various descriptions of cultivators, and finally, under heading No. 2, a statement of the jumma bundee, according to the rates recommended by the Ameen, and the particulars thereof, showing the description, quality, quantity, rate of assessment and amounts of jumma in respect of all the lands in the mehal, giving a total of 10,632 odd beegahs, assessed at a gross jumma of 2,667 odd Rs. and 748 beegahs of land unculturable, and not fit to pay, making a grand total of 11,381 odd beegahs of land included in the mehal. The field-book of Bissonath Dutt gives the particulars of each dag in the mehal, and the quantity and quality of land contained in it, and the name of the occupier.

The result of the proceedings before Mr. Toogood appears from the following passage in his Report, page 125. Referring to the Report of Bissonath Dutt, he says:—

"From the papers filed by the Ameen it appears that the said Ameen, having measured beegahs 11,381-6-12½ of land, and fixed Rs. 2,677-10-1 as the hustabood jumma thereof, filed the papers accordingly. Hence it is deemed proper to enter into an ijarah settlement with Mr. Dalrymple, the former ijaradar, for a term of ten years, commencing from the 1st May 1855, at an annual rental of Rs. 2,409-13-11, being the balance, after deducting Rs. 267-12-2 on account of collection charges, at the rate of 10 per cent. on the said jumma (hustabood).

The proceedings were forwarded to the Commissioner of revenue for his orders (page 129), and on the 15th March 1856, an order was made by the Commissioner to the effect that the said ijarah settlement, for a term of ten years, from the 1st May 1855, at an annual rental of Rs. 2,409-13-11, should be entered into with Mr. Dalrymple. The ijarah was accordingly granted, and shortly before its expiration the khas mehal was sold to the plaintiff, subject to a revenue of Rs. 2,409-13-11, the same amount as that reserved in the ijarah. The document signed by the plaintiff upon her purchase of the mehal stated the quantity of land in the mehal to be 10,377 odd beegahs, the same as in the measurement of Bissonath Dutt. (See No. 11, Supplemental Record in 162, 1868, p. 8.)

It cannot be disputed that the plaintiff has got possession of the 10,377 beegahs of cultivable land, and the other lands, making up 11,381 beegahs included in Bissonath Dutt's survey and field-book; but she claims, in addition, that part

of the bed of the river which was not included in Bissonath Dutt's survey, but was at the time of that survey covered with water and has since dried up.

In support of the argument that the plaintiff is entitled to those lands, it is said that part of the bed of the river, which dried up after the first *ijarah* to Mr. Dalrymple, was included in Bissonath Dutt's survey and measurement in the second *ijarah* to Mr. Dalrymple. That is so. But there is a great distinction between that part of the bed of the river which was included in the second *ijarah* to Mr. Dalrymple and that part which has since dried up and is the subject of the present appeals. The former portion was resumed by Government, and whether they were in strictness entitled to it or not, it was included in the revenue settlement, treated as part of the *khas mehal*, and included in the second *ijarah* to Mr. Dalrymple; whereas the land now in dispute, being that part of the bed of the river which dried up after Bissonath Dutt's survey, has never been resumed by Government, or assessed to the public revenue, and has never been included in the *khas mehal*. Whether Government was entitled to resume that part of the bed of the river which was included in the second *ijarah* to Mr. Dalrymple, is not a question in the present appeal. The plaintiff is in possession of it, and her title to it is not disputed in the suits under appeal. As to the lands in dispute, she is not in possession of them; she seeks to turn out the defendants who are in possession of them, and she has therefore to prove that they were the property of Government, and were included in the sale to her. In both of these respects she has failed to make out her case.

It was contended on behalf of the plaintiff that even if the land in dispute was not part of the *khas mehal*, either originally or as an accretion to the island, within the meaning of Reg. XI of 1825, she was still entitled to it upon the general principles of equity and justice according to the provisions of cl. 5 s. 4 Reg. XI of 1825.

It appears to their Lordships that the land in dispute was not gained by alluvion or dereliction of a river within the meaning of that clause. Furthermore, the plaintiff did not, in her plaint, rest her case upon the provisions of that section, or upon the general principles of equity and justice. Her claim was based upon an alleged title to the land as part of the *khas mehal* purchased by her from Government, of which, after the expiration of Mr. Dalrymple's *ijarah*, she had obtained actual possession, and from which she had been afterwards ousted by the defendants. But even if she were entitled to rely upon cl. 5 of s. 4 of the Regulation above referred to, their Lordships fail to discover upon the facts disclosed any general principles of equity or justice in her favor.

As to the suits for damage to the crops, it is clear that the plaintiff must fail as to the crops alleged to have been sown upon that portion of the lands in dispute to which she has failed to prove title. As to the crops alleged to have been sown upon the lands in respect of which decrees have been given in her favor in suits Nos. 86 and 87 of 1866, their Lordships concur in the view taken by the High Court. The suit is founded upon an assumed possession and actual ouster; but the plaintiff has failed to prove that she was in possession of the land when she sowed the crops, and that defendants ousted her from possession as alleged in her plaint; on the contrary, it appears that the defendants were then in possession of the lands.

It becomes unnecessary, therefore, to consider upon what portion of the lands in respect of which the plaintiff has succeeded crops sown by the plaintiff were destroyed or appropriated by the defendants, or what was the value of such crops. This decision will not prejudice the plaintiff's right, if she has any, to sue for the mesne profits of the lands to which she has established her title, and for which she has obtained decrees in the Lower Courts. The result is that their Lordships will humbly recommend Her Majesty to affirm the decisions of the High Court with the costs of these appeals.

The 3rd July 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Act XIV of 1859 s. 1 cl. 15—Limitation—Usufructuary mortgages—
Acknowledgment—Construction.*

*On Appeal from the High Court at Calcutta.**

Luchmee Buxsh Roy

versus

Runjeet Ram Panday.

The limitation enacted in Act XIV of 1859 s. 1 cl. 15 embraces every kind of mortgage, including usufructuary mortgages.

The acknowledgment referred to in the said clause must bear the signature of the mortgagee himself the signature of an agent would not satisfy. The words of the Statute, which being one of limitation, ought to receive such a construction as the language in its plain meaning imports.

This is a suit brought by the appellant, the descendant of Gujraj Roy, who in the year 1790 mortgaged five mouzahs to Motee Ram Panday, the ancestor of the present respondent. It may be assumed, for the purpose of the present judgment, that the mortgage was a usufructuary mortgage, or in the nature of one. The defence made to the suit, independently of a defence on the merits, was that it was barred by limitation, and the only question is whether the suit has been so barred or not.

It appears that, in the year 1802, the mortgagee had been dispossessed of four of the five mouzahs by the sons of the mortgagor; apparently, it was an unlawful dispossession, and he brought a suit in that year for the restoration of possession, to which suit the then mortgagor set up the defence that the mortgage money had been fully satisfied by the usufruct of the property. An account was taken, and it was found that so far from the mortgage debt having been satisfied, interest had accrued upon it to a larger amount than the debt itself; and it was therefore ordered by the Court that the mortgagee was entitled to a restitution of possession, and it made a declaration, which perhaps was unnecessary, that he was entitled to hold possession until the amount found due was fully paid. That suit and the decree in it do not really affect the question, because the present suit was not brought within 60 years after the decree in 1804. Even if it had been within that period, it might be a question whether that decree at all affected the right of the mortgagee to rely on limitation, for the suit was brought only to recover the possession of the mouzahs which had been unlawfully taken from the mortgagee by the mortgagor or his sons.

The limitation which applies in this case is found in s. 1 cl. 15 of Act XIV of 1859, and is in these terms:—"To suits against a depositary, pawnee, or mortgagee of any property, moveable or immoveable, for the recovery of the same, a period of 30 years if the property be moveable, and 60 years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawnor, or mortgager, or of his right of redemption shall have been given in writing signed by the depositary, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing." It is clear that a period of 60 years has elapsed since the mortgage.

* From the judgment of L. S. Jackson and Markby, *J.J.*, in Regular Appeal No. 134 of 1869 decided 23rd November 1869,—12 W. R. 443.

Two points have been made by Mr. Leith for the appellant ; first, that a usufructuary mortgage is not within this clause at all. He pointed out that in usufructuary mortgages the possession was consistent with the original intention of the parties until the mortgage debt was paid off, and contended that a limitation which would run from the time of the mortgage could not apply to them ; but the Legislature has enacted this limitation in the most general terms, and in language sufficiently large to embrace every kind of mortgage. There can be no doubt it was deliberately done, and that the provision found in cl. 4 s. 3 Reg. II of 1805, which excluded cases of mortgages or deposit from the regulations relating to limitation, was designedly set aside, a different policy prevailing with those by whom the recent Act was passed.

Their Lordships therefore think that this mortgage is clearly within Act XIV of 1859.

The other and the main question is whether, 60 years having elapsed from the date of the mortgage, the right of the mortgagor to bring this suit has been kept alive by such an acknowledgment as is referred to in the Statute.

Now, the Section requires an acknowledgment of the title of the mortgagor, or of his right of redemption, to be given in writing, signed by the mortgagee. In this case two documents are relied upon, which appear in a suit instituted in the year 1847. It seems that in that year a descendant of the mortgagor instituted a suit in the Civil Court of Lohardugga for an adjustment of accounts. The suit was dismissed on the ground that the Court was not competent to entertain it ; but in that suit the respondent, the mortgagee, gave a mookhtarnamah to a mookhtar to defend it, and the mookhtar filed a written statement which it is alleged contains an acknowledgment of the title of the mortgagor and of his right to redeem. It is plain that neither of the documents by itself satisfies the Statute—the mookhtarnamah is signed by the mortgagee, but contains no acknowledgment of title ; the written statement of the mookhtar does contain, or may be assumed to contain, an acknowledgment, but is not signed by the mortgagee—and their Lordships think that it is impossible to put those two documents together so as to satisfy the requirements of this Statute.

It was argued that the signature of an agent was sufficient, and that the mookhtar being authorized to defend the suit, and to use such arguments as he thought fit, authority was given to him to make an acknowledgment of title ; and that such an acknowledgment having been made and signed by him, the Statute was complied with. Their Lordships think that is not so. The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely, the mortgagee, and it would be a wrong construction of it to hold that any other signature would satisfy those words.

The same question arose upon Lord Tenterden's Act in England, and was decided in the case of *Hyde v. Johnson* (2nd Bingham's New Cases, p. 776). Chief Justice Tyndal, in giving judgment there, says—"When therefore we find in the Statute now under consideration that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the Statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed not by the party chargeable thereby, but by his agent."

Their Lordships entirely adopt that principle of construction, which they think applicable to the present case.

They are also of opinion that the written statement cannot be said to be incorporated into the mookhtarnamah so as to make it a part of the document signed by the mortgagee. The mookhtarnamah is no more than an authority to the mookhtar to defend the action in the best way he can and according to the best of his judgment.

It has been said that this case ought to be decided upon an equitable construc-

tion, and not upon the strict words of the Statute; but their Lordships think Statutes of Limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Statutes of Limitation are in their nature strict and inflexible enactments. The object of the Legislature in passing them is to quiet long possession and to extinguish stale demands. Such legislation has been advisedly adopted in India as it has been in this country, and their Lordships think that in construing these Statutes the ordinary rules of interpretation must prevail.

Their Lordships are therefore of opinion that the judgments of the Courts below are correct, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

The 8th July 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Hindoo law—Ancestral property—Will—Issue—Consent of parties—
Res judicata—Cause of action—Act VIII of 1859 s. 2.*

*On Appeal from the High Court at Calcutta.**

Soorjomonee Dayee
versus
Suddanund Mohapatter.

In a suit brought by the heir-at-law to recover possession of immoveable property devised by his father to one B, where, *inter alia*, plaintiff sought to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained, inasmuch as he could not devise ancestral real property, and both parties invoked the opinion of the Court upon this question, which was raised by the pleadings and argued:

HELD, that the judgment upon it was not *ultra vires*, merely because an issue was not framed which, strictly speaking, embraced the whole of it, and that the Court were called upon to decide whether or not the will was operative as to all, or to any, or what portion of the property.

HELD, that the Court had power, with the consent of the parties, to substitute for the relief specially sought, viz., the cancellation of the will, the simple declaration that such deeds could not affect the ancestral property, and that they were at liberty to sue afresh to recover such property.

The words "cause of action" in Act VIII of 1859 s. 2 are to be construed with reference rather to the substance than to the form of action.

This suit was brought by Suddanund Mohapatter, as adopted son and heir-at-law of Chuckurdhur, against Soorjomonee Dayee, the widow of Bonomalee, the devisee of Chuckurdhur, to obtain possession of all the estate, real and personal, of Chuckurdhur. Other defendants were joined, but inasmuch as Soorjomonee is the only appellant against the judgment, which was in favor of the plaintiff, the rights of the plaintiff, as against Bonomalee, have only to be considered. The claim to the personal property was abandoned by the plaintiff, nor did he dispute that Chuckurdhur had the right to dispose by will of all real property which had been self-acquired by him; but he asserted that there was no self-acquired real property; that all the real property of Chuckurdhur was either ancestral in the strict sense of the word (that is, acquired by inheritance from his father) or bought out of the income of ancestral property, whereupon it also became ancestral. The defendant did not maintain that Chuckurdhur could devise his ancestral property,

* From the judgment of Loch and Hobhouse, *J.J.*, in Regular Appeal No. 249 of 1864, decided 5th May 1869,—11 W. R. 436.

properly so called, but maintained that what he had bought from the income of ancestral property was, according to the Mitacshara law (which is admittedly applicable to this case) self-acquired and disposable by his will.

She further maintained that this very question had been decided in favor of Bonomalee in a previous suit between the plaintiff and him. She also contended that in fact a large portion of the property had been bought by Chuckurdhur from other sources than the income of ancestral property.

The High Court held that this question had not been so determined as to bind the plaintiff. After directing further evidence to be taken upon the point, they found as a fact that the real property bought by Chuckurdhur had been bought from the income of ancestral property ; and that being so, they ruled that according to the Mitacshara law he had no power to dispose of it by will.

The first question which arises in the cause is, whether or not it had been decided in a manner binding upon the parties that Chuckurdhur had the power to devise by will such real property as he had acquired out of the income of his ancestral property.

The suit in which this question is alleged by the defendant to have been so decided was brought by the plaintiff against Bonomalee and others in January 1859, and judgment was given in it in 1863. It is not now denied by the Counsel for the respondent that this question was in fact decided by that judgment ; but it is argued that the question was not so raised as to give the Court jurisdiction to decide it, and that the judgment upon it was *ultra vires*.

The facts necessary to make that suit intelligible are as follows :—

Chuckurdhur had first adopted the plaintiff and subsequently adopted Bonomalee. On the 5th April 1849 he made a will, giving a nine-anna share of his real estate to the plaintiff, and a seven-anna share to Bonomalee, dividing his personal estate equally between them. The will contained a clause to the effect that if either devisee disputed it, he should forfeit all benefit under it. Chuckurdhur shortly afterwards published this will by filing it in the Court of the Collector.

Violent disputes having arisen between the plaintiff and his father, in the course of which the plaintiff disputed his father's competence to make a will, Chuckurdhur, in 1857, filed in the same Court two petitions, the purport of which was that he disowned the plaintiff as his son, and adopted, and acted upon, the clause of the will depriving either devisee who disputed it of any benefit under it. On the 14th January 1859 the plaintiff filed a plaint against his father and against Bonomalee and some other persons who had obtained property under deeds executed by his father, for cancellation of those deeds, for cancellation of the adoption of Bonomalee, for cancellation of the will, and for maintenance. He alleged the will to be inoperative and fraudulent, on the ground that his father had no testamentary power over his ancestral property, to which the plaintiff was jointly entitled with him during his life ; he further alleged that his father had acquired such property as he had not inherited from the proceeds of his ancestral property, and that such property was therefore ancestral ; and in a schedule appended to his plaint, entitled "a schedule of the disputed property," he distinguished ancestral zemindaries from zemindaries acquired from the profits of ancestral estate.

The case of Kanth Narain Singh v. Prem Lal Paurey and others, reported in the third volume of the Weekly Reporter, page 201, decides that it was competent for the plaintiff to bring such suit in his father's lifetime.

Chuckurdhur, in his answer, maintained his right of disposition by will in these terms : "The plaintiff writes that I had no authority to transfer ancestral estates by sale or gift, and prays for the reversal of the will and the deeds of gift executed by me. This is his mistake, because I am the owner of all the estates, ancestral and self-acquired, and have every power to alienate them by sale or gift

in various ways." He further denied the fact that his purchases of land were made solely from profits of the ancestral estate. In the replication the plaintiff re-asserted his right of inheritance, and maintained that in that right he was entitled to require, among other things, the cancellation of the will. He re-asserted that all the estates of his father were ancestral estates, and none self-acquired according to Hindoo law, and that by that law they are not transferable by sale or gift or otherwise; and joined issue on the fact that the purchased estates were acquired otherwise than from the proceeds of ancestral estate.

In their Lordships' opinion, the effect of the pleadings is that the plaintiff sought, *inter alia*, to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral, consisting of such as he had inherited from his father and such as he had bought out of the income of it.

It is true that this question is not raised as distinctly as it ought to have been in the issues, the only issue directly referring to the will being whether or not it was assented to by the plaintiff, an issue clearly embracing but a portion of the controversy between the parties.

That the question was, however, raised in the suit, appears not only by the pleadings which have been referred to, but by the grounds of appeal by the plaintiff from the decision of the Principal Sudder Ameen which was against him, wherein he insists (among other things) that the will is wholly irregular and illegal, and that the defendant had no power under the shasters to execute such a will or wills. He says, "All the properties, moveable and immoveable, are ancestral, and not the self-acquired properties of my adopted father; therefore according to the provisions of the Mitacshara shaster, gifts of even a portion without the consent of your petitioner are illegal and improper." Chuckurdhur, in opposition to the grounds of appeal, insists that his will was valid and regular, and that he had the power to dispose by it of all property not ancestral in the proper sense.

If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires*. To so hold would appear scarcely consistent with the case of *Mussamat Mitna v. Syad Fuzl Rub* and others, reported in 13 Moore's Indian Appeals, page 573,* wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid.

Their Lordships are of opinion that the plaintiff sought for the decision of the Court on this question, whether his father had or had not the power to dispose of all or part of his real property by will, he himself dividing that property under two heads, viz., ancestral property, and that derived from the income or profits of ancestral property; that this question was raised by the pleadings and treated by both parties as before the Court; and that the Court had jurisdiction, and indeed were called upon, to decide whether or not the will was operative as to all, or to any, or what portion of the property. The Principal Sudder Ameen decided in substance in favor of the plaintiff as far as the ancestral property was concerned, but dismissed his suit as far as it related to the property derived from the income of ancestral property.

An appeal from this decision came before the High Court on the 28th February 1863, after the death of Chuckurdhur, and it now becomes necessary to refer to the judgment given on that appeal. After stating that "the present suit

* 15 W. R. P. C. 15; and p. 387 *ante*.

is brought by Suddanund for maintenance, to declare the adoption of Bonomalee invalid and unlawful, to declare that the father's repudiation of the plaintiff as a son is illegal and beyond the father's powers, to declare the will and petitions disinheriting him inofficious and inoperative, and to set aside certain deeds of sale and gift" (with which we are not concerned at present,) the High Court proceed to say, that the case involves several important questions of Hindoo law, and they thus divide those questions :—First, "the *status* of Bonomalee, whom the plaintiff seeks to declare to be no lawful son of Chuckurdhur;" secondly, "the *status* of plaintiff, who seeks to be declared a son, and whom the father sought to repudiate;" and thirdly, "the property." After deciding in favor of the plaintiff on the question of adoption and *status*, they then proceed to deal with the question of property in these terms :—"With respect to the property, our decision must follow the decision regarding personal *status* above laid down. By the Mitacshara law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that the ancestral property is only that actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it. On the other hand, the father has it in his power to dispose as he likes of all acquired and all personal property. Such, then, being the *status* of the parties, and such the law, we declare that the will and the petitions sought to be set aside are inofficious and inoperative so far as they profess to deprive the plaintiff, the only son of Chuckurdhur, of his right to succeed to the whole ancestral immoveable property held by the said Chuckurdhur; but as regards all other property, seeing that Chuckurdhur was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the plaintiff. There is not the least doubt that by the petitions presented by Chuckurdhur, he unmistakably published his will and desire to deprive the plaintiff of all right to the property so far as he could deprive him and give it to Bonomalee." They then deal with the question of consent to the will, which they find in favor of the plaintiff; and then they proceed to say, "the father being dead, the appellants have waived a decision of the claim to maintenance; and with respect to the deeds of sale and gift sought to be set aside, as the appellants must again go into Court to recover possession of the ancestral property, they are satisfied with the simple declaration that such deeds cannot affect the ancestral property, and that they are at liberty, in any fresh suit, to recover possession of all such ancestral property." In their Lordships' opinion the Court had the power to substitute, with the consent of the parties, such a declaration for the relief specifically asked for, viz., the cancellation of the will.

The 2nd clause of Act VIII of the Code of Procedure of 1859 is in these terms :—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." Their Lordships are of opinion that the term "cause of action" is to be construed with reference rather to the substance than to the form of action; and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this Clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res-judicata*, founded on the principle "*nemo debet bis vexari pro eadem causa*." This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns, *Gregory v. Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in

effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the Duchess of Kingston.

Applying these principles of law to the present case, their Lordships are of opinion that there has been a binding decision between the plaintiff and the defendant, who, for this purpose, stands in the position of her late husband, that Chuckurdhur's will was operative to dispose of all such real property as he had acquired out of the income of ancestral property. Their Lordships agree with the High Court that Chuckurdhur did in fact devise the property over which he had the power of disposition to Bonomalee; and they regard the petitions of 1857 not as in the nature of new wills, but as declarations of his intention to act upon the clause of forfeiture in his will,—a clause which, according to the case of *Cook v. Turner*, reported in 15 Meeson and Welsby, page 727, and in Symonds' Reports, would be valid and operative.

Having come to this conclusion, their Lordships forbear from intimating any opinion on the points of law which would have arisen had their decision on this been different, on one of the most important of which the judgment of the 28th February 1863, and that which is now under appeal, are in conflict.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, and the decree of the Principal Sudder Ameen affirmed.

Considering that the complications which have arisen have been due in some measure to the manner in which Chuckurdhur himself dealt with his property, and that the Courts below, both that of the Principal Sudder Ameen and the High Court, thought this a case in which each party ought to bear his own costs, their Lordships are of opinion that each party should bear his own costs in this appeal and before the High Court.

The 17th July 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Putnee and dur-putnee—Transfer—Sale for arrears of rent—Deposit—
Liability of assignor—Limitation—Act XIV of 1859 s. 14.*

*On Appeal from the High Court at Calcutta.**

Luckhinarain Mitter and another

versus

Khettro Pal Singh Roy and another.

Where the assignees of a dur-putnee talook, although the transfer was not registered in the putneedar's books, deposited in the Collector's Court the amount due to the zemindar as an arrear of rent to stay the sale of the putnee and protect their own interest, they were held entitled to recover the amount from the putneedar.

According to the true construction of Act XIV of 1859 s. 14, a plaintiff is entitled to deduction of the whole time in which he has been fruitlessly engaged in prosecuting a suit *bonâ fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination that the Court had no jurisdiction.

* From the judgment of Kemp and Glover, *J.J.*, in Special Appeal No. 1668 of 1870, decided 10th February 1871,—15 W. R. 125.

This is an appeal from a judgment of the High Court pronounced upon special appeal in a suit in which the respondents were plaintiffs, and the appellants were defendants. The suit was brought to recover a sum of money lodged by the plaintiffs in the Court of the Collector of East Burdwan, in order to stay the sale of a putnee talook called Mouzah Astara for an arrear of rent due to the zemindar from the defendants, who were the putnee talookdars, and thereby to save a dur-putnee talook of the second degree, which had been created by the defendants out of their said putnee talook.

The dur-putnee was granted by the defendants to Sitanath Ghose, at an annual rent of Rs. 5,496, in consideration of a bonus of Rs. 100, and it was stipulated that Sitanath was to have full powers of sale or gift, but was not to underlet in se-putnee without the consent of the putneedars. Sitanath sold and assigned the dur-putnee to the plaintiffs for the sum of Rs. 2,925, and it was stipulated that the plaintiffs were, in the usual manner, to cause mutation of names in the putneedars' books, by causing Sitanath's name to be removed and the plaintiffs' names inserted instead, and that the plaintiffs should duly pay the dur-putnee rent; and further that, if there should be any delay in causing mutation of names, and Sitanath's name should remain on the putneedars' books, it should not entitle him to profit, or subject him to loss. The plaintiffs did not register the transfer in the serishta of the defendants, and the defendants never recognized the plaintiffs as their tenants. The money deposited by the plaintiffs was applied in discharge of the rent due from the defendants as putneedars, and the sale of the putnee was stopped. It was contended that the money deposited by the plaintiffs was a voluntary payment, and, consequently, that they were not entitled to recover the amount from the defendants. The Court of first instance held that the plaintiffs were entitled to recover, and gave them a decree for the amount with interest from the time of the commencement of the suit. The Zillah Judge, upon regular appeal, reversed that decree; but upon special appeal the High Court reversed the decision of the Zillah Judge, and upheld the decree of the Court of first instance. From that decree the defendants have appealed to Her Majesty in Council.

Their Lordships are of opinion that the decision of the High Court is correct. The plaintiffs were assignees of the dur-putnee talook, and, though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the zemindar in order to protect their own interest. They made the deposit, and the defendants had the benefit of it. The plaintiffs are consequently entitled to recover the amount from the defendants. The law upon the merits of the case is very clearly and accurately laid down in the judgment of the High Court, and it is scarcely necessary for their Lordships to enlarge upon it.

Several cases were cited by the learned Counsel for the appellants, and amongst others the case of Anundchunder Bannerjee v. Soobulchunder Dey, Sudder Decisions, 1857, page 1195. In that case it was held that a mortgagee of a dur-putnee tenure out of possession could not recover from the putneedars an amount deposited by him to prevent the sale of a putnee talook for arrears of rent due from the putneedars: that he was not the holder of a talook in the second degree, and had no authority under s. 13 Reg. VIII of 1819 to make the deposit. It does not appear what the nature of the mortgage was, and it would seem that the dur-putneedar had not paid his rent to the putneedar, for it was said "the mortgagee might have sued the dur-putneedar for the money which he had been compelled to pay." Without knowing more of the facts of that case, it is impossible to say whether the decision was correct or not. It is, however, unnecessary to do so, as that case is very different from the present.

It may be remarked, however, with reference to that case, as well as to the case cited from 6 Weekly Reporter, Act X Cases, page 8, in which it was held

that the amount deposited by the plaintiffs in the present case could not be set-off in a suit brought by the present defendants against Sitanath for subsequent instalments of the dur-putnee rent, that neither of them is of any greater weight than the decision of the High Court now under appeal, and that their Lordships could not, upon the mere authority of those two cases, hold that the decision of the High Court in the present case was wrong.

With the exception of those two cases, none of the numerous authorities cited by the learned Counsel for the appellants are in point. In some of the cases it is impossible to ascertain from the reports what were the precise facts; many of them had no relation to putnee or dur-putnee tenures; and none of them appear to carry the case further than this, that the grantor of a dur-putnee talook is not bound to recognize the assignee of the tenure until the transfer has been registered in his *serishta*, and that, until such registry has been effected, he may sue the original dur-putneedar for the rent, and sell the tenure in execution of a decree obtained in such suit without notice to the assignee. This is the only effect of the cases cited from 2 Hay's Reports, page 14; 2 Weekly Reporter, Civil Rulings, page 282; 10 Weekly Reporter, Civil Rulings, page 466.

Those decisions are quite consistent with the ruling of the High Court. Until the assignment has been registered, or the assignee has been accepted by the putneedar as his tenant, the assignor is not discharged from liability, and such liability may be enforced by the sale of the dur-putnee talook in execution of a decree against him for the rent.

It was contended that the decision reported in 6 Weekly Reporter, Act X Rulings, page 8, in which it was held that the money deposited by the plaintiffs could not be set off in an action against Sitanath for arrears of the dur-putnee rent, was a bar to the present suit, as an adjudication by a competent Court in a former suit upon the same cause of action. Their Lordships are, however, of opinion that that determination was not one within the meaning of s. 2 Act VIII of 1859. It was merely determined in a suit under Act X of 1859 that Sitanath was not entitled to credit for the payment made by the plaintiffs.

As to the point of limitation, their Lordships are of opinion that the High Court was correct in holding that the present suit was not barred. It is unnecessary to determine whether the period of limitation was three years under cl. 9 s. 1 Act XIV of 1859, or six years under clause 16 of that section. The deposit sought to be recovered by the plaintiffs in the present suit was made on the 17th November 1864, and the present suit was commenced on the 8th June 1869. On the 30th October 1867 a suit was instituted by the plaintiffs against the defendants in the Zillah Court of Hooghly to recover the amount claimed in the present suit. The defendants pleaded to the jurisdiction of that Court, and, on the 14th April 1868, the Principal Sudder Ameen rejected their plea and gave judgment for the plaintiffs. The defendants appealed to the Judge, who, on 31st July 1868, reversed the decision of the Principal Sudder Ameen, and, on special appeal to the High Court, the decision of the Judge was affirmed on the 26th May 1869.

Deducting the whole period occupied in the suit commenced in Zillah Hooghly from the time of the commencement of that suit to the time when the High Court gave final judgment therein on special appeal, the present suit was commenced within three years from the time when the cause of action arose. It has been found as a fact that that suit was prosecuted *bond fide*, and there is no reason for contending that that finding was in consequence of any error in law, or that the suit was not prosecuted with due diligence. Their Lordships are of opinion that, according to the true construction of s. 14 Act XIV of 1859, the whole time occupied in that suit, including the time during which the special appeal to the High Court was pending, must be deducted. It was contended on the part of the appellants that, as the decision of the Principal Sudder Ameen was annulled by the Judge in consequence of a defect of jurisdiction, the time in which the

plaintiffs were engaged in the special appeal to the High Court, who affirmed the decision of the Judge, cannot be deducted under the provisions of s. 14 of the Act. The words of that section are not very clear, but their Lordships are of opinion that, giving them a reasonable construction, the whole time in which plaintiff has been fruitlessly engaged in prosecuting a suit *bond fide* and with due diligence for the same cause of action, in which he fails in consequence of a final determination in the suit, whether upon appeal or otherwise, that the Court in which the suit was brought had no jurisdiction, is to be deducted.

The learned Counsel for the appellants complained of the protracted litigation in reference to the plaintiffs' claim, and he stated in terms of indignation that the case had been before eleven different tribunals. But surely the appellants are not the persons to complain, when they have been the cause of the whole of this protracted litigation, first, by neglecting to pay their rent to the zemindar, and thus rendering it necessary for the plaintiffs for their own protection to deposit the money with the Collector; then by refusing to allow credit for the amount in the suit against Sitanath; afterwards by objecting to the jurisdiction of the Principal Sudder Amcen of Hooghly; then by objecting to the amount of stamp on the plaint when it was transferred to the Court in Burdwan; and, finally, by appealing against the decision of the Principal Sudder Ameen in this suit, which was ultimately upheld by the High Court.

In short, the appellants have resisted by every means in their power the endeavors of the plaintiffs to recover the amount which they were obliged to deposit, of which the appellants have had the benefit, and which they, according to every principle of justice and good conscience, ought to have repaid.

It is idle to say that they were afraid of repaying the money lest by so doing they should be held to have recognized the plaintiffs as their tenants before the registration of the assignment, or to contend that the appellants are not bound to repay the amount deposited because they would have benefited by the sale of the putnee free from incumbrances.

Their Lordships will humbly recommend Her Majesty in Council to affirm the decision of the High Court with the costs of this appeal.

The 31st July 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, and Sir Montague E. Smith.

Review of judgment—Act VIII of 1859 s. 7.

*On Appeal from the High Court at Calcutta.**

Ramhurry Mondul

versus

Mothoor Mohun Mondul.

A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.

A former suit for a share of property purchased in the name of *G*, which claimed it to be joint property, does not bar the plaintiff from suing for other property, which was bought in the name of *M* at another time, the latter claim being no part of the claim arising out of the cause of action in respect of the property first mentioned so as to come within the meaning of Act VIII of 1859 s. 7.

* From the judgment of Bayley and Pundit, *J.J.*, in Regular Appeal No. 369 of 1865, decided 29th March 1866,—5 W. R., *Civil*, 182.

The appellants in this case are Ramhurry Mondul for self and as guardian of Judoonath Mondul, and Dhurroonohur Mondul, and Ramgopaul Mondul; and the respondent is Mothoor Mohun Mondul, who was the plaintiff in the suit. The plaintiff obtained a decree of the High Court, and the appellants object to it.

The suit was commenced on the 8th July 1865 by Mothoor Mohun Mondul, claiming in his own right and as heir of the late Bulloram Mondul. It was brought against Khamankaree Dossee, the widow of the late Mokoondram Mondul, Ramhurry Mondul, Ramdoolal Mondul, and Ramgopaul Mondul, to recover possession of a twelve annas share of certain talooks mentioned in the schedule to the plaint.

The suit was founded upon a decree passed by the High Court on the 29th September 1863 in two suits; one, in which Bulloram sued the appellants and the respondent; and the other, in which the appellants sued Bulloram and Mothoor Mohun, the plaintiff in this suit. Bulloram's suit was brought on the 22nd March 1861, and in that suit he sought to recover possession of an eight annas share of certain talooks, which were mentioned in the schedule to his plaint. He stated that his father, the late Nityanund Mondul, had two sons, of whom the late Gridhur Mondul was the eldest, and he the second; that they were two brothers, and lived ijmalee; that they had joint possession of the property left by their father, and with the proceeds of a joint trade in salt, &c., acquired the following talooks and putnee in the name of the eldest brother (see Record, p. 27). That suit was brought merely for an eight annas share of property which had been purchased in the name of Gridhur Mondul, and for an eight annas share of Boicheeram Chuck, standing in the name of Mokoondram.

With reference to the suit brought by the appellants, we have not the plaint before us, but the substance of it is stated in the judgment at page 32, line 20. It is there said:—"In suit No. 18 of 1861, Ramhurry, Ramdoolal, and Rangopaul" (Ramdoolal is now dead) "sought to recover an eight annas share in Chucks Gourang, Gohurdhunpore, Bahoobalpore, Boicheeram Chuck, and other property, which it is not now necessary to mention, on the ground that this property had been acquired by Gridhur and Mothoor Mohun when those two were in ijmalee occupation, independent of Bulloram, who was a mere pensioner."

That suit included three of the mehals which are now the subject of the present suit and were not included in Bulloram's suit. The suit of Bulloram included only one of the mehals, which is the subject of the present suit, but it is to be observed that in the present suit the plaintiff is suing not for a twelve annas share of the mehal which was included in Bulloram's suit, but merely for a four annas share of that mehal, admitting that the eight annas share belonging to Bulloram is now in his, the plaintiff's, possession. With regard to Mehal Boicheeram Chuck, which was one of the mehals mentioned in Bulloram's suit, he says:—"Towjee No. 491, in the name of the late Mokoondram Mondul, sudder jumma is Rs. 2,077 odd annas, of which, deducting eight annas share in possession, the remaining sudder jumma of the four annas in my own right is Rs. 519." So he is not suing to recover any portion of the eight annas share of that mehal which was recovered in Bulloram's suit. Nor is he now asking to have execution with regard to any portion of that share.

The two suits were heard together by Mr. Justice Elphinstone Jackson, who gave judgment, which is set out at page 6 of the Record. He considered that the property was joint property belonging to Bulloram and Gridhur Mondul, but that the parties were bound by an award, by which only a four annas share had been awarded to Bulloram. He says:—"I therefore decree that arbitration award to be binding upon all parties, and Bulloram, Ramhurry, and his brothers, and Mothoor Mohun Mondul, to be entitled to a four annas, six annas, and six annas share respectively."

An appeal was preferred against that decision. Khamankaree Dossee, who was

the widow of Mokoondram, also appealed upon the ground that it had been held that the property standing in the name of Mokoondram was joint family property. She contended that it was the separate property of Mokoondram. The case then went up to the High Court, and the judgment, which is set out at page 20 of the Record, was given by a Division Bench. They considered that the parties were not bound by the award, and they held that Bulloram was entitled to his full legal share of the joint undivided family property, namely, one-half; and then as regards the appeal of Khamankaree, the widow of Mokoondram, they say:—"We have carefully considered all the arguments adduced by the Counsel, Mr. Paul, but we find nothing to induce us to interfere with the decision of the Judge to the effect that Mokoondram's acquisitions were obtained with family funds, and were for the family at large, and not for himself individually. This being the case, and the property having been acquired while Mokoondram was living in commensality with the rest of the family, and on default of proving separate means sufficient to give separate acquisitions, it is legally to be presumed that the property standing in his name was acquired for and belonged to the family in general. We, therefore, decree the appeal of Mussamut Gourmoney Dossee, the widow of Bulloram, and, in modification of the decision of the Judge, award her one-half or eight-anna share of the family property. The appeals of Ramhurry and his brother, and of Mussamut Khamankaree, are dismissed with costs." Upon that a decree was drawn up in Bulloram's suit in favor of the widow of Bulloram, by which it was awarded that the decision of the Lower Court should be modified to the extent of awarding to the special appellant Gourmoney Dossee one-half or an eight annas share of the property which was the subject of that suit.

It was contended in argument that this suit is brought for the purpose of executing that decree; but the suit in which it was made did not include any of the property which is the subject of the present suit, except the Mehal Boicheeram in respect of which the plaintiff is now suing only for the four annas share which belongs to him in his own right, and not for the eight annas share which descended to him as the heir of Bulloram.

Upon a motion for a review of judgment, Mr. Justice Bayley, upon refusing to admit the review, makes use of this expression, speaking of the shares in the three mehals which were not included in Bulloram's suit:—"Because Gourmoney did not sue for these shares, she cannot have them in this suit;" but then, unfortunately, the learned Judge went on to say:—"Then they would go half and half to the plaintiff Ramhurry and to Mothoor Mohun and his representatives" (Record p. 30). At page 24, it appears that the case was again brought before Mr. Justice Bayley on an application for a review of that judgment. He there says, speaking of himself and Mr. Justice Roberts, who had joined in the original judgment:—"We have both broadly held that as the title to the three villages was based solely on the allegation of self-acquisition, and that as we held that the whole property was one of a joint undivided character, we ruled that the admission by Bulloram of his not claiming those three villages would not render the title of self-acquisition good. We consequently decided that, as Bulloram did not sue for those villages, they must merge in the general joint property as joint, and so go with the other joint shares, but could in no way be admitted to be what they were claimed to be, self-acquired."

Now it is contended that the effect of the decisions in the two former suits is sufficient to bar the plaintiff under s. 2 of the Code of Civil Procedure from recovering more than an eight annas share of the mehals which are the subject of the present suit, inasmuch as it is contended that it was decided therein that the sons of Bacharam were entitled to an eight annas share, whereas if they were entitled to an eight annas share, the plaintiff in this suit could be entitled only to an eight annas, and not a twelve annas share.

It appears to their Lordships that what was said by the learned Judge on the

two occasions when a review was applied for and refused, was not a decision to that effect, nor an alteration of the judgment which had already been given. A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree.

Their Lordships are therefore of opinion that there is no valid decision as between the parties ; that the appellants Ramhurry and others and Mothoor Mohun were each entitled to an eight-anna share of the property. The decision really was that the property was joint family property, of which Bulloram was entitled to an eight-anna share, and the appellants and respondents each to a four-anna share ; and there was no decision in the former suit which would bar the plaintiff, under s. 2 of the Code of Civil Procedure, from claiming in this suit the eight-annas share which descended to him from Bulloram.

That disposes of the second plea in this suit, which is set out at page 5, that "a moiety of the property standing in the name of the late Mokoondram, included in the claim in the suit brought by us, and not included in the claim of Bulloram, was declared by the High Court to belong to the plaintiff, and the other moiety to us. Against the same the plaintiff has again instituted this suit. Such a suit cannot be entertained under s. 2 of Act VIII of 1859."

The other defence was the defence set up by the first plea. The defendants say that as Bulloram did not include in the former suit a claim to recover a share of the mouzahs which are the subject of the present suit, the plaintiff, as his heir, is barred by reason of s. 7 of the Code of Civil Procedure. That Section provides that "every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

Now Bulloram was suing in respect of property purchased in the name of Gridhur Mondul, which he claimed to be joint property in respect of which he was entitled to a share. But the present suit has to do with other property, which was bought in the name of Mokoondram at another time, and it appears to their Lordships that those are not the same cause of action, and that the present claim to property purchased in the name of Mokoondram is no part of the claim arising out of the cause of action in respect of other property purchased in the name of Gridhur.

Their Lordships are therefore of opinion that the plaintiff is not barred by s. 7 from recovering Bulloram's share in the mouzahs which are the subject of the present suit, upon the ground that Bulloram omitted to include them in the suit which he brought in respect of property purchased in the name of Gridhur Mondul.

With regard to the case cited from 11 Moore's Indian Appeals, *Buzloor Ruheem v. Shumsoonessa Begum*,* their Lordships are of opinion that it is not applicable to the present case.

In that case their Lordships held that, on their construction of s. 7 Act VIII of 1859, the correct test is whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit ; and secondly, that the Section included accidental error and involuntary omission of the subject of the new suit ; that is to say, that if the matter was omitted to be brought in the former suit through error or mistake, that would not prevent the operation of the Section. There was one conversion by the husband of several Government securities belonging to his wife. It was one entire conversion and one cause of action, and not a separate cause of action, in respect of each of the Government securities.

It appears to their Lordships that that case is not applicable to the present,

and that the cause of action in the present case is not part of the cause of action in respect of which Bulloram was suing.

The third answer was that "in the answer filed in the previous suit brought by us, and in the plaint in this case, the plaintiff has admitted the talooks standing in the name of our father to be his self-acquired property, and he must now be held as bound by his former admission."

There is nothing in that objection. Indeed, their Lordships understood that Mr. Doyne did not press it, and that the property was admitted to be joint family property.

Their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty to affirm that decision, and to dismiss this appeal, with costs.

The 1st August 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Alluvial land—Gradual accretion—Riparian proprietorship—Issues—
Onus probandi.*

*On Appeal from the High Court at Calcutta.**

Maharajah Rajendur Pertab Sahee

versus

Lalljee Sahoo and others.

At the permanent settlement, the River Gunduck divided Mouzah Sohagpore (Zillah Tirhoot) from the village of Doomree (Zillah Sarun). In 1837, the river got into its southern channel, and a quantity of chur land to the north was resumed by Government and settled with the zemindars of Sohagpore. In 1846 it was again settled with the same zemindars, who remained in possession until 1848 when, the river having returned to its northern channel, the deara land was claimed by proprietors on the southern or Sarun side of the river. The consequence was an Act IV of 1840 suit, which was decided in favor of the zemindars of Sohagpore. In 1856, on the expiry of the last temporary settlement, the question arose with whom Government should engage for the revenue, and it was finally decided by the Board of Revenue that a settlement should be made with the zemindars of Doomree; who accordingly obtained possession. The Board's decision proceeded on two principles, viz., that an usage existed that the main channel of the Gunduck should be the boundary of the zemindaries, and that therefore the interest of the zemindars of Sohagpore had been of a limited, temporary, and conditional character.

These zemindars then brought a suit to impeach this settlement and to recover possession. After decision, appeal, and remand, it was finally decided by the High Court that the land in dispute was identical with that formerly settled with the maliks of Sohagpore who (it was assumed) had a permanent proprietary interest therein:

Held, that the proper issues to be tried were: 1st, Whether the land had been settled in 1837 with the maliks of Sohagpore as proprietors of alluvium which had gradually accreted to their estate; or upon what other grounds such settlement was made,—the onus of proving gradual accretion being on plaintiffs; and 2ndly, Whether there was at the permanent settlement, and has been since, a clear and definite usage such as supposed by the Board of Revenue,—the burden of proving the affirmative of this being on the defendant.

Their Lordships regret to find that they are not at present in a condition to recommend to Her Majesty to make an order which will finally determine the long litigation between the parties to this appeal.

The appellant, the Maharajah of Hutwah, is the owner of a large estate in

* From the judgment of Bayley and E. Jackson, J.J., in Regular Appeal No. 43 of 1866, decided 24th August 1866.

Zillah Sarun, which comprises a village named Doomree, and for the purposes of this appeal may be called the Doomree estate.

The respondents are zemindars in Tirhoot. Their estates comprise a mouzah called Sohagpore, and may be designated by that name.

The two Zillahs are divided by the River Gunduck, which at that part of its course has a northern and a southern channel; and it is proved beyond a doubt that, during the dry months, the main body of the stream has run sometimes in the northern and sometimes in the southern channel.

In 1790-91, when the two estates were permanently settled, the Gunduck ran in the northern channel: which, their Lordships think, must be taken to have been at that time the boundary of the two zillahs, and also of the two estates—Tirhoot and Sohagpore lying on the northern, Sarun and Doomree on the southern bank of the stream.

In the year 1837 the river, whether by gradual recession or sudden shifting is not very clear, had got into the southern channel; and a quantity of chur land to the north of that channel was then resumed by Government; and after an investigation, which will be hereafter more particularly considered, a temporary settlement of it for the term of seven years was made by the Collector of Tirhoot with the zemindars of Sohagpore. This was confirmed by the Commissioner of Revenue on the 23rd April 1838; and, in August 1846, a second settlement of this land for a term beginning on the 1st May 1846, and ending on the 1st May 1856, was made by the same authority with the then zemindars of Sohagpore. Under the two settlements these zemindars appear to have been in undisturbed possession until 1848, when, the river having returned to the northern channel, the deara land so settled was claimed by the appellant's father, and other proprietors on the southern or Sarun side of the river. This led to disputes, and to an Act IV of 1840 suit, which, on the 16th April 1849, the Magistrate of Sarun decided in favor of the zemindars of Sohagpore, and his decision was confirmed on appeal by the Zillah Judge of Sarun on the 5th October 1849. It appears from these proceedings that, on that occasion, the jurisdiction over the lands in question was admitted to have passed, on the change in the channel of the river, from the Tirhoot to the Sarun authorities. Both the Magistrate and the Judge, however, maintained the possession of the zemindars of Sohagpore under the subsisting settlement, leaving the Sarun claimants to establish their title by regular suit. Some such suit, as to part of the land, appears to have been brought; but the final determination in it of the question of title was prevented by the proceedings which are next to be mentioned.

On the 1st May 1856, the last temporary settlement with the zemindars of Sohagpore expired, and the question then arose with whom the Government should engage for the revenue of the deara land. On the 7th January 1857, the Collector of Tirhoot (Mr. Lautour), entertaining in consequence of the change in the course of the river doubts as to his jurisdiction to make a new settlement, though the revenue assessed under the previous settlements had always been paid into his treasury, brought the question before the Commissioner of Patna, Mr. Tayler. That officer held a proceeding on the 3rd March (both parties being represented before him), and came to the following conclusion:—

“In this suit I have no doubt in the matter which the Collector has referred to me for my opinion, because from the purport of the report of the Collector it is evident that the lands appertaining to the deara settled, were, without any dispute, in possession of the proprietors of Sohagpore, and the revenue has been paid by them to the Collectorate of Zillah Tirhoot. Under these circumstances, the stream of the river having been changed, the rights and interests of the proprietors cannot be prejudiced thereby. Neither can the boundary be altered, as, for instance, there is much land on this side the Ganges which still belongs to Patna; therefore,

"Ordered—

"That an answer to the letter of the Collector of Zillah Tirhoot be forwarded to him, and he should act according to the directions in the said letter."

And, on the 15th March 1857, he wrote a letter to the same effect to the Collector of Tirhoot, who re-settled the deara with the zemindars of Sohagpore by a proceeding dated the 15th April 1857. The appellant, however, appealed against this settlement to the Commissioner, and, through him, to the Board of Revenue; and the decision of the latter body was given on the 4th September 1857, in a letter from their Secretary, of which the following are the material paragraphs :—

"2nd.—At the time of the permanent settlement, and since then, there has been, the Board observe, a distinct and clear usage that the main channel of the Gunduck should be the constant boundary between the two districts of Sarun and Tirhoot, and between the zemindaries on each bank divided by the river,

"3rd.—In accordance with this usage, the chur, the object of the present dispute, has been twice temporarily settled with the maliks of Mouzah Sohagpore on the Tirhoot side, on which estate it was an increment, the main channel of the Gunduck being to the westward of the chur. On the expiry of the last lease, when the chur became open to settlement as if it had been a new formation, Maharajah Chutterdharee Sahai claimed the settlement to be made with him, as the lands by a change in the main channel of the river had become separated from Sohagpore, and formed then an increment on his estate within the district of Sarun.

"4th.—Local enquiries by the proper officers verified this fact; but on reference to him, Mr. Tayler, the Commissioner, directed the settlement to be again made by the Collector of Tirhoot with the maliks of Sohagpore, as they were in possession, and the lands of the chur, not having been washed away, were fully capable of identification.

"5th.—But the lessee's right of occupancy, the Board are of opinion, ceased with his lease, and Mr. Tayler's decision is not only opposed to established usage, and to s. 2 Reg XI of 1825, but also to the principle laid in the Sudder Court's decision in the case of Rajah Greesh Chand, appellant, v. Maharajah Tez Chand, respondent,* in which the Court disallowed the plaintiff's claim to alluvial lands which had originally formed in his estate and had afterwards become united to the defendant's estate by the return of the river to its former course.

"6th.—The Board would particularly refer to the note in this case, as showing the distinction between the separation by change in the course of a river of an alluvial increment not incorporated with an original estate by permanent settlement, and the separation from the same cause of a portion of original land from its parent estate, provided for in cl. 2 s. 4 Reg. XI of 1825. In the advertisement to this volume of the reports, the notes are stated to have been written or approved of by the Judges who decided the cases, and they are consequently entitled to weight.

"7th.—Under these circumstances, the Board have reversed Mr. Tayler's orders appealed against, and they will be obliged if you will direct, in case the lands remain in their present state, that the papers and proceeding may be made over to the Collector of Sarun, within whose jurisdiction the chur now lies, in order that he may form a settlement of it with the petitioner Maharajah Chutterdharee Sahai."

In conformity with the directions contained in this letter, a summary settlement of the deara lands, which are the subject of this appeal, was made with the Maharajah of Hutwah, who obtained possession of them.

The present suit was brought on the 31st January 1860, by the zemindars of Sohagpore, to impeach the ruling of the Board of Revenue and the settlement made under it, and to recover possession of the lands in dispute.

This being the object of the suit, it is desirable to observe what were the principles laid down by the Board of Revenue, upon which the settlement with the plaintiff was set aside, the new settlement made, and the possession of the property changed. They are:—

1. That a clear and distinct usage that the main channel of the Gunduck should be the constant boundary, not only between the two districts of Sarun and Tirhoot, but between the zemindaries on each bank divided by the river, existed at the time of the permanent settlement, and had since continued to exist.

2. That the chur land, when twice settled with the maliks of Sohagpore, had been so settled with them on the ground that the river then ran in what has alone been called the southern channel, thereby making it an increment for the time being to their estate within the district of Tirhoot.

3. That by reason of the change in the main channel of the river, the land, of which they do not dispute the identity, had become an increment of the Maharajah's estate within the district of Sarun, and accordingly ought to be settled with him.

4. That the right of occupancy of the maliks of Sohagpore, who are called lessees, ceased on the expiration of their so-called lease.

The two principles then upon which the determination of the Board, and therefore the title of the appellant rests, are the existence of the alleged usage and the inference that by reason of that usage the antecedent interest of the plaintiffs, and their predecessors in the land, was only of a limited, temporary, and conditional character.

Their Lordships do not propose to go at length into the pleadings in the suit, which appear to them to have sufficiently put in issue the propositions of the Board of Revenue. They must remark, however, that the trial of the cause has been unfortunate, inasmuch as it has failed to determine these substantial questions. The suit came originally before a Principal Sudder Ameen, who dismissed it, first, on a technical question of parties; and secondly, on the ground that the orders of the Board of Revenue were conclusive and binding on the Civil Courts. On appeal both these objections were overruled by a Divisional Bench of the High Court, which remanded the case for trial on the merits; but, in doing so, unfortunately intimated an opinion that the question was to be tried "whether (with reference especially to cl. 2s. 4 of Reg. XI of 1825) the lands were the property of the plaintiffs; the defendants alleging (with reference to clauses 1 and 3 of the same section) that the lands were their property, having been acquired by gradual accretion to their estates." The opinion thus intimated clearly implies that the principal, if not only, questions between the parties were, whether the change in the course of the river having been sudden, and the lands being capable of identification, the case fell within the second clause; or, whether the recession of the stream having been gradual, it had taken from the Tirhoot estate what had once belonged to it, and given what it so took to the Sarun estate by accretion in the proper sense of the term. The High Court seems to have assumed that the plaintiffs may once have had the permanent and proprietary interest in the lands; and altogether to have ignored the existence of the alleged usage as an element in the case.

This seems to have misled the Principal Sudder Ameen who tried the cause on remand; for, although in one part of his judgment he treats the temporary settlements with the maliks of Sohagpore as having been made with reference to some such usage as that alleged, and, therefore, to have given them only a limited tenure, he omitted to try the issue whether the usage existed in fact. And the greater part of the judgment is devoted to the consideration of the questions whether the change in the course of the river had been sudden or gradual; and whether the land in dispute was capable of identification as the land formerly held by the plaintiffs, or had formed by gradual accretion on the appellant's estate

Deciding these questions in the appellant's favor, he dismissed the suit. The cause then came again before a Divisional Bench of the High Court, which pronounced the decree now under appeal. The learned Judges differed from the findings of the Principal Sudder Ameen as to the gradual recession of the river, and the formation of the land in dispute. They held that the latter had been shown to be identical with that which was formerly held under the temporary settlements by the maliks of Sohagpore, and had been the subject of adjudication in the Act IV case of 1849; and that it had been separated from Sohagpore by the Gunduck, causing a sudden disruption of the plaintiffs' land. Their judgment assumes that the plaintiffs had a permanent proprietary interest in the deara land settled with their predecessors in title; and does not in any way deal with the question of usage.

On the argument of the appeal, the contention between the parties finally assumed the following form :—

The case of the plaintiffs—who, coming to disturb the defendant's possession, must establish their title to do so—was, 1st, that the deara land settled with them in 1837 was so settled with their predecessors in title as the proprietors of the alluvium which had formed on their estate, subject to the right of the Government to assess revenue thereon; and that, though from its nature it continued to be subject to a fluctuating revenue, it thereupon became an integral part of their estate; and, 2ndly, that this land having been separated from the rest of their estate by a sudden change in the course of the river, and remaining capable of identification, continued to be their property.

On the other hand, the case of the appellant was, 1st, that the deara land had not been settled with the maliks of Sohagpore in 1837 as proprietors of the alluvium, but in conformity with the usage which made the main channel of the river the boundary of the two estates; that such land had not been shown to have been formed by gradual accretion on the Sohagpore estate, which could alone give the maliks of that estate a right to claim it as proprietors; and that, by virtue of the alleged usage when the northern channel became, in 1847, again the main channel of the river, the deara land ceased to belong to Sohagpore, and became part of the estate of Doomree, the temporary settlements having given to the maliks of Sohagpore at most only a right of occupancy during their subsistence. The appellants, moreover, as their Lordships understood, did not abandon the defence founded on the findings of the Principal Sudder Ameen to the effect that the return of the river from the southern to the northern channel had been gradual and not sudden; that the lands in dispute were incapable of being identified as those settled with the maliks of Sohagpore, but had been formed by gradual accretion on the estate of Doomree, and were therefore an increment to that estate under the general law of alluvium.

Of this latter part of the appellant's defence their Lordships propose finally to dispose.

Upon a full consideration of the evidence they are of opinion that the High Court was right in holding that the land in dispute has been shown to be identical with that which was the subject of the Act IV case of 1849, and therefore with that which was the subject of the settlements of 1837 and 1846; and to have been separated from Sohagpore by a sudden change in the course of the main stream of the river. They agree with the High Court in thinking that, on this latter point, the conclusion of the Magistrate, formed when the change was recent, is to be preferred to that of the Principal Sudder Ameen.

The necessary consequence of this finding of their Lordships is that the plaintiffs are entitled to follow their lands across the stream, under cl. 2 s. 4 Reg. XI of 1825, unless they are prevented from doing so by force of the alleged usage, being a clear and definite usage within the meaning of the second section of the Regulation; or by reason of their never having had the proprietary right in the

soil. Upon the latter point it was argued for the appellant that the proprietary right in the soil may all along have remained in the Government; which, though it made the two temporary settlements with the maliks of Sohagpore, may have retained and lawfully exercised the power of settling with the proprietors of Doomree on the expiration of the last of those settlements. Their Lordships, however, are unable to find in the settlement proceedings, or in the rest of the record, any evidence that the Government ever asserted a title to the land as a chur thrown up in a navigable river, or as being wholly or in part the bed of the river. The first settlement certainly purports to have been made with the then maliks of Sohagpore in the character of "proprietors" of the alluvial land settled; but, in their Lordships' opinion, it is doubtful whether they were treated as proprietors by reason of the alleged usage, or because the deara land was supposed to have formed by gradual accession on their estate, and to have become an increment thereto within the meaning of cl. 1 or of the latter part of cl. 3 s. 4 Reg. XI of 1825. Their Lordships have not before them the whole settlement proceedings; and the Board of Revenue, which presumably had access to them, has stated that the settlements were made in accordance with the supposed usage. The proceedings which are before their Lordships are not altogether inconsistent with this proposition. On the contrary, they contain passages which seem to favor it; though they do not, taken as a whole, support the finding on this point of the Principal Sudder Ameen.

From what has been said above, it plainly appears that the material thing to be determined in this case was the existence of the alleged usage. Yet the issue upon that point has never been tried. Their Lordships may observe that the admitted or proved existence of such an usage was the basis of the decision cited from the 1 Sudder Dewanny Adawlut decisions in the letter of the Board of Revenue;—a case which, remarkably like the present in many of its circumstances, was decided many years before the passing of Reg. XI of 1825 upon the principles afterwards embodied in that statute.

Again, from what has been said above, it also appears that, in their Lordships' opinion, some further enquiry is necessary touching the settlements of 1837 and 1846; the grounds upon which the maliks of Sohagpore were treated as the persons entitled to settle; and the nature of the proprietary interest in the alluvium then recognized in them. If it should clearly appear that the Revenue officers then dealt with them as persons who had acquired a proprietary interest in the accretions under the provision of cls. 1 or 3 s. 4 of the Regulation, their Lordships are of opinion that this should be held to be sufficient evidence of their proprietary title. Their Lordships do not think that it would be right to cast upon them the burden of proving at this distance of time that the lands settled had, in fact, been formed by gradual accretion. If, on the other hand, it should appear that the alleged usage exists, and that the settlements were made on the basis of it, or that for any other reason the interest of the maliks of Sohagpore in the same land was of a limited and temporary character, and had expired, that would be fatal to the plaintiffs' suit. But these are questions for the determination of which their Lordships have not now before them the necessary materials.

Upon the whole, then, their Lordships have reluctantly come to the conclusion that it is their duty to advise Her Majesty to reverse the decree under appeal and to remit the cause to the High Court with instructions to cause the following issues to be tried; and to pronounce a decree according to the findings upon such issues in the manner provided by s. 354 of the Code of Civil Procedure. The issues are:—

1st.—Whether the land in dispute was settled in 1837 with the then maliks of Mouzah Sohagpore as the proprietors of alluvium which had become an increment to their estate by gradual accretion; or upon what other grounds was such settlement made. The burden of proving the affirmative of the first part of this issue to be on the plaintiffs.

2ndly.—Whether there was at the date of the permanent settlement, and has since been a clear and definite usage that the main channel of the River Gunduck should be the constant boundary, not only between the districts of Sarun and Tirhoot, but also between the zemindaries on each bank divided by the river. The burden of proving the affirmative of this issue to lie on the defendant (the appellant). Each party is to be at liberty to produce such further evidence on these issues as he may think necessary; and their Lordships will also recommend that the costs of this appeal on both sides be taxed, and the amount thereof certified to the High Court; and that it be part of the order that such costs be costs in the cause.

The 4th November 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo Law—Joint family—Partition.

On Appeal from the Court of the Financial Commissioner of Oudh.

Thakoor Durriao Singh

versus

Thakoor Davi Singh.

The mere fact that there had been no partition of a family estate for six or seven generations cannot control the operation of the ordinary Hindoo law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded.

Their Lordships are of opinion that this appeal must be allowed. It is an appeal against a decision of the Financial Commissioner, who, upon special appeal, overruled the finding of the two lower Courts, to the effect that the succession and enjoyment of the estate in question, and the rights of the appellant and respondent as members of a joint and undivided Hindoo family, were to be regulated by the ordinary rules of the Hindoo law. That the family was joint and undivided was indisputable; and it therefore lay on the respondent, if he could displace the operation of the ordinary Hindoo law, to do so by clear proof of some family or other custom which varied the law. Both the lower Courts have found that no such custom was established; but that, on the contrary, there was evidence, satisfactory to them, that the estate, though engaged for in the name of one brother, was, in point of fact, held and enjoyed by the two brothers as co-sharers. There was also evidence that although there had been no partition of this estate for six or seven generations, the property of the family had in former times been the subject of partitions. The case went before the Financial Commissioner upon special appeal, and he appears to have considered that it was governed by a former decision of his predecessor Mr. Davis, by reason of which he was bound to reverse the judgments of the Courts below. The only appeal is against that reversal on special appeal.

It appears to their Lordships that the decision of Mr. Davis has not the effect which the Financial Commissioner, Colonel Barrow, attributes to it; and that it is not an authority which governs the present case. In the case before Mr. Davis the lower Courts had found that during six or seven generations the estate then in question not only had remained undivided in fact, but had descended as an

impartible estate to a single heir. That being so, Mr. Davis appears to have ruled that this proof was sufficient to raise a presumption of an unbroken family custom, which could not be rebutted by some evidence that had been tendered to show earlier partitions in the family, whereby a larger estate had been broken up into several smaller portions, one of which was the estate in dispute.

In the present case, there was no evidence of enjoyment by a single member of the family during six or seven generations; all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindoo law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded.

If then the decision of Mr. Davis fails to support that which is under appeal, is there any other ground upon which the Financial Commissioner was justified in overruling on special appeal, the judgments of the lower Courts? Their Lordships can find none. It certainly cannot be said that there was no evidence to support the material findings of these Courts; for they had before them the admission of the respondent by his agent on the occasion of applying for the settlement of 1859, and his former admission on the occasion of applying for the settlement in 1856.

Their Lordships in the course of the argument intimated that it was not open to them upon such an appeal as this, as it was not open to the Financial Commissioner, on special appeal, to disturb the findings of fact by the lower Courts. They may, however, state that if they could have violated the rule which they have laid down as to not giving special leave to re-open the whole case when the application is made to them for the first time at the Bar, they do not think that upon the evidence on this record Mr. Leith could have succeeded in inducing them to come to a different conclusion from that arrived at by the Courts below.

Their Lordships will therefore humbly advise Her Majesty to allow this appeal, to reverse the decision of the Financial Commissioner, and to affirm the decrees of the lower Courts.

The appellant must have the costs of this appeal.

The 5th November 1873.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

Mortgaged property—False representation.

*On Appeal from the High Court at Calcutta.**

Munnoo Lall

versus

Lalla Choonee Lall and others.

A man who has represented to an intending purchaser that he has not a security in the property to be sold, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.

This appeal has been heard *ex parte*, and after considering the opening of

* From the judgment of Peacock, C.J. and L. S. Jackson and Macpherson, J.J., in Letters Patent Appeal No. 6 of 1868, decided 6th December 1869.

Mr. Leith, which has been made in a fair and candid manner, it appears that there are concurrent findings of two Courts below upon a question of fact decisive of the case, and decisive of it against the appellant.

The circumstances are very short. It appears that a man of the name of Reep Bhunjun Singh was in debt, and at the time possessed some considerable estates. The appellant Munnoo Lall had been his banker and advanced money to him, and, amongst other securities, he held a mortgage of the date of 9th October 1863 from Reep Bhunjun Singh of Mouzah Shahpore. It was an ordinary mortgage to secure the sum of Rs. 20,000. Subsequently to that mortgage, on the 9th August 1864, Reep Bhunjun Singh sold the mouzah to the respondents, or to those whom the respondents represent, the bulk of the consideration given for the purchases being the money which was due to the purchasers from Reep Bhunjun Singh, for which they had obtained decrees. Besides the amount of the decrees, a small sum was paid on each of the purchases in cash. Four years after these purchases the appellant commenced this suit, which is a suit to enforce payment of his mortgage bond against the respondents, and prayed a sale of the mouzah. The defence set up by the answer, amongst others, was the equitable defence that Munnoo Lall could not enforce his mortgage bond as against these respondents, because at the time of their purchase he had been present when the negotiations for the purchase took place, and in answer to enquiries had led the purchasers to believe that he had not any lien upon the estate; consequently that he had not the mortgage bond which he sets up in this suit. The defence is made in the answer, as Mr. Leith observed, in not very precise terms, but they say that the purchase was made in consultation with the plaintiff and his son, and at that consultation they were led to believe that there was no such lien as the mortgage of 1863.

The issues were settled, and two only of them are material. The first was that the bond was altogether collusive and made without consideration for the purpose of defeating any subsequent purchasers; and the second, which has become the material one, is "Was its existence"—that is the existence of the mortgage deed—"intentionally kept secret from the defendants at the time of the purchase?" There was a third issue, which raised the question whether the litigated property being under attachment at the time of the execution, the mortgage deed was thereby rendered nugatory. Upon the first trial of these issues, the Judge of Shahabad, having found the third issue against the plaintiff, was of opinion that it decided the cause, and that it was immaterial for him to determine the other issues. However, on appeal to the High Court, that Court reversed the judgment of the Judge of Shahabad, and remanded the case for trial upon the first two issues to which attention has been called, and amended the second issue by inserting the words "by the plaintiff" after the words "was its existence intentionally kept secret." The parties went down to try that issue, which was in effect whether the plaintiff had intentionally and designedly, and with a view to deceive the defendants, kept the existence of his mortgage secret from them. That issue raises a pure question of fact. It appears that there was evidence on both sides, the witnesses on behalf of the respondents giving testimony that the negotiations took place in the presence of the appellant Munnoo Lall; that enquiries were made whether he had any mortgages, it being expected from his relation to the vendor that he might have them; and that in answer to those enquiries, he distinctly stated that he had none, and documentary evidence was also given in support of the affirmative of the issue. Some evidence undoubtedly was given on the other side of a contrary character. The Judge of Shahabad, who heard the witnesses, has given credit to those who were called on the part of the defendants. He distinctly gives credit to them, and he thinks that their evidence is corroborated not only by the documents, but by the probabilities of the case. On appeal to the High Court, the High Court affirmed his finding, after much consideration given by themselves to the evidence. The Chief Justice, who analysed the evi-

dence given by the witnesses, has pointed out various circumstances which appear to him to corroborate them. The learned Chief Justice thought that Munnoo Lall was present at the time of the negotiations, and that enquiries were made of him. Their Lordships think it is a natural conclusion to draw from all the circumstances that some enquiry would have been made of him, and they think it must be pretty evident from the whole circumstances of the case that if the defendants had had notice of the mortgage held by the appellant, they would have hesitated to purchase as they did. They took the estate, giving up their decrees, and also an attachment which they held. Their Lordships agree with what is stated by Mr. Leith that there may have been no duty upon Munnoo Lall voluntarily, and without being asked, to disclose his security ; but the case is not put simply upon the omission to give notice, but upon an actual misleading of the defendants, not merely by the acts, but by the express declarations of Munnoo Lall himself.

Under these circumstances their Lordships think that they could not have departed from their ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had felt some doubt upon the finding. But after the discussion of this case, their Lordships are disposed to agree with the findings of the Court below.

If then the issue has been properly found, it is really decisive of the case, because it supports the plain equity that a man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.

The result is that their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed and this appeal dismissed, with the costs incurred by the respondents previous to the hearing.

The 7th November 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Old document—Evidence—Possession.

*On Appeal from the High Court at Calcutta.**

Bisheshur Bhattacharjee and another

versus

George Henry Lamb and others.

Where a document, which is not proved because of its great age, and of there being no witnesses to prove it, is put forward as a document intended to operate as a merasi tenure, it is necessary in order to establish its authenticity to show that it was accompanied by possession.

This is a suit brought, as far back as the 1st July 1853, to recover certain talooks, or zemindaries, from a person who claims under and stands in the position of a purchaser at a sale in execution of a decree against the zemindar. When the plaintiff took measures to get into possession of the estates which he had pur-

* From the judgment of Trevor and L. S. Jackson, *J.J.*, in Regular Appeal No. 125 of 1860, decided 17th January 1863.

chased, two leases, called merasi leases, were set up against him; and it was contended that, having purchased only the rights of the zemindar, he had purchased subject to those two leases, and that he was entitled only to the rents under them. The rents amounted to about Rs. 17 more than the Government revenue; so that the plaintiff, if the leases are upheld, instead of purchasing, as he expected, the zemindaries free from encumbrances, purchased the value of about Rs. 17 in excess of the Government revenue.

Their Lordships will take one of those documents as an example. On the face of it, it appears to be very suspicious. Chunder Narain Ghose was the zemindar; he states in the pottah that, having purchased the talook Gooroo Dass Roy, and having fixed the annual rent at Rs. 301, "you being my grand-daughter—my son's daughter—and I having received fifteen gold mohurs of the value of Rs. 20 each from you, which were received as jotook at the ceremony of unnoprashon, do grant the same talook to you by meras lease;" so that he is to be supposed by this document to have sold to his grand-daughter for 15 gold mohurs, which she received at a certain religious ceremony, a merasi lease at the rent of Rs. 301, which was only Rs. 13 more than the Government revenue which he had to pay. That that is the value is admitted by the defendant in the answer. Indeed, it has not been disputed.

Now the Judges have found that this document had never seen the light from the time when it was granted on the 11th Srabun 1213 (the year 1806) up to the time when the purchaser under the execution sought to get into possession of the zemindary in 1854; and that from 1806 to 1854 no public notice, no mention, and ever been made of this lease. When an execution is put in, notice is given of the execution, and any persons claiming rights in the property seized under it have a right to set them up. No claim of that sort was made in the present case. One of the defendants is the son of the grand-daughter, and claims to be entitled to his mother's right, but he never set it up when the execution was put in.

Now, in order to satisfy the Court that such a document as this was a valid document, intended to operate as a merasi tenure, it would be important to prove that possession had accompanied it. The document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it. In order to corroborate the lease, another document was put in, which is called a bundobust, signed by the sons of the grandfather, who were the zemindars in 1817. Now this is an unusual document, and it does not appear for what reason it was executed. If the merasi tenure was a valid one, the grand-daughter had the right to the lease, at a rent of Rs. 301, payable yearly. The bundobust is signed by the representatives of the zemindar, and by it they make the rent of Rs. 301 (which in the pottah was payable yearly), payable by six-monthly instalments. What reason could there have been, if the grand-daughter had got the tenure at a rent of Rs. 301 payable yearly, for her agreeing to pay it by six-monthly instalments, or for the zemindar's granting her this document making it payable by instalments? One can hardly see what the object of this could have been, except for the purpose of making it appear that the lease was treated by the representatives of the zemindar as a genuine document, and thus giving it the appearance of authenticity.

The question then turns upon the point as to whether possession was taken under the document. The Principal Sudder Ameen has found that there was no possession taken under it. He says that the few jumma-wasil-bakees, chittahs, kuboolcuts, and evidence of ryots and low caste servants which had been adduced by the defendants, were all unreliable, the documents being prepared, and the witnesses tutored.

The Judges of the High Court agreed with the Principal Sudder Ameen as to the absence of possession. They said:—"Nothing but the most complete and

satisfactory evidence of good faith, coupled with reasons for the previous absence of all mention, could enable the defendants to get over so strong and significant a circumstance. Not once in half a century do these *meras* appear in Court, not once have they been sued for rent, not once have they found occasion to assert or to protect their tenure until it is brought forward as the last of a series of measures to prevent the talooks passing into the hands of the purchasers." Then they say:—"In Chunder Kant's case there is a bundobust paper of the 25th Maugh 1224, which is said to be a confirmation of his *meras*, but neither the authenticity, nor the occasion of this document, is sufficiently made out." Here, then, are two concurrent findings of the Lower Courts upon the question of fact, whether possession did accompany the documents; and both Courts have found distinctly that the possession was not in accordance with the documents; that the zemindars remained in possession from the time when those *meras* leases were alleged to have been granted up to the time when the purchaser sought to obtain possession under the sale in execution. But then certain mouzah-waree papers were produced. The Principal Sudder Ameen made certain observations with regard to those papers. The Judges of the High Court, speaking of them, say:—"They produce what are called quinquennial or mouzah-waree papers from the Collector's office of the Bengalee year 1217, in which the *meras* tenures are specified. And in the case of Jugul Kishore a register book is produced, in which these papers are referred to. But the appellants fail to show for what reason these mouzah-waree papers, filed by the zemindar in the Collectorate, should contain a specification of under-tenures with which the Collector had no concern; and as to the so-called register book, we are not informed under what regulation or rule of practice it was kept; nor have the defendants taken the evidence of the Collectorate officers to throw light on the subject." Now it is contended that the Judges were wrong in making these remarks; but the fact of the Judges making a mistake, even if they did make a mistake, with reference to the mouzah-waree papers, does not affect the other part of their finding, viz., that the leases had never been made public; that they had never seen the light; and that possession had never accompanied them. Even if they did make a mistake with regard to the mouzah-waree papers, it would not be a sufficient reason for their Lordships reversing the finding upon the other question of fact. One of the Judges who gave judgment, upon a motion for review of judgment, says:—"The sole ground taken, and ably argued at the hearing by Mr. Plowden, was that the Court had come to an erroneous conclusion with respect to the mouzah-waree papers, which had been relied on to prove the existence of the talooks. I am now inclined to believe that the papers in question, though not precisely in the form prescribed by the Regulation, were nevertheless prepared in accordance with the instructions of the Board of Revenue." Therefore he admits they were mistaken, but he says:—"Even if this be fully conceded, the fact will not outweigh the other considerations which led us to disbelieve the real existence at the present time of the tenures in dispute. And with that feeling of disbelief upon our minds, produced by a review of the whole evidence, we certainly could not reverse the judgment of the Court below, simply because it had assigned reasons for its judgment which did not appear to be extremely cogent."

The Principal Sudder Ameen's judgment is also objected to. It is said that he has given certain reasons which are not borne out by the evidence, and it must be admitted that there are mistakes in the judgments both of the Principal Sudder Ameen and of the High Court, and that they are perhaps not so satisfactory as they might have been; but the question is whether their Lordships are satisfied that they have come to a wrong conclusion upon the evidence.

Now, so far from that being the case, their Lordships are of opinion that if they had been reviewing the judgment of the Principal Sudder Ameen, they would have arrived at the same conclusion as the High Court did, that the documents

were not genuine documents intended to operate in the way in which they professed to operate.

Under those circumstances, their Lordships are of opinion that the rule by which they are usually guided in not overturning the decision on a point of fact of the Lower Court, when that decision has been affirmed by the High Court, must apply in the present instance.

They, therefore, will humbly advise Her Majesty that the decision of the High Court be affirmed, together with the costs of this appeal.

The 19th November 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Mitacshara law—Succession—Family custom—Law of primogeniture.

*On Appeal from the High Court at Calcutta.**

Mussamut Sheo Soondooree

versus

Pirthee Singh and others.

The question in this cause was the right of succession to Talook Sunkra, which had been held by *S*, the common ancestor of plaintiff and defendant, and settled with him after resumption by Government.

Plaintiff's case was that *S* left two sons, *M* and plaintiff, who was a minor; that *M* took possession and, in law, held for himself and infant brother; that on *M*'s death, his son *D* took his place as managing member of the joint family; and that on his death, leaving only a daughter (the defendant), plaintiff became entitled under the Mitacshara to the whole estate.

The defendant's case was that plaintiff was illegitimate, and that the estate descended from *D* to herself, an alternative defence being that, according to family custom, the right of inheritance had been invested in the line of the eldest son.

The only issues settled were—

1. Whether respondent (plaintiff) was the legitimate son of *S*.
2. Whether the law of primogeniture obtained in *S*'s family.

Accepting (as the Privy Council did) the High Court's finding that plaintiff had established his legitimacy, the estate which was admitted to be ancestral and presumed to be joint would, in the absence of a special family custom, descend to his two sons, leaving plaintiff entitled to one moiety at least. Whether he would be entitled to more would depend on the general law of succession to be applied. The Privy Council remanded the case for trial of the following issues :—

1. Whether *S* left any other legitimate sons than *M* and plaintiff; and if any are dead, whether they have left any male descendants.
2. Whether the estate of *S*, which was formerly within Zillah Beerbhoom, having been transferred to Zillah Bhaugulpore, the succession thereby became regulated by the law of the Mitacshara; or whether, by reason of any local or family custom, it continued to be governed by the Dayabhaga.

This appeal was heard some months ago. Whilst it stood for judgment their Lordships were asked to suspend their decision in the hope that a proposed compromise would be effected. They have since been informed that the negotiations for a compromise have failed, and that the parties desire to have their Lordships' judgment; which I now proceed to deliver :—

The question in the cause was the right of succession to an estate called Talook Sunkra, forming part of Tuppa Belputta in Zillah Bhaugulpore. The estate was unquestionably held by Soomaer Singh, the common ancestor of the appellant and respondent, and, having been resumed by Government with the

* From the judgment of Kemp and Glover, *J.J.*, in Regular Appeal No. 48 of 1866, decided 27th July 1867,—8 W. R. 261.

rest of Tuppa Belputta, was temporarily settled with him in 1840. Soomaer Singh died in March 1851.

The case of the respondent (the plaintiff in the cause) as stated in the plaint is, that Soomaer Singh left two sons, viz., Manick Singh and the respondent, the latter being a minor at the date of his father's death, and continuing to be so until March 1865; that Manick Singh took possession of the property, but, at least in law, held it on behalf of himself and his infant brother as members of a joint and undivided Hindoo family; that on Manick's death, his son Durbejoy took his place as managing member of the joint family; that on the death of Durbejoy, leaving only a daughter, the respondent became entitled, under the law of the Mitacshara, which is the law of Zillah Bhaugulpore, to the whole estate, the daughter (the appellant) being entitled only to maintenance; but that, nevertheless, he had been dispossessed by the Court of Wards, acting on her behalf, which had since procured a permanent settlement of the property to be made in her favor.

The case made by the Court of Wards on behalf of the appellant is that Soomaer Singh left only one legitimate son, viz., Manick (the respondent being illegitimate); and, accordingly, that the estate descended from Soomaer to Manick, from Manick to Durbejoy, and from the latter to the appellant. The answer set up also an alternative defence, viz., that, according to the custom and usage of the family of Soomaer Singh and the zemindars in the neighbourhood, the right of inheritance has generally been vested in the line of the family of the eldest son in succession. The only issues settled in the cause (p. 72) were—

1. Whether the respondent is the legitimate or illegitimate son of Soomaer Singh.

2. Whether the law of primogeniture obtains in the family of Soomaer Singh or not.

A further question, which does not appear on the pleadings, was raised in the course of the suit, viz., whether the district in which the estate is situate (Tuppa Belputta), having been transferred as late as 1795 from Zillah Beerbhoom, of which it was theretofore part, to Zillah Bhaugulpore, the general law of succession to be applied to the case was that of the Dayabhaga, or that of the Mitacshara.

The respondent being out of possession, the burden of maintaining the first issue, of course, lay upon him. And if he has not done so, his suit must stand dismissed. But if it be assumed that, as the High Court has found, he has succeeded in establishing his legitimacy, it becomes material to consider what in such a case would be the remaining questions between the parties.

The property is admitted to be ancestral; and the family, if not admitted, must be presumed, to be joint. Hence, in the absence of a special law of descent, founded on family or other custom, the estate at Soomaer's death would descend to his two sons as Hindoo co-parceners; and on Manick's death, Durbejoy would succeed only to his father's moiety. The respondent, therefore, would unquestionably be entitled to at least a moiety of the estate.

Whether he would be entitled to more depends on the question, what is the general law of succession to be applied? Under the law of the Mitacshara he would succeed to Durbejoy's share, subject to his daughter's right to maintenance; under the law of the Dayabhaga, she would succeed to her father's share in preference to her uncle.

To establish, therefore, the appellant's title to the whole estate, she must prove a special and customary rule of succession; to establish her title to even a moiety, she must show that the succession is to be regulated by the law of the Dayabhaga.

Again, the second issue as settled, does not comprehend the whole of what is essential to the appellant's title to the whole estate. For, let it be granted that the rule of primogeniture did obtain in Soomaer Singh's family, that circumstance

would, no doubt, support the title, first of Manick, and afterwards of Durbejoy, to the estate as impartible. But on the death of Durbejoy the next male member of the joint family would, under the law of the Mitacshara, be entitled to succeed to the ancestral estate, though impartible, in preference to the daughter of the last holder. This was admitted in the Shivagunga case,* although, on the ground that the impartible estate in question was the separate acquisition of the last holder, it was there ruled that it ought to descend, according to the rule of succession to separate estate, to his widow. Hence, to make out the appellant's title to the whole estate, it must be shown both that by custom it was impartible, and descended according to the law of primogeniture; and also that either by special family custom, or by the operation of the law of the Dayabhaga, as the law which should govern the case, she, on the death of her father, was entitled to succeed to it, in preference to her great-uncle.

It is next to be considered what are the proper findings on the settled issues.

The Principal Sudder Ameen altogether omitted to decide the first. The High Court, on a careful review of the evidence, came to the conclusion that the plaintiff (the present respondent) had established his legitimacy; and, at the close of the argument at the Bar, their Lordships were clearly of opinion that no case had been made for disturbing that finding.

Upon the question of the alleged family custom, the decisions of the two Lower Courts were in conflict; the Principal Sudder Ameen holding that the evidence showed that the estate was impartible, and that the appellant was entitled to succeed to it. It is not, however, very clear whether he rested the appellant's right of succession on family custom, or on the law of the Dayabhaga, treating that as the law which was to govern the case. The High Court held that there was no proof of any custom which varied the ordinary law of inheritance; that the law to be applied was that of the Mitacshara; and, consequently, that the respondent was entitled to recover the whole estate.

The point to be first considered on this part of the case is, whether the first of these propositions of the High Court is correct.

The fresh evidence adduced by the appellant in support of the alleged custom is very slight. Of the five witnesses called by her, two only speak to the custom. One of these does not put it higher than a custom by which the eldest son takes the whole estate; and, in answer to the plaintiff's pleader, admits (thereby recognizing the applicability of the Mitacshara) that on the death of the eldest son, after he has taken possession of the property, leaving only a daughter, the brother would take before the daughter. (See p. 72, line 39.)

The documentary evidence does not carry the case much further. Mr. Sutherland's Report does not show more than that in the year 1819 there was great confusion and uncertainty as to the nature of the subtenures in Tuppa Belputta; that Soomaer Singh was then claiming many villages to which he was not entitled; that the documents of title produced by him were untrustworthy; and that if the villages specified in List No. 1, p. 35 (of which only two are identified as villages now in dispute), were originally held on a ghatwallee tenure, the ghatwals in that district (see p. 29, line 50) had virtually ceased to be such, and had become mere under-farmers. It does not appear what was done on this report; but it is certain that many years after its date, i.e., in 1840, the talook in dispute was resumed by Government, and settled as ordinary malgoozary land with Soomaer Singh.

The other documentary evidence of the appellant proves little or nothing. But it is remarkable that the proceedings for the mutation of names on the deaths of Soomaer and Manick, which form part of it, contain the usual enquiry whether there were other heirs of the deceased; and that in neither instance was the claim expressly asserted as one founded on the right of primogeniture.

* 2 W. R. P. C. 31; 1 Suth. P. C. R. 520.

On the other hand, it is singular that the strongest evidence in favor of the position that the estate had been treated as in the nature of a raj is to be found in the oral testimony given on the part of the respondent. (See in particular witness No. 5, p. 28.) But this evidence would at most prove that the property, though held as a raj, belonged to a joint family, of which, not invariably the eldest son of the last holder, but the most competent male member, was entitled to succeed as rajah ; and, further, that the original possessions of the family, viz., those held by Jye Singh, had been the subject of partition.

On the whole, whatever may have been the earlier history of the estate, which was, at most, only a subtenure of some kind under the Rajah of Beerbhoom, there seems to their Lordships to be no sufficient ground for disturbing the conclusion of the High Court, that since the resumption it is to be treated as subject to the general law of succession.

The result of this is that, if there are no legitimate descendants of Soomaer Singh other than the respondent and the appellant, the respondent is entitled in any case to recover half the estate ; and, if the general law of succession is that of the Mitacshara, to recover the whole.

What, then, is the general law of inheritance by which the case is to be governed?

The High Court applied the law of the Mitacshara as that which undoubtedly rules in Zillah Bhaugulpore ; and refused to listen to the plea founded on the transfer of Tuppa Belputta from Beerbhoom to Bhaugulpore in 1795, treating it as "started at the eleventh hour on appeal." This last position is not, in their Lordships' view, correct ; because the point is expressly taken by the Printipal Sudder Ameen in his judgment, and seems to have been one ground of his decision. (See page 77, line 40.)

The applicability of the Dayabhaga to the case may depend upon either of two circumstances. It may be that the whole of the transferred district has continued to be governed by its old law, in which case the law would be an exceptional local law ; or the particular family, though now domiciled in a zillah governed by the Mitacshara law, may have continued to retain the law of the Bengal school as an exceptional family law. If the first state of things exists, the fact must be notorious to those who administer justice in that part of the country. The second state of things would require to be shown by evidence, and the record contains no evidence on this point. Nor, the pleadings and issues being what they are, could it be expected to do so ?

The two Lower Courts being, in fact, in conflict as to the law applicable to the case, and the question having been insufficiently tried, it seems to their Lordships desirable to remand the cause for further enquiry on this point.

The case has hitherto been dealt with as if there could be no dispute as to the property, except between the appellant and respondent. The High Court has almost assumed this to be so, remarking, incidentally (page 82, line 55), that of the four sons of Soomaer, other than Manick, Pirthee was the only survivor. On the argument of the appellant, however, it was shown, that on the face of the oral evidence given for the respondent, it was stated, that of these sons, Teeluck at least was legitimate, and had left issue (see pp. 24 and 25). This fact (if true) would affect the original shares of the respondent and Durbejoy in Soomaer's estate ; though, unless Teeluck outlived Durbejoy, it would not affect the respondent's right to succeed to that person's share, whatever it may have been.

The respondent, having to recover by force of his own title, is bound to show that the whole inheritance of Soomaer is, according to the law of the Mitacshara, now vested in him ; and his own evidence leaves so much doubt on this point, that a remand upon it also seems to be necessary.

The learned Counsel for the appellant sought also to set up a *jus tertii*, as regards some of the earlier generations of this family, appearing in the Genea-

logical Table at page 80. It seems to be clear that there was a partition of some kind amongst the sons of the original ancestor Jye Singh ; but it is not so clear that the share of Tribhoobun, one of these sons, was ever divided amongst Soomaer and his other sons.

Their Lordships, however, are not disposed to invite litigation, by extending the enquiry beyond the descendants of Soomaer. Both parties have come into Court representing him to have been the sole owner of the estate; and if there were co-sharers with him, and there are now descendants of such co-sharers, it will be open to them, whatever may be the result of this suit, to assert their title in another and independent suit.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree under appeal in so far as it declares that the respondent was the legitimate son of Soomaer Singh ; to reverse the rest of the said decree ; and to remand the cause to the High Court, with directions to determine the appeal from the decree of the Principal Sudder Ameen, pursuant to the provisions of s. 354 of Act VIII of 1859, after causing the following issues to be tried, viz.:—

1st.—Whether Soomaer Singh left any and what legitimate sons, other than Manick Singh, in the pleadings mentioned, and the respondent ; and if so, whether they are living or dead ; and if any of them are dead, when they respectively died, and whether they have left any and what male descendants.

2ndly.—Whether the estate of Soomaer Singh, which was formerly within the limits of Zillah Beerbhoom, having been transferred to Zillah Bhaugulpore, the succession thereby becomes liable to be regulated by the law of the Mitacshara ; or whether, by reason of any local or family custom, such succession, notwithstanding the transfer, continues to be governed by the law of the Dayabhaga.

Their Lordships will also recommend that the costs of this appeal on both sides be taxed ; and that the amount of such taxed costs be certified to the High Court, and be dealt with by that Court as part of the costs in the cause.

The 27th November 1873.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Execution proceedings—Bona fides—Limitation—Mistake.

*On Appeal from the High Court at Calcutta.**

Benoderam Sein and others

versus

Brojendro Narain Roy.

Mr. Doyne for the Appellants.

Mr. J. Cutler for the Respondent.

Where a charge is made of want of *bona fides*, it lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

In considering whether certain execution proceedings were *bonâ fide* or not, their Lordships did not confine themselves to one particular attempt to revive execution, but felt bound to look at the whole course of the proceedings : and where they found that the first proceeding had been prosecuted with

* From the judgment of L. S. Jackson and Markby, J.J., in Miscellaneous Regular Appeal No. 46 of 1869, decided 20th March 1869,—11 W. R. 269.

effect, and that in a third attempt against which the judgment-debtor set up limitation the decree-holder had successfully opposed him in two Courts, their Lordships thought there was strong evidence of a *bonâ fide* desire to execute the decree.

Even where a proceeding is ineffectual because of some mistake in the particular step advised, if it was taken to enforce the decree it protects the decree-holder from the operation of the statute of limitations.

This was an appeal from a decree of the High Court of Judicature at Calcutta, dated the 20th March 1869, reversing a judgment of the Principal Sudder Ameen of Beerbhoom, dated the 1st December 1868. Such judgment and decree were respectively given and passed in an execution case wherein the present appellants except Gunesh Chunder Sein and Brojomohun Sein, the predecessor in title of the last-mentioned appellant were decree-holders, and the present respondent was judgment-debtor.

By a decision and decree of the Judge of the Civil Court of Zillah Beerbhoom, dated the 5th April 1855, and made in a suit wherein the appellant, Benoderam Sein and others were plaintiffs, and Chundernarain Roy was defendant, a sum of Rs. 7,460-8, together with Rs. 542-10 as costs, was decreed to be paid by the defendant to the plaintiffs.

On the 6th August 1857, a petition for execution of the last-mentioned decree was filed by the then decree-holders, praying that the amount of such decree might be realized by attachment and sale of the properties scheduled to the petition. On the 23rd October 1859, it was ordered that notice should be issued upon the judgment-debtor, and orders were subsequently made for the attachment and sale of part of the said property; and on the 5th April 1858, the same was sold by auction for Rs. 6,550. On the 8th January 1859, an order was duly made confirming the said sale. The said sum of Rs. 6,550 was in due course received by the decree-holders, and on the 26th March 1859 an order was made to strike the case off the file.

On the 31st December 1861, the decree-holders presented a petition for the revival of execution of the said decree, claiming Rs. 5,114-2, and praying that the judgment-debtor might be summoned and ordered to pay the said amount due, with interest till the date of realization and costs. On the 13th April 1863, the Principal Sudder Ameen of Zillah Beerbhoom made an order for sending the papers in the case to the Court of the Judge of Zillah Moorsshedabad. The papers were accordingly so sent, and on the 29th April 1863 the last-mentioned Judge made an order, under s. 216 of the Code of Civil Procedure, for the service of a notice upon the judgment-debtor. The notice was served by a copy thereof being stuck upon the front door of the house of the judgment-debtor. On the 6th May 1863, the Principal Sudder Ameen of Zillah Beerbhoom made an order "that the vakeel of the decree-holders do take the best step he knows in the course of three days." On the 11th August 1863, the said Principal Sudder Ameen made an order in the following terms:—"Whereas the vakeel of the decree-holders did neither furnish the list of properties nor take any other step up to this day, hence it is ordered that at present the case be struck off from the arrear file." On the 23rd March 1865, another petition for the revival and execution of the decree was filed in the Court of the Principal Sudder Ameen of Zillah Beerbhoom by Benoderam Sein, Brojomohun Sein, Nittyannund Sein, and Boidonauth Sein, as decree-holders, against Chundernarain, and, after his demise, this respondent, as his son and heir, as judgment-debtor, praying that the case be revived, and the decretal amount be ordered to be given to the decree-holders, after realizing the same by public sale of the properties left by the judgment-debtor. On the 2nd September 1865, the Principal Sudder Ameen ordered that a notice should be issued. On the 31st May 1866, the Principal Sudder Ameen made an order for sending the necessary papers, together with a certificate, to the Zillah Judge of Dinagepore for execution of the said decree, and that the execution case should be struck off in the Court of Zillah Beerbhoom.

The case was subsequently struck off from the file of the Court at Dinagore for default. On the 25th March 1867, the decree-holders took proceedings in the Court of Dinagore to revive execution of the decree, and the judgment-debtor having notice, appeared both in the Court of Beerbhoom and in the Court of Dinagore, and in both objected that execution of the decree was barred by limitation. On the 29th June 1867, the Judge of Beerbhoom overruled the objection. The Judge of Dinagore allowed the objection, and refused to execute the decree. The decree-holders appealed to the High Court at Calcutta against the decision of the last-mentioned Judge, and the appeal was on the 11th May 1868 heard by Mr. Justice Loch and Mr. Justice Glover, who ruled that the Judge ought not to have admitted and adjudicated upon the application, and held that the order refusing to execute the decree must stand, with liberty for the decree-holders to apply to the Court which passed the decree, but they set aside the judgment on the point of limitation on the ground that the Judge ought not to have entered into it.

On the 18th May 1868, the appellants, except Gunesh Chunder Sein and Brojomohun Sein, filed a petition against this respondent as judgment-debtor in the Court of the Subordinate Judge of Zillah Beerbhoom, praying that, after having served notice upon the judgment-debtor, an order be passed for duly sending a certificate to the Court of the Judge of Dinagore for the attachment and sale of the property which had been previously attached. On the 16th July 1868, notice of the application was served on the respondent. On the 7th August 1868, the respondent filed a petition by which he set up the plea of limitation.

The Subordinate Judge rejected the plea, and ordered that a certificate be sent.

The High Court on appeal reversed the decision of the Lower Court, and held that execution of the decree was barred.

Mr. Doyne, for the appellant, contended that execution was not barred, and that all the appellant's proceedings to obtain execution were *bonâ fide*. He relied upon the judgment of the Judicial Committee in *Maharajah Mahtab Chand Bahadoor v. Bulram Singh* (XIII Moore's Indian Appeals 479; S. C. 14 Weekly Reporter, P. C., 21.)*

Mr. John Cutler, for the respondent contended that the proceedings of the appellant were not taken *bonâ fide*, and therefore could not keep the decree in force; that, if execution were once barred, it could not be revived (*Ram Dhun Roy v. Khajah Abdool Gunnee*, 9 W. R. 390); and that it was barred in this case by the interval that elapsed between the 26th March 1859 and the 23rd March 1865, the proceedings of the 31st December 1861 not being *bonâ fide* proceedings.

SIR MONTAGUE SMITH delivered the following judgment:—

This appeal arises out of execution proceedings which were taken to obtain execution of a judgment obtained by the appellants against Chundernarain Roy, the father of the respondent.

The original judgment is dated on the 5th April 1855, and was obtained in the Civil Court of Zillah Beerbhoom for Rs. 7,400 and costs.

The only question which arises is whether the proceedings in execution, which were commenced on the 18th May 1868, are barred by the operation of s. 20 of the Limitation Act XIV of 1859. The ground on which it is urged that limitation is a bar is, that no proceeding had been taken to enforce the judgment within three years next preceding the application for execution in 1868 within the meaning of the Act.

Now, unfortunately for the appellant, in this case he has been obliged to resort to no less than four different attempts to obtain execution of his judgment. The first effort he made was to a certain extent fruitful and successful, for he obtained a sum of Rs. 6,650 in part satisfaction of his judgment. The proceedings in which that sum was realized commenced on the 6th August 1857, and it appears from the

* See p. 351 ante.

schedule to the petition to obtain execution in that year that he sought to attach three estates, one in Zillah Beerbhoom, and two in Zillah Moorsshedabad. The Court, rightly or wrongly, put him to his election whether he would take out execution first against the estate in Zillah Beerbhoom, or in the other Zillah. It appears that he elected to attach the estate in Zillah Beerbhoom; and having attached it, proceedings were taken by the defendant to obstruct that execution,—proceedings which went to the High Court. Those proceedings were undoubtedly prosecuted by the plaintiff in a vigorous manner and with success, for he obtained ultimately the sale of the estate, and under that sale obtained payment of the sum already adverted to. But it appears that the obstruction opposed by the defendant delayed that payment until the 17th March 1859. The execution proceeding was then at an end so far as that estate was concerned, and on the 26th March of that year it was struck off the file.

The next proceeding is on the 31st December 1861. That was, undoubtedly, within three years of the former. The execution was commenced by petition, praying for the arrest of the defendant. It appears there was then remaining due on the judgment for principal and interest a sum of upwards of Rs. 5,000. The application being more than a year after the date of the last order in execution, the Court required that notice should be served upon the defendant in pursuance of s. 216 Act VIII of 1859, and it appears that a formal notice was issued by the Court on the 13th April 1863, which was sent to Moorsshedabad for service. It was put into the hands of the regular officer of the Court, and the Nazir made a report to the Court that he had in vain endeavored to effect personal service of it, but had affixed it to the front door of the defendant's house. That report was in May 1863. It seems that no arrest was made. Why it was not made does not certainly appear, but the plaintiff apparently desired to effect the arrest. If he did not mean to arrest the defendant, why did he obtain the order, get it transferred to Moorsshedabad, and go to the expense of paying the fees of the officer for executing it? It may be that there is not sufficient to show that the defendant was absconding, but there is nothing to show that he was in the way; and when the charge is made of want of *bona fides*, it certainly lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

This last proceeding was, undoubtedly, abortive, but within three years of the report of the Nazir, that is, on the 23rd March 1865, the defendant having died in the interval, a fresh petition to execute the decree by an attachment and sale of some property in Zillah Dinagepore was presented. It was presented to the Judge of Beerbhoom who made an order, of the date of the 31st July 1866, that copies of the decree and the application for execution should be sent to Dinagepore in order that the Judge there might execute it. It seems that the decree was taken there, and then began proceedings, which emanated from the defendant, to set aside the execution on the ground that it was barred by limitation. The Judge at Dinagepore decided that limitation was a bar. There was an appeal to the High Court by the present appellant, and he was successful in that appeal. The High Court reversed the order below on the ground that the Judge at Dinagepore had no authority to make it. In the meantime, pending that appeal, the defendant presented a petition to the Judge of Beerbhoom, praying that the proceedings might be dismissed on the ground that they were barred by limitation. The Judge of Beerbhoom decided, upon the issue raised on that petition and the petition in answer, that the proceedings were not barred by limitation. His order rejecting the objection was made on the 29th June 1867, and in May 1868 the present proceedings were commenced.

Now it was not contended by Mr. Cutler that there was an interval of three years between the proceedings which have been narrated, and which were taken on the part of the appellant; but his sole contention before their Lordships to-day

was that these proceedings were not *bona fide*, and when pressed during the argument to show in what respect they were not *bona fide*, and to what particular proceedings he alluded as open to that charge, he referred to those of 1861, which were commenced by the petition praying for the arrest. He says that those proceedings were not *bona fide*, first, because there was delay to take them after 1859; next, that the defendant was not arrested; thirdly, that the plaintiff petitioned for an arrest instead of an attachment.

The delay may have been caused by the plaintiff making enquiries about the defendant's property before applying for an arrest. Probably, though he had inserted in his schedule estates in Moorshedabad, of which he had some knowledge, there was difficulty in reaching them, and he may have thought that if he arrested the defendant he might obtain payment under the compulsion of that arrest. At all events it is a probable solution of the delay. He may have thought that instead of incurring the difficulty of following the estates, perhaps in other names, it would be a more cogent mode of obtaining the money to arrest the defendant.

Their Lordships, in considering whether these proceedings were *bona fide* or not, cannot be confined to this particular attempt to revive the execution in 1861, but must look at the whole course of the proceedings; and when they find that the first proceeding to obtain execution was not only prosecuted, but prosecuted with effect, and a large sum obtained; when they find also that in the third attempt, when the defendant set up the defence of limitation and attempted to bar the proceeding, the appellant opposed him, and successfully opposed him, in two Courts, going up to the High Court; they think the case affords strong evidence of a *bona fide* desire to execute his decree, which was thwarted and baffled by the defendant.

Their Lordships are unable to concur in the view taken by Mr. Justice Markby that these proceedings appear to have been taken merely to keep the decree alive for some ulterior purpose. The learned Judge does not explain what ulterior purpose he supposes the plaintiff had in view, nor does he suggest any. There is no doubt it would be, what he calls a "nefarious practice" for plaintiffs having decrees to keep them for some wrong motive hanging over the heads of defendants; but there is not the slightest evidence that any such motive existed in this case.

Their Lordships, therefore, think that upon the facts there is not only an entire want of proof of *mala fides*, but strong evidence of a real and in some respects (though there are delays which are not quite accounted for) a strenuous prosecution of these proceedings.

Their Lordships find that Mr. Justice Jackson gave as one of his reasons for thinking the statute was a bar that "no steps of an effectual kind were taken." Now it is perfectly clear that the enquiry, whether the steps taken were in fact effectual, can only be material, provided the proceeding be in its nature one to enforce the judgment, so far as it may be an element in considering the question of *bona fides*.

It constantly happens in these executions that proceedings are taken which are ineffectual, because of some mistake in the particular step which has been advised. The point was before this Committee last year in a case of Roy Dhunput Singh v. Madhomotee Debea. (The judgment was delivered on the 2nd May 1872.)* In that case the plaintiff had obtained two decrees. He had attached some money under decree A, and then he filed a petition by mistake in suit B, praying to have the attached amount paid out to him. When it came before the Court, the defect was pointed out, and the petition was of course abortive and ineffectual. In a subsequent execution suit under decree B, it became necessary for the plaintiff to establish that he had taken a proceeding within three years of the proceeding in execution which he was then prosecuting, and to rely upon

* 18 W. R. 76; and p. 615 ante.

the former abortive petition as a step to enforce the decree. This Committee held that although it had been of no avail by reason of a mistake, it was a step which the plaintiff had taken to enforce his decree, and therefore that it did protect him from the operation of the statute of limitations.

For these reasons their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, to affirm the decree of the Principal Sudder Ameen, and to order that the respondent do pay the costs of this appeal and the costs in the High Court.

The 28th November 1873.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Admission—Mahomedan law—Heirship constituted by acknowledgment—
Act XXVII of 1860.*

*On Appeal from the High Court at Calcutta.**

Mirza Himmut Bahadoor

versus

Sahebzadee Begum and another.

In an application by *H*, *E*, and *B* for a certificate under Act XXVII of 1860, on proof of heirship to a deceased Mahomedan lady; it was admitted that *H* and *E* were the sons of the deceased, and as such claimed her property :

HELD that such an admission did not necessarily imply that *H* and *E* were to all intents and purposes brothers and heirs to each other ; and that to give such an effect to the admission would be to carry the doctrine of heirship constituted by acknowledgment further than is warranted by the principles of the Mahomedan law.

This was a case in which Mirza Himmut Bahadoor was the plaintiff ; Sahebzadee Begum and Mussamut Bismullah Begum, one being the widow, and the other the illegitimate sister, of Mirza Ekbal Bahadoor, were defendants. The case of the plaintiff was that he was one of the co-heirs of Mirza Ekbal. If this point were decided in his favor, other questions would arise respecting the title of the widow to dower, and the title of the sister to maintain possession of certain property of Ekbal which she was possessed of ; but if the question of heirship be decided against Mirza Himmut, none of these questions arise ; and their Lordships are of opinion that the judgment of the High Court is right, which decided this question against him.

In the Court below a question was raised on which a good deal of evidence was given, and which was discussed at great length, whether or not Mirza Himmut and Ekbal were the legitimate sons of their mother Baratee and their father Modenarain Singh ; but the Court below, as well as the Court above, have come to the conclusion that there was no marriage between their parents, and it must be taken, and indeed is admitted, that they were illegitimate. The Court below, held, however, that notwithstanding this illegitimacy, and notwithstanding therefore that by the law of the Sheah sect of the Mahomedans (which by admission of parties applies to this case) the plaintiff would not be heir of Ekbal, that Ekbal had so acknowledged the plaintiff to be his heir, that the plaintiff acquired that

* From the judgment of Kemp and Glover, *J.J.*, in Regular Appeal No. 17 of 1869, decided 19th December 1869,—12 W. R. 512.

status, and was entitled to succeed to his property as such. The High Court, agreeing with the Court below upon the first question as to the legitimacy, reversed its decision upon the second point, being of opinion that there was no proof of any such acknowledgment on the part of Ekbal; and the sole question before their Lordships now is whether or not there was such an acknowledgment. There is no question that, under the Mahomedan law, acknowledgments may be made of such a kind as to operate not merely as admissions but as actually conferring certain descriptions of *status*, among others a *status* of heirship, limited or general, as the case may be, upon the persons acknowledged. With respect to acknowledgments of relationships, their Lordships have been referred to Mr. Baillie's "Digest of Mahomedan Law," Part I., published in 1865, and they find it there thus laid down:—"The acknowledgment of a man is valid in regard to five persons,—his father, mother, child, wife, and mowla, because in all these cases he acknowledges an obligation, and it is not valid except for these," and then, further, after giving cases of those acknowledgments which have been stated to be valid, on page 406 this is found:—"The acknowledgment of a man is not valid with respect to any other persons than those before mentioned, such as a brother, or a paternal or a maternal uncle, or the like," so that if this passage stood without further explanation, it would lead to the conclusion that, by the Mahomedan law, an acknowledgment of one person by another as his brother, and as such his heir and successor, would have no validity. However, the passage is further explained thus:—"When it is said that the acknowledgment of a man is not valid with respect to any other than those above mentioned, it is only meant that it is not obligatory on any other except the acknowledger and the acknowledged; but with regard to such rights as affect them only the acknowledgment is valid, so that if one were to acknowledge a brother, for instance, having other heirs besides who deny the brotherhood, and the acknowledger should die, the brother would not inherit with the other heirs, nor would he inherit from the acknowledger's father if he denied the descent, but he would be entitled to maintenance, as against the acknowledger himself, during his life." The acknowledgment contended for consists in this and this only:—It appears that after the death of the mother a proceeding in the Civil Court of Gya was instituted on the 20th January 1866, in which it is recited that Mirza Himmud Bahadur, Mirza Ekbal Bahadur, and Mussamut Bismullah Begum, sons and daughter of Mussamut Baratee Begum, deceased, by their pleaders, prayed for a certificate under the provisions of Act XXVII of 1860, on the proof of heirship to the said Mussamut Baratee Begum. That, coupled with this further fact which appears, that these three did by some means or other obtain possession of some property belonging to an elder sister, apparently in the character of her heirs, is relied upon as such an acknowledgment as to constitute the *status* of full brotherhood and heirship on the part of the plaintiff to the defendant. Their Lordships are of opinion that it would be carrying the doctrine of heirship constituted by acknowledgment to an extent to which it has never been carried before, and farther than the principles of the Mahomedan law as to acknowledgments warrant, if they were to give such an effect, as has been contended for, to what is but an argumentative or inferential admission at best. All that is directly admitted by the statement in Court (the language being that of the pleader of the parties) is that the plaintiff and the defendant were the sons of Baratee, and as such claimed her property. It is sought to deduce from this that they must therefore necessarily be taken to have declared, not only that they were sons and heirs of Baratee, but that they were to all intents and purposes brothers and heirs to each other,—“full brothers” is the term in the plaint,—and that they were entitled to succeed to each other's property, not only property obtained from Baratee, but any property which may have been obtained by either of them from any source whatever. It appears to their Lordships that it would be very unduly stretching the purport of this

document to give it any such interpretation. It does not appear to their Lordships by any necessary implication that they must have intended to constitute each full brother of the other for all intents and purposes as has been contended. It may be that they sought to avail themselves of the Soonee Mahomedan law, whereby, as it was admitted, they would, although illegitimate, be heirs of their mother. If that were so, the settlement in this document amounts to no admission at all, but simply to a statement of fact, and to the inference which the law would derive from that fact. But be that as it may, their Lordships are of opinion that it is by no means shown, and no inference can be fairly deduced, that it was the intention of the parties by this document to constitute each brother to the other, so as to make him an heir to his estate.

This being their Lordships' opinion on the question of fact, it is unnecessary for them to consider the question whether the widow, who is generally included with the other sharers in the term "heirs," but is not, like sharers, entitled in the absence of "residuaries" to a "return," is or is not an heir in the sense in which the word is used in the passage above cited, and also in the passages in the Hedaya to which their Lordships were referred in the course of the argument, so that her existence would have destroyed the effect of the acknowledgment, had one been proved.

On these grounds their Lordships are of opinion that the judgment of the High Court is right; and they will humbly advise her Majesty that it be affirmed, and this appeal dismissed with costs.

The 4th December 1873.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Toda giras haks—Immoveable property—Limitation—Act XIV of 1859 s. 1.
cls. 12 & 16.*

On Appeal from the High Court at Bombay.

Maharana Futtehsangji Jaswantsangji

versus

Dessai Kullianraiji Hekoomutraiji.

In a suit to establish plaintiff's right to a toda giras hak upon defendant's inam village, and to recover arrears due in respect of that hak, the substantial question was whether the suit being for the recovery of an "interest in immoveable property" fell within cl. 12 s. 1 of Act XIV of 1859, or was to be governed by cl. 16.

HELD that the determination of the question depended upon the general construction to be given to the terms "immoveable property" and "interest in immoveable property" as used by the Indian Legislature: and that the term "immoveable property" comprehends all that would be real property according to English law, and possibly more.

HELD further that whatever may have been the origin of the hak, it must be assumed to be now a right to receive an annual payment which has a legal foundation and of which the enjoyment is hereditary, and that the liability to make the payment is not personal but attaches to the inamdar *virtute tenuræ*.

HELD accordingly that the interest of the hakdar was an "interest in immoveable property" within the meaning of Act XIV of 1859, and that the suit would be governed by the limitation of 12 years provided by cl. 12 of s. 1.

The suit which has given rise to this appeal was brought by the appellant in January 1865, against the respondent, to establish the right of the former to a

toda giras hak upon the inam village of the latter, and to recover the arrears due in respect of that hak, for the seven years preceding the commencement of the suit. The annual amount alleged to be payable by the respondent to the appellant is Rs. 501 ; though it may be questionable on the evidence whether this sum is the gross amount of the hak, or the net balance after deducting certain small payments and allowances to other persons which are entered in the accounts.

The respondent admitted, as his father in other proceedings had admitted, the existence of the hak, and that it had been paid by the inamdars of the village up to the Samvat year 1914 (corresponding with 1857-58) ; but contended that his father had then properly exercised a right to put an end to it ; and, further, that the present suit was barred by the law of limitation.

The issues settled are at page 20 of the Record ; but the only one which is to be considered on this appeal is whether the claim is within the appropriate period of limitation or not. Of the remaining issues, one, which is no longer treated as material, was disposed of in the appellant's favor, and the others have not been tried.

The substantial question considered in the Court below was, whether the suit, being one for the recovery of an "interest in immoveable property," fell within cl. 12, or was to be governed by cl. 16 s. 1 of Act XIV of 1859. In the former case, the period of limitation would be twelve years, and the suit would be brought in time ; in the latter case, the period of limitation would be only six years, and the suit would be barred.

The determination of this question involves the consideration of the nature of a toda giras hak. A good deal of learning on this subject is to be found in the case of the Collector of Surat *v.* Pestonjee Rutonjee, 2 Morris's Cases in the Sudder Dewanny Adawlut of Bombay (for 1855), p. 291, and in the case of Sumbhoolall Girdhurlall *v.* The Collector of Surat, 8 Moore's I. A., p. 1,* to which their Lordships have been referred. They do not think it necessary to go at any length into this. It is sufficient to state that these annual payments, although originally exacted by the Grasias from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments ; that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by inam villages to fall on the inamdar. And since the decision of the before-mentioned case in the 8th vol. of Moore, it cannot be questioned that the toda giras haks of the former class constitute a recognized species of property capable of alienation, and of seizure and sale under an execution. How far that decision may govern the rights of an inamdar, and some of the questions raised by the untried issues in this suit, their Lordships abstain from considering. For the purpose of determining the question of limitation, it must be assumed that the claim of the appellant, if not barred, has a legal foundation.

The question to which period of limitation these claims are subject has been the subject of several decisions in the Bombay Courts.

The earliest of these being the case of the Collector of Surat *v.* Tejoobawa Bhugwansungji, which is set out at p. 67 of the Record, does not materially affect the present question. When that suit was commenced, Act XIV of 1859 had not come into operation ; and under the law then in force (the Bombay Reg. V of 1827), the claim was subject only to the twelve years' rule of limitation, whether a toda giras hak was in the nature of moveable or of immoveable property. It is true that the High Court, in delivering its judgment, intimated an opinion that whatever might have been the original nature of that toda giras payment, its conversion into an annual payment out of the Government treasury, not secured

* 1 W. R. P. C. 55 ; 1 Suth. P. C. R. 387.

or chargeable on any particular lands, had deprived it of the character of immovable property, if it ever possessed that character. But it is obvious that this dictum has no application to a *toda giras hak* payable by an *inamdar*, in respect of which there has been no such conversion. The case of *Furushram Nurbheram v. Syud Hossein Wullud*, which is set out at pp. 69 and 72 of the Record, is, however, in point. There the question arose between the purchaser of the *Grasia's* interest in a *toda giras hak* at an execution-sale, and an *inamdar*; and the law of limitation to be applied was Act XIV of 1859. The Judge of Broach there held (and his decision was affirmed on appeal by the High Court) that the claim was clearly for a money payment, and that the case must be decided by cl. 16 s. 1 of the Statute.

The authority of this last case has been recognized, and its ruling adopted by each of the three judgments now under appeal.

The other decisions of the High Court of Bombay which have been cited, are all distinguishable from the present.

That of the Collector of Surat *v. The Heiresses of Kirvabai*, 2 Bombay High Court Reports, 239, seems to their Lordships to have no bearing upon the question before them. The only questions raised in it were whether a *toda giras hak* was alienable, and whether, by reason of its falling within the definition of "land" contained in a particular statute (which it did not), the Court was deprived of jurisdiction. In the case of *Baratsangji v. Navanidaraya*, 1 Bombay High Court Reports, 186, as in that set forth at p. 67 of the Record, the law of limitation to be applied was the Bombay Reg. V of 1827; and what the Court actually decided was, that the right to the *desaigiri* allowance claimed would be barred, unless the plaintiff could establish the receipt of a payment on account of it within twelve years. The Court, no doubt, described the allowance claimed as "in the nature of one charged upon, or payable out of land." But whether it were so or not was not a point in issue. Again, in *Raiji Manor's* case, reported in 6 Bombay High Court Reports, p. 56, the Court, in ruling that the claim was barred by the six years' limitation, distinguished it from the last-mentioned case on the ground that it was a claim for a *pagdi* allowance, which was a mere money payment out of a *desaigiri* allowance, and not like the latter in any sense an interest in land. The same distinction may exist between a *pagdi* allowance and a *toda giras hak*.

The case of *Krishnabhat Hiraganji*, reported in 6 Bombay High Court Reports, p. 137, and that of *Purshotam Sidheshvar*, reported in 9 Bombay High Court Reports, p. 99, both relate to hereditary offices and not to *haks*, and cannot, therefore, be regarded as directly in point, although the principles which they lay down for the construction of Act XIV of 1859 are important, and will have to be considered hereafter. It is, however, to be remarked that, in the latter case, Chief Justice Westropp, at the close of his able and elaborate judgment, expressed a strong doubt of the soundness of the decisions which had ruled that claims for the *toda giras haks* were subject to the six years' rule of limitation. This being the state of the authorities at Bombay, their Lordships cannot think that there has been that long and consistent course of decisions which affords grounds for treating the question under consideration as concluded by authority, even in the Courts of India.

It has, however, been strongly urged on the part of the respondent that this appeal is to be determined by the authority of their Lordships' recent decision in the case of *Desai Kullianrai Hakoomutrai* (the present respondent) and the Government of Bombay, 14 Moore's I. A., p. 551. Their Lordships cannot accede to this argument.

In the case so relied upon, the question of limitation did not arise. It is, however, true that in deciding it the High Court of Bombay had held that the respondent had acquired a title, by positive prescription, to the *hak* which he

claimed by force of s. 1 of the Bombay Reg. V of 1827; and that their Lordships, though they upheld the decree in favor of the respondent on other grounds, intimated that they were not satisfied either that the particular hak could properly be said to be "immoveable property" within the meaning of the Regulation, or that there had been such an enjoyment of it for thirty years without interruption as would bring the right, if in the nature of immoveable property, within the operation of the Regulation. This was the expression of a doubt rather than a positive decision. Moreover, the hak then claimed differed widely from that which is the subject of the present suit. It was a money allowance for the sustentation of a palanquin, which had been granted by the then native power to an ancestor of the respondent, not as a necessary incident to the office of Desai, but as a reward for meritorious service, and was made payable by the native collector out of the general revenues of the Pergunnah of Broach received by him. As such it resembled the annuity granted by King Charles the Second out of the Barbadoes duties, which in the case of the Earl of Stafford v. Buckley, 2 Ves. Senr., p. 170, Lord Hardwicke held to be "a mere personal annuity, having no relation to lands and tenements, or partaking of the nature of a rent by any means." But however that may be, their Lordships cannot treat the decision in the palki case as an authority on the present question, which they will now proceed to consider upon its merits.

The learned Counsel for the appellants have argued, on the authority of the above-mentioned cases of Krishnabhat Hiraganji and Purshotam Sidheshva, and particularly of the latter, that the construction of the Statute of Limitation must, in this particular case, be determined by the light of the Hindoo law.

According to the report of the latter case in 9 Bombay High Court Reports the respondents had sued to recover from the appellants the amount of fees due to the holder of the hereditary office of the village Joshi (or astrologer) for five years. This statement their Lordships conceive must be taken to import that the right to hold the office was matter of contest between the parties; since it can hardly have been held that, because the hereditary office was in contemplation of the Hindoo law, of the nature of immoveable property, fees recoverable by the admitted holder of the office from persons whose horoscope he might have cast, fell within the same category. The case was referred to a Full Bench, partly in consequence of some difference of opinion between the two Judges who composed the Division Bench, and partly on account of a supposed inconsistency between the two decisions already cited from the 6th Vol. of the Bombay High Court Reports, which, nevertheless, seem to their Lordships capable of standing together. The judgment of the Full Bench was given by Chief Justice Westropp. It fully upheld the decision in Krishnabhat v. Kapabhat, and affirmed the correctness of the rule there laid down for the interpretation of Act XIV of 1859 s. 1 cl. 12. The rule is shortly this, viz., that, inasmuch as the term "immoveable property" is not defined by the Act, it must, when the question concerns the rights of Hindoos, be taken to include whatever the Hindoo law classes as immoveable, although not such in the ordinary acceptation of the word. To the application of this rule within proper limits, their Lordships see no objection. The question must, in every case, be whether the subject of the suit is in the nature of immoveable property, or of an interest in immoveable property; and if its nature and quality can be only determined by Hindoo law and usage, the Hindoo law may properly be invoked for that purpose. Thus, in the two cases on which the appellant relies, Hindoo texts were legitimately used to show that, in the contemplation of Hindoo law, hereditary offices in a Hindoo community, incapable of being held by any person not a Hindoo, were in the nature of immoveables. And those decisions receive additional support from the 1st section of the Bombay Reg. V of 1827, which expressly declares hereditary offices to be immoveables, an enactment which, inasmuch as it relates only to the acquisition of a title by

positive prescription, seems to be unaffected by Act XIV of 1859, and to stand unrepealed in the Presidency of Bombay.

The learned Counsel for the appellant have, however, insisted on the authority of these decisions that a *toda giras hak* must be held to be an interest in immoveable property, because, according to Hindoo law, it would be "*nibandha*." Their Lordships, in dealing with this argument, prefer to use the Sanscrit word, inasmuch as they do not think that "*corrody*" is a very happy translation of it; "*corrody*" being a word of medieval origin, properly signifying a peculiar right, viz., the grant by the royal or other founder of an abbey of certain allowances out of the revenues of the abbey in favor of a dependent or servant. (See Ducange, *in verbo*: Fitzherbert "*De naturâ Brevium*," p. 229, writ "*de corrodio habendo*.")

Whether a *toda giras hak* be "*nibandha*" within the strict sense of that term is, in their Lordships' opinion, a question not free from doubt. The original text of *Yajnyawalkya*, which is the foundation of all the other authorities cited by Chief Justice Westropp, implies that the subject rendered by the word *corrody* in 2 Colebrooke's Digest, Placitum xxxiv, is something created by Royal grant. This, too, is included in Professor Wilson's definition of "*Nibandha*." That the word in the subsequent glosses on *Yajnyawalkya*'s text is used in a wider sense may be due to the want of precision for which Hindoo commentators are remarkable. It is, however, unnecessary to consider this point, because their Lordships are of opinion that the question whether a *toda giras hak* is an interest in immoveable property within the meaning of Act XIV of 1859 is one which ought not to be determined by Hindoo law. It appears from the authorities cited in the case (reported in the second vol. of Morris's Report) that the *Grasias* were sometimes Mahomedans, and therefore that the *hak* may in its inception have been held by a Mahomedan. It is certain that, as these *haks* now exist, they may pass to, and be held and enjoyed by, Mahomedans, Parsees, or Christians; and their Lordships think that the applicability of particular sections of this general statute of limitation must be determined by the nature of the thing sued for, and not by the status, race, character, or religion of the parties to the suit. The period of limitation within which the claim is barred must be fixed and uniform, by whomsoever that claim is preferred or resisted.

The determination, therefore, of the present question depends, in their Lordships' opinion, upon the general construction to be given to the terms "*immoveable property*" and "*interest in immoveable property*" as used by the Indian Legislature. Their Lordships cannot think that the former term is identical with "*lands or houses*." They conceive that the word "*immoveable*" was used as something less technical than "*real*," and that the term "*immoveable property*" comprehends certainly all that would be real property according to English law, and possibly more. In some foreign systems of law in which the technical division of property is into moveables and immoveables, as *e.g.*, the Civil Code of France, many things which the law of England would class as "*incorporeal hereditaments*" fall within the latter category.

Now, what is disclosed on the Record touching the nature of this *hak*?

The plaintiff claims it as "*leviable upon the village Mouzah Kalam*." The fair inference from the written statements of the respondent is, that the *hak* existed and was regularly paid by his father, as *inamdar*, up to the year 1857-58. The question raised by these statements as to the right of the respondent and his father to discontinue the payments is one to be determined, not upon the issue of limitation, but on the trial of the other issues settled in the cause. The evidence taken in the suit shows that the answer of *Hukomutrai* (the respondent's father) to a question addressed to him in 1856 by a native official, to the effect, whether there was any *toda giras* paid for the Maharana of Amud on account of the village of *Kalam*, was, "There are payable Broach Rs. 501 for the *toda* of the said Rana;"

that the same Hukomutraí described the money paid by him on account of this hak, in his deposition on the 6th November 1861, as "the money on account of toda giras leviable upon my inam village of Kalam," and in his deposition of the 4th April 1862, as "the annual amount of toda giras of my village of Mouzah Kalam;" and further, that the payments made were made out of the revenues of the village, and were so entered in the village accounts.

Taking this as the fair result of the evidence, and considering what has been ruled touching toda giras haks in the case in the 8th Moore's Indian Appeals, and other decided cases, their Lordships are of opinion that, whatever may have been the origin of the hak, it must be assumed to be now a right to receive an annual payment which has a legal foundation, and of which the enjoyment is hereditary; and that the liability to make the payment is not personal to the respondent, but one which attaches to the inamdar into whosoever hands the village may pass; or, in other words, that the hak is payable by the inamdar *virtute tenure*. This being so, their Lordships have come to the conclusion that the interest of the hakdar does possess the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the character of a freehold interest in or issuing out of real property (see I Cruise's Digest, p. 47, Plac. 10); that upon the general principles of construction applicable to an Indian Statute it must be held to be "an interest in immoveable property" within the meaning of Act XIV of 1859; and, accordingly, that the suit, having been brought within twelve years after the date of the last payment, can be maintained.

This being their Lordships' conclusion on the first and principal question argued, it is unnecessary for them to consider the second, viz.:—Whether, upon the principles enunciated and enforced in such cases as *The Dean and Chapter of Ely v. Cash*, 15 M. and W.; *Grant v. Ellis*, 9 M. and W.; and *Owen v. De Beauvoir*, 16 M. and W., and 5 Exch., it ought to be held that, inasmuch as Act XIV of 1859 contains no express words to bar the right as well as the remedy, that statute can have any effect on the appellant's claim, except that of preventing him from recovering more than the arrears for the six years next preceding the institution of the suit. Their Lordships abstain from the consideration of this question the more willingly because it was never raised in the Courts below; because the pleadings in the suit, which is brought to establish the right as well as to recover the arrears, assumes that the whole claim is subject to the law of limitation; because there seems to be a considerable body of Indian authorities which support that assumption; and because the limitation applicable to claims to establish rights will, at no distant date, have to be determined by the more carefully-drawn Statute of Limitation of 1871, which is soon to supersede that of 1859.

On this appeal their Lordships will humbly advise Her Majesty to reverse the decrees under appeal; to declare that the appellant's suit is not barred by the Statute of Limitations, but was brought within time; and to remand the cause for trial on its merits. Their Lordships think that the appellant ought to have the costs of this appeal. The costs incurred in India by reason of the trial of the second issue should be dealt with by the Bombay High Court in the usual way on the final determination of the cause; the appellant receiving back the costs (if any) which he may have paid under any of the decrees reversed.

The 19th December 1873.

Present :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

Joint Hindoo family—Partition—Intention.

*On Appeal from the High Court at Calcutta.**

Doorga Pershad and others

versus

Mussamut Kundun Koowar.

Inasmuch as there may be (*vide* case of Appoovier *v.* Ramasubha Aiyar and others) a division of a joint and separate Hindoo family and of the joint property, such as to alter the *status* of the family, without a regular partition by metes and bounds, the question in every particular case of disputed division must be one of *intention*,—whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, was to effect such a division.

The appellant in this case is the childless widow of Moneerut Dass, who was the son of one Showkee Lall, and the respondents are the descendants of the three sons who, with Showkee Lall, constituted the family of the common ancestor.

The family must be presumed to have been originally joint. The suit was brought by the widow, claiming as heiress of her deceased husband his share of the property in question. The family are Agurwallas by caste, but Jains in religion, and as the suit was originally framed she claimed to be entitled to the property of her late husband whether the family was divided or undivided, under the law regulating successions among the Jains. The third and fifth issues settled in the suit raised this question; and the Principal Sudder Ameen decided those issues, as well as those upon which the determination of this appeal depends, in favor of the widow.

Upon appeal the High Court held, first, that there was no sufficient evidence in the cause to show that the law of succession among the Jains was different from that of the ordinary Hindoo law, governing the particular province in which the property was situated, which in this case is the law of the Mitacshara ; bt, secondly, that in the circumstances of the case the plaintiff was under that law the heiress of her husband, and entitled to recover the property in dispute. Mr. Cutler, who appeared for the respondents, did not altogether give up the first point; but as their Lordships have formed an opinion that the judgment of the High Court is correct upon the second, they will assume that it was equally correct in respect of the law regulating the succession of this family. The question then is reduced to this; was this family at the time of the death of Moneerut Dass an undivided Hindoo family in such a sense that, according to the law of the Mitacshara, his widow was entitled merely to maintenance, and his share passed by survivorship to the nearest male members of his family; or was it so separate in estate that by the operation of that law the widow was entitled to succeed to her husband?

It is an undisputed point in the case that the members of this family in October 1851, that is, in the lifetime of Moneerut Dass, executed an ikrarnamah, and that thereafter, if not before, the property was managed and enjoyed in conformity with the provisions of that instrument.

The learned Judges of the High Court have held that, upon the authority of

* From the judgment of Peacock, C.J., and L. S. Jackson, J., in Regular Appeal No. 309 of 1865, decided on the 29th June 1867,—8 W. R. 116.

the case of *Appoovier v. Ramasubha Aiyan and others*, 11 Moore's I. A., 75,* the family must have been taken to have been separate in interest and title, and therefore that the widow was entitled to succeed. The learned Chief Justice, it may be inferred from his judgment, would have been, independently of that case, of this opinion upon the construction of the *ikrarnamah*. The other learned Judge, Mr. Justice Jackson, seems to have had serious doubts whether that instrument did operate as a division of the family, but conceived himself bound, as we read his judgment, by the authority of the case in the Privy Council.

The authority of that case is of course binding upon us here ; and the only question is, whether the present case is distinguishable from it. It is not necessary to go through the whole judgment, as Mr. Leith called upon us to do, or to consider with nice criticism whether this or that proposition is or is not stated in words stronger than were necessary. The broad point which their Lordships conceive to be decided by the case, is that there may be division of a joint and separate Hindoo family, and of the joint property without a regular partition by metes and bounds. Lord Westbury, after stating that the term division is capable of a two-fold application, that there may be a division of right, and there may be a division of property, says :—"Thus after the execution of this instrument there was a division of right in the whole property, although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time, when it would be convenient to make that partition." In another passage he says :—"We find, therefore, a clear intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition." And, again speaking of the legal effects of the deed, he says :—"It operated in law as a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, viz., that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter." The fair inference from the decision seems to their Lordships to be that inasmuch as there may be a division of the kind there spoken of, viz., a division which though not carried out by a partition by metes and bounds, would, nevertheless, alter the *status* of the family, the question in every particular case must be one of intention, whether the intention of the parties to be inferred from the instruments which they have executed, and the acts they have done, was to effect such a division.

The decision of this case must turn upon the application of these principles to the *ikrarnamah*, and their Lordships are of opinion that the construction which the learned Chief Justice put upon that instrument is substantially correct. The family at the time of the execution of the instrument appears to have been in that state which so often gives rise to very difficult questions in Courts of law; and of which we had recently a very remarkable instance, namely, the question whether the family is joint or separate; and if joint, in what degree, and in what particulars, the different members of it possess separate property? It is clear that some members of this family before the date of the *ikrarnamah* had been carrying on business separately and on their own account. There was also a *kotee* in which they were jointly interested, and there seems to have been a number of landed estates, some of them standing in the name of one member of the family, and some of them standing in the name of another. That state of things may, however, afford an argument in favor of the contention of either party. On the one hand it may be said that in executing the *ikrarnamah* the members of the family desired only to make clear what was to be joint, and what was to be

* 8 W. R. P. C. 1 ; 1 Suth. P. C. R. 657,

separate. On the other hand it may be argued that the object of the ikrarnamah was to establish beyond all future question the undivided *status* of the family.

The learned Chief Justice appears to have assumed that the instrument was merely declaratory of the antecedent state of the family. Their Lordships do not think it necessary to decide that question, as to which there may be some doubt, because they entirely agree in an observation which he subsequently makes, to the effect that if the instrument did not declare that to have been the state of the family, yet upon the true construction of it it created such a state. However, there are passages which support the view of the Chief Justice as to an antecedent division of interest. The document begins by stating—"We four co-sharers being in possession of equal shares, viz., of one-fourth each without contention from any one, appropriate and enjoy the profits thereof in proportion to our respective shares." Those words appear to their Lordships to point to an appropriation and enjoyment of the profits inconsistent with that which is the normal state of enjoyment of a joint and undivided Hindoo family. It then goes on to say:—"Now with a view to avoid future complications, in consultation and agreement among ourselves, we have under our signatures executed four chittas with regard to the said kotee up to the 24th of the month of Kowar of the year 1259 Fuslee, and four schedules with regard to houses and shops, both ancestral and purchased, mangoe and mahawa orchards; and also four schedules regarding silver articles, tent, &c., articles for assemblies and conveyance, &c., and all the partners have retained one of each." The deed thus proceeds:—"We have executed this deed to have matters entirely above board, and to have names enrolled in the Government record in respect of the estates. It is desirable and very necessary for us declarants, according to this deed, to have the names of all the parties enrolled for equal shares." Upon this it may be remarked that there could be no actual necessity, if they continued as a joint family, "to have the names of all the partners enrolled for equal shares, viz., one-fourth in the name of me, Lalla Mukhun Lall, one-fourth in the names of us, Lalla Mahaber Pershad and Munhur Dass," and so on. There is not much, if any, evidence on the record as to what was done in order to procure a mutation of names, or to carry out this stipulation of the deed; but if it were carried out in the way proposed, that appears to their Lordships to be strong *prima facie* evidence of the intention to hold the undivided shares as the separate property of each co-partner. It may not be conclusive, but at all events it is strong *prima facie* evidence of such an intention. It is confirmed, in their Lordships' opinion, by what appears upon the face of the butwarra proceedings, in which the present respondent, the plaintiff, is named as the heir of her late husband, and representing his interest in the proceedings taken for a formal partition by metes and bounds of certain properties between the whole of this family on the one side, and certain co-sharers in those properties on the other. The deed next proceeds to deal thus with the kotee:—"Now also by amicable settlement the business of the kotee will continue to be carried on jointly and in partnership in the same manner as carried on heretofore. We will amicably transact all matters connected with the kotee in consultation and agreement among ourselves, and will keep appropriating and enjoying the profits thereof in proportion to the aforesaid shares, viz., equal one-fourth share each." It then provides for any estates which may be purchased out of the moneys of the kotee.

The Principal Sudder Ameen, upon the inspection of the accounts, has found (and the learned Judges of the High Court agree with him) that the accounts were kept in a way from which it is to be inferred that when the accounts of the kotee were balanced, each of the four partners was entitled to his separate share of the profits realised; or in other words, that the accounts were kept as they would be kept between four ordinary partners, and not as they would be kept as between members of a joint and undivided Hindoo family.

The deed then provides that certain silver articles, tents, carpets for assemblies, and conveyances, shall continue as before in possession of all four sharers. Their Lordships do not think that that is a very unusual stipulation as to certain articles of property, even in cases in which partition is carried out formally, and as to the greater part of the property, by metes and bounds. Therefore they can infer from that stipulation no intention contrary to the intention which the learned Judges of the Court below have imputed to the parties in framing the deed.

Their Lordships, after carefully considering the whole deed and the evidence in the cause, have come to the conclusion that this case is undistinguishable from that in the 11th Moore; that the real intention of the parties to the *ikrarnamah* was to hold and enjoy the property which was the subject of it in severalty; and that the decree of the Court below is correct.

It is to be regretted, no doubt, that the parties who make such arrangements should not declare on the face of the deed what their intention is, and that, if they are an undivided family, it is their intention thenceforth to cease to be so. On the other hand, it is to be observed that there is no statement upon the face of the deed in question here that the *status* of indivision had continued up to its date.

On the whole their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

The 31st January 1874.

Present:

Sir James W. Colville, Sir Montague Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*Mortgage—Partition (butwarra)—Remedy of mortgagee—Regulation XIX
of 1814.*

*On Appeal from the High Court at Calcutta.**

Byjnath Lall

versus

Ramooddeen Chowdry.

Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, he cannot by so doing affect the interests of the other sharers, and the persons who take the security, *i.e.*, the mortgagees, take it subject to the right of those sharers to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty.

Where such a partition is affected under the provisions of Reg. XIX of 1814 before the mortgagees have completed their title by foreclosure, and the consequential decree for possession, the mortgagees of the undivided share of one co-sharer who has no privity of contract with the other co-sharers would have no recourse against the lands allotted to such co-sharers; but must pursue their remedy against the lands allotted to the mortgagor, and, as against him, would have a charge on the whole of such lands.

The suit out of which these appeals have arisen was brought by the appellant to recover possession and be registered as proprietor of various parcels of land, all of which once belonged to one Gopal Narain Singh, deceased, but had afterwards been purchased by different persons at several sales in execution of decrees against him. The defendants were the representatives of Gopal Narain Singh and the several auction-purchasers; and the title on which the plaintiff sued was based

* From the judgment of Peacock, *C.J.*, and L. S. Jackson and Maopherson, *J.J.*, in Appeal No. 1 of 1869 under s. 15 of the Letters Patent, decided on the 7th December 1869.

upon a deed of mortgage by way of conditional sale alleged to have been executed to him by Gopal Narain Singh ; and upon the proceedings subsequently taken under Reg. XVII of 1806 to foreclose that mortgage.

The principal defences raised in the suit, and indeed the only defences now to be considered, were—1st, that the mortgage deed having been made collusively and without consideration, was fraudulent and void as against the auction-purchasers ; and 2nd, that, even if it were good against them, it conferred no title on the plaintiff to several of the parcels claimed by him.

The Principal Sudder Ameen who tried the cause in the first instance decided the first question in favor of the plaintiff, and gave him a decree for the lands claimed with the exception of some which are now no longer in dispute.

Against this decree, which bears date the 8th January 1866, the different defendants presented four separate appeals, the plaintiff also preferring a cross-appeal, to the Judge of Zillah Tirhoot. That officer, on the 14th June 1867, decided that the plaintiff had failed to establish that the mortgage deed was executed *bond fide*, and dismissed the suit. His decree was, however, reversed on special appeal by a Division Bench of the High Court, which transferred the regular appeals for final hearing and decision to itself. There is no further trace of plaintiff's cross-appeal ; but the appeals of the different defendants were separately numbered in the High Court as Nos. 96, 100, 101, and 102, and were heard by this Division Bench, consisting of Mr. Justice Kemp and Mr. Justice Elphinstone Jackson, which made a separate decree in each. On appeals Nos. 96 and 101, the two Judges were divided in opinion, Mr. Justice Kemp holding that the mortgage was a fictitious transaction in which no consideration passed, and that the suit ought on that ground to be dismissed generally ; and Mr. Justice Jackson holding that the mortgage deed was executed *bond fide* and was valid, but that the plaintiff could recover only such of the parcels claimed as were specifically mentioned in the deed. Accordingly, each of the decrees originally made on these appeals stated that the Senior Judge had given a decree for the dismissal of the suit ; but that the Junior Judge dissented therefrom, and was of opinion that the plaintiff ought to have a decree for certain of the lands claimed inasmuch as they were included in the mortgage deed ; but that his claim to others, which were held not to be covered by the deed, should stand dismissed.

In deciding the appeals Nos. 100 and 102, the two Judges concurred in the dismissal of the suit as against the parties appellant, on the ground that none of the lands sought to be recovered from them were covered by the mortgage deed ; touching the validity of which they expressed no opinion.

In this state of things there was a reference to a Full Bench of the High Court, which held that it was only competent to deal with the two appeals in which the Judges had expressed conflicting opinions, and with the particular point on which they differed. And having thus limited the reference to the appeals Nos. 96 and 101, and to the question of the *bona fides* and validity of the mortgage deed, it decided that question in favor of the plaintiff (the present appellant). The result was that the final decrees upon all the appeals were drawn up in accordance with the principle laid down by Mr. Justice Jackson. The plaintiff appealed to Her Majesty in Council in each case ; but the four appeals were afterwards consolidated, and have been heard as one appeal by their Lordships. Of the respondents those only who were appellants in Nos. 100 and 101 have appeared here by Counsel.

Mr. Doyne, on their behalf, insisted that, although they had filed no cross-appeal, they were nevertheless entitled to impeach the validity of the mortgage deed, on the ground that their appeals were never before the Full Bench of the High Court, and consequently were not affected by the last decree. Their Lordships do not think it necessary to examine very nicely into the question of right, because they are of opinion that, if the right be conceded, no sufficient grounds for

coming to a conclusion upon the *bona fides* and validity of this deed other than that in which the Principal Sudder Ameen, one of the Judges of the Division Bench, and the three Judges who composed the Full Bench of the High Court have concurred, have been laid before them. There may be in the transaction circumstances of suspicion arising out of the position in life and presumable means of the plaintiff; but there is no evidence on which their Lordships would feel justified in overruling so many concurrent judgments.

This disposes of the first defence raised in this suit; and the only remaining question is whether the principle applied by Mr. Justice Jackson is correct; or whether the High Court ought to have affirmed the decree of the Principal Sudder Ameen in its integrity!

To elucidate this question, which is both novel and difficult, it is necessary to consider the facts of the case somewhat more in detail.

Gopal Narain Doss, the mortgagor, was on the 24th September 1860, when he executed the deed of conditional sale, the undisputed owner of an 8-anna undivided share in an estate consisting of three uslee mouzahs, called Gunniporebija, Pemburinda, and Tajpore Ruttumpore, to each of which certain dakhilce villages were appurtenant. The deed describes him as proprietor of 8 annas severally of the two first mouzahs, and inhabitant and shareholding proprietor of 8 annas of Tajpore Ruttumpore, and some argument was sought to be raised on this distinction. Their Lordships, however, conceive that the utmost which it imports is that he may have collected his share of the rents of the two first mouzahs separately, and the rents of the other mouzahs jointly with his coparceners, it being perfectly clear from what afterwards took place that his interest in the whole estate was an undivided moiety. In this state of things he executed a conditional sale of "the whole and entire 8 annas out of the whole 16 annas severally of Mouzahs Gunniporebija and Pemburinda," as a security for the sum of Co's Rs. 26,050, expressly excepting from the operation of the deed the 8 annas of Tajpore Ruttumpore and certain bromuttur and other lands devoted to religious or charitable purposes.

Before the execution of this mortgage, and as early as September 1858, some of the other sharers in the estate had commenced proceedings to effect a butwarra, or partition of the whole estate, under the provisions of Reg. XIX of 1814. The usual proceedings were had, not, as appears from the Collector's proceeding dated the 31st July 1862, without disputes between the co-sharers, and objections on the part of Gopal Narain Singh in particular. The partition was finally made by the last-mentioned proceeding, which was duly confirmed by the superior revenue authorities. Its effect as regards Gopal Narain Singh was to allot to him, to be held in severalty, and in lieu of his undivided moiety of the whole estate, the whole of Mouzah Pemburinda, the whole of the principal Mouzah of Tajpore Ruttumpore, with a 2 annas and 15 gundas share of its dependency Mouzah Mudwee, the whole of Mouzah Moustafapore, or Joysingpore, a dakhila, or dependency of Gunniporebija, and thirty-six beegahs and odd cottahs of other land in the last-named principal mouzah.

Gopal Narain Singh was duly put into separate possession of these parcels.

He did not, however, long remain in possession. On the 24th December 1862 his right, title, and interest in Mouzah Pemburinda was purchased at an execution sale by Hurreehur Chowdry, now represented by the respondent Ramoodeen Chowdry and two other persons, who are said to have since come to a compromise with the appellant. The one-third share of the last-named respondent in the land so purchased was the subject of the appeal No. 96.

On the 8th December 1864, the right, title, and interest of Gopal Narain Singh in Mouzah Moustafapore was in like manner purchased at an execution sale by the respondent Ramanoograh, and the land included in that purchase was the subject of the appeal No. 101.

On the 23rd December 1862, the right, title, and interest of Gopal Narain Singh in Mouzah Tajpore Ruttumpore was purchased at an execution sale by the respondents Moulvie Mahomed Ahsun and Kashee Pershad Singh, and the land included in that purchase was the subject of appeal No. 102.

And on the 7th February 1865, the right, title, and interest of Gopal Narain Singh in the portion of Mudwee, which was allotted to him on the partition, was purchased at another execution sale by the respondent Mohunt Parsoo Ram Doss, and that parcel of land was the subject of the appeal No. 100.

In the meantime the appellant had proceeded to foreclose his mortgage. The proceedings taken for that purpose began on the 12th December 1863, and the final order for foreclosure was obtained on the 12th December 1864. Their Lordships think it is established by the evidence that all the purchasers under the execution sales, except the Mohunt, whose purchase was subsequent to the foreclosure, had due notice of these proceedings.

The Principal Sudder Ameen's decree gave to the appellant the whole of Mouzah Pemburinda, the whole of Moustafapore, 8 annas of Mouzah Tajpore Ruttumpore, and 193 beegahs and a fraction of Mouzah Mudwee, to which quantity, for reasons which are not now impeached, he reduced the appellant's claim.

The decrees under appeal disallowed the appellant's claim to any portion of the two latter parcels, and gave him only one-half of the share in Pemburinda, which he claimed as against the respondent Ramooddeen Chowdry, and only 8 annas of Moustafapore.

The principle for which the appellant contends, and that on which the Principal Sudder Ameen proceeded, is that the mortgagee is entitled to whatever was allotted to the mortgagor on the partition in respect, or in substitution of his undivided 8-anna share in Mouzahs Gunniporebija and Pemburinda, which was the subject of the mortgage, and that this includes all the parcels now in dispute.

The principle on which the High Court has proceeded and for which the respondents contend is that the appellant can recover nothing which is not expressly named in and covered by the mortgage deed, and consequently that he can take no part of Mouzah Tajpore and its dependencies, and only an 8-anna share of Mouzah Pemburinda, and an 8-anna share of Moustafapore, the latter being the only portion of Mouzah Gunniporebija which is in dispute.

It will be convenient to consider, first, what in such a case would be the rights of the mortgagee against the mortgagor; and next, whether the respondents stand in any better position than the mortgagor.

Now, what was the subject of this mortgage? It was an undivided moiety in two out of three villages forming a joint and undivided estate. The sharers, however, do not appear to have been members of a joint and undivided Hindoo family, but to have enjoyed their respective shares (at all events their shares in Gunniporebija and Pemburinda) in severalty. It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.

The partition which actually took place in this case was not one which had for its sole object the division of the joint estate by metes and bounds, an object which might be effected by the private agreement of the parties. It had for a further object the apportionment of the public revenue assessed on the whole estate, so as to relieve each proprietor from the obligation to pay that revenue *in solido*, and to make him responsible only for the amount to be charged on his separate and defined share. To such a partition the State necessarily became a party for the protection of the revenue, and it was one which could only be affected by the machinery of the Regulation. The provisions of Reg. XIX

of 1814 appear to their Lordships to have been carefully designed to secure a fair partition of the estate to be divided. The division is to be made, in ordinary cases, by a public officer (the Ameen) acting under the orders of the Collector. Even if, under s. 22, the terms of the partition are proposed by the parties, or referred by them to arbitration, the law still requires the intervention of the Ameen, before whom the accounts are to be produced and verified, and in whose presence and subject to whose inspection the division is to be made. When the terms have been so settled they must be sanctioned by the Collector, and afterwards by the superior revenue authorities. The partition, after it has been so sanctioned, is declared by s. 20 to be final, subject to the power reserved to the Governor-General in Council, by s. 25, of directing a fresh apportionment of the revenue in cases of proved error or collusion at any time within ten years after the confirmation of the partition.

Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and, for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed.

It appears, however, to have been settled by decisions, and upon the construction of the regulations, first, that no such partition can be disturbed by a Civil Court; and, secondly, that a mortgagee who has not perfected his title by foreclosure, and the consequential decree for possession, can neither compel a partition nor be a party to the butwarra proceedings. And this latter point has been the foundation of one of the principal arguments addressed to their Lordships by the learned Counsel for the respondents.

It was argued that, as the mortgagee could not be a party to the butwarra proceedings, so, upon general principles of jurisprudence, he could not be held to be bound by them; that, consequently, he was at liberty to enforce his rights against an undivided share in every parcel specified in the mortgage deed to whichever of the co-sharers such parcel might have been allotted, but that he could not claim more. The objection that, in such a case, he must either forfeit part of his security or pursue his remedy against those with whom he had no privity of contract was met by the suggestion that the co-sharers thus injuriously affected would, upon the principle of implied warranty such as exists in this country on a title acquired by partition or exchange, have a remedy over against the mortgagor, even if the consequence of that were the re-opening of the partition. And it was further argued that, if the contention of the appellant concerning a partition by butwarra were correct, it must be equally true of a partition by private arrangement; and that in either case an unequal partition might be affected by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee.

Upon this it is to be observed that fraud would be a substantive ground for relief, and that, if the fraud supposed were effected by private arrangement, the mortgagee would have a clear remedy against all who were parties to it in the Civil Court.

In the more improbable case of such a fraud being effected by means of butwarra proceedings, his remedy might be more difficult by reason of the finality of the partition, and the incapacity of the Civil Court to entertain a suit to disturb it. But without entering into these nice questions, which do not directly rise on this appeal, their Lordships deem it sufficient to observe that the finality of such a partition cannot be greater than that of the purchase of an estate at a

sale for arrears of the public revenue ; and that even in this latter case, Courts of justice have found the means of relieving the person injuriously affected by fraud. (See the case of *Nawab Sidhee Nuzur Ali Khan v. Rajah Ojoodhyaram Khan*, 10 Moore's I. A., 540.)* In such cases, however, the alleged fraud is the foundation of the suit, and it is difficult to see upon what principle, in the absence of that or some equivalent cause of action, the mortgagee, who could not have sued the co-sharers for a partition, could have any remedy against them or their separated shares, which, under the butwarra, had become distinct estates. And if he does not claim to have such a remedy, but is content to claim, as the subject of his security, that which his mortgagor has received in substitution of the original pledge, it is still more difficult to see what right the mortgagor can have to resist such a claim or to say, I, being in possession of the new estate, insist on your being limited to the old.

In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made.

A distinction has, however, been taken between the parcels in the possession of the respondents Ramooddeen Chowdry and Ramanoograh Sahoy, and those in the possession of the Mohunt and of the respondents Mahomed Ahsun and Kashee Pershad Singh, on the ground that the latter are portions of the Mouzah Tajpore Ruttumpore, which was expressly excluded from the security. It is certainly possible to conceive cases in which, the security not covering the undivided share in the whole estate, it might be difficult to determine which of the lands allotted in substitution of that share represented the mortgage premises. No such difficulty, however, exists in the present case, inasmuch as the whole of Tajpore Ruttumpore was allotted to Gopal Narain Singh on the partition. He was already entitled to an eighth undivided share in this mouzah, which, being excluded from the mortgage, is not claimed by the appellant. But it follows from this that whatever portion of this mouzah was allotted to him in excess of those 8 annas must have been so allotted in substitution of his interest in the Mouzahs Gunniporebija and Pemburinda, and, therefore, became subject to the mortgage. Their Lordships, therefore, are of opinion that, if all the parcels in dispute were still in the possession of Gopal Narain Singh, he would have no defence to the appellant's claim in respect of any of them.

The only remaining question is, whether the respondents other than the representatives of the mortgagor are in a better position than he would have been. They were all mere purchasers at execution sales of his right, title, and interest (the Mohunt purchasing at a date subsequent to the final foreclosure), and could acquire no higher rights than he possessed at the date of the purchase. In respect of such purchases, the question whether they were made with notice of the appellant's title is not very material; but if it were, there is no doubt that they were made with such notice. Not only was the mortgage deed registered, but all the respondents, except the Mohunt, whose title had not then accrued, seem to have been served with notice of the foreclosure proceedings, and might have claimed the right to redeem. They had also notice of the partition. To say that they were deceived by the description of the mortgaged premises, is to affirm, not that they had no notice of the appellant's superior title, but that they mistook its legal effect.

Their Lordships are therefore of opinion that the decree of the Principal

Sudder Ameen was right as against all the respondents ; and they will humbly advise Her Majesty to reverse all the four decrees under appeal ; and, in lieu thereof, to make a decree dismissing all the four appeals, and affirming the decree of the Principal Sudder Ameen with the costs of the proceedings in the High Court. The appellant must also have the costs of these appeals.

The 3rd February 1874.

Present :

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

Limitation.—Act XIV of 1859 s. 1 cls. 10 and 12—Contract—Immoveable property.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Ranec Mewa Kooer

versus

Ranee Hulas Kooer.

A suit upon a deed of compromise based on the assumption that there was an antecedent title of some kind in the parties, and acknowledging and defining that title, does not rest on contract only, but upon a title to the land acknowledged and defined by the contract which is part only of the evidence adduced to prove that title. It is therefore not a suit founded on contract or for the breach of it, to which the limitation prescribed by cl. 10 s. 1 Act XIV of 1859 applies ; but a suit for the recovery of immoveable property governed by cl. 12 of that Section.

This is a suit brought by Ranee Mewa Kooer, the granddaughter of Rajah Ruttun Singh, against Ranee Hulas Kooer, the widow of Khyratee Lall, who was a grandson of the Rajah, to recover $8\frac{1}{2}$ annas share of three houses and an imambaras situate in the city of Lucknow. The appellant claims $4\frac{1}{2}$ annas in her own right, and $4\frac{1}{2}$ as the representative of her deceased sister, Chuttur Kooer.

The claim arises in this way :—The property in dispute, which is in Oudh, belonged, with other considerable property in Rohilcund, to Rajah Ruttun Singh, who died in 1851. It is said that he became a Mahomedan, and that, according to Hindoo law, his ancestral property thereupon vested in his son, Dowlut Singh, the father of the appellant and her sister. Dowlut Singh died before his father, and in consequence of his having so pre-deceased him, and having no male issue, the property of the Rajah Ruttun Singh would have descended to the grandson, Khyratee Lall, whose widow, Hulas Kooer, is the defendant and present respondent, unless the conversion of the Rajah and the consequent vesting of the estate in Dowlut Singh was established. The defendant raised a further question, namely, that the property of Rajah Ruttun Singh had been confiscated by the King of Oudh, and had, after the Rajah's death, been granted by the King as an act of grace to his widow, Ranee Raj Kooer, and that on her death it descended to Khyratee Lall as her legal heir. It appears that questions arising out of this alleged conversion to Mahomedanism of the Rajah, and respecting the confiscation, were contested between the widows of the deceased Rajah Ruttun Singh and of his son, Dowlut Singh ; and after their deaths the controversies were renewed between Khyratee Lall and the respondent and her sister. After these controversies, and avowedly to put an end to the disputes, a compromise was effected between the parties, the terms of which are found in what is described as a deed of agreement of the 21st July 1860. It is essential to the determination of the questions in this appeal to consider what is the effect of this agreement and of a

subsequent one which was entered into at a later period of the same year, namely, on the 12th November.

The first agreement is made between the contending parties, Khyratee Lall, and his cousins, Raneer Chuttur Kooer and the present appellant, Raneer Mewa Kooer, the daughters of Dowlut Singh. It is this: "We," describing the parties, "do hereby declare that, regarding the dispute which existed for all the houses, lands, and property left by Rajah Ruttun Singh, deceased, whether moveable or immoveable, ancestral or self-acquired, in the custody of the Court of Wards situated in the district of Bareilly, Pilibheet, Shahjehanpore, Budaon, &c., and in the province of Oudh, we have, whilst in the perfect enjoyment of our senses, and without being under any kind of compulsion or coercion, come to amicable terms in the presence of Mr. John Inglis, Collector of Bareilly, and agreed to regard the whole property as if it were one rupee, and to divide it into the following shares: 7½ annas as the share of Khyratee Lall, 4½ annas as the share of Raneer Chuttur Kooer, and 4½ annas as the share of Raneer Mewa Kooer." That is an agreement that the whole property left by the Rajah Ruttun Singh, as well that in Rohilcund as that in the province of Oudh, shall be divided in those shares. Then comes a provision for a division of the property, according to those shares, by a partition by metes and bounds. That part of the agreement is this: "According to these rates the whole of the property shall be divided amongst the above, agreeably to a punchait to be convened for the purpose. That we shall not retract from this proposed division;" and then declaring that it should be a final agreement between them. It is undisputed that this agreement relates to the whole of the property of Rajah Ruttun Singh, as well that in Oudh as in Rohilcund. In fact that is the case on the part of the respondent as well as that on the part of the appellant. Both agree that this agreement was intended to settle the disputes relating to the whole of the property left by the Rajah. Now there is no evidence to be found in the record of an actual partition of the property, either in Rohilcund or in Oudh, pursuant to the terms of this agreement; but it is said on the part of the respondent, the defendant, that by the subsequent agreement, to which I have alluded, of the 12th November 1860, there is an acknowledgment on the part of the present appellant and her sister whom she represents, that a partition had taken place of the whole property, as well the property in Oudh as in Rohilcund, an acknowledgment which binds them by way of estoppel; and that, under those circumstances, the present claim of the appellant to a share of the houses in Lucknow must be defeated. This document is in ambiguous language, and some care is required in considering what is the effect of the language used in it. It may here be said that those who rely upon the document as an estoppel,—the nature of an estoppel being to exclude an enquiry by evidence into the truth,—must clearly establish that it does amount to that which they assert. Now the document is this: "We Khyratee Lall in person," and the appellant and her sister by their attorneys,—the principals, being heirs of Rajah Ruttun Singh, deceased, do hereby declare that: Whereas our case regarding rendition of accounts and division of the property left by Rajah Ruttun Singh, now in charge of the Court of Wards, was pending before Moulvee Mahomed Khyrooddeen,"—and other persons, naming them, and describing them "as members," and their Lordships understand that they were a committee of persons, or a punchait, appointed to make a partition. The document goes on, "the same has now been amicably adjusted and divided amongst ourselves, according to our specific shares,"—that is, the shares mentioned in the first agreement,—"under the auspices of Mr. John Inglis, Collector of Bareilly, and the division, under the blessings of Providence, having been made accordingly regarding the whole property, viz., cash, furniture, villages, (mortgaged and free from mortgage), houses and shops, cash deposited in banks and treasury, other property moveable of every description, and books, we have received our respective shares, Now there is not the slightest dispute

amongst us left unadjusted and unsettled, and there is not a fraction of such property which has not been divided amongst us. We have therefore filed this *razeenamah* acknowledging division of property and settlement of accounts in the court of the above-mentioned deputy collector that it may prove of use hereafter." There are undoubtedly words in this agreement which, taken by themselves, are sufficient to comprehend the whole of the property which was the subject of the first agreement; but the words which occur in the commencement of the agreement appear to their Lordships to be the governing words of the instrument, as far as the property included in it is concerned, and those words are: "Whereas our case regarding rendition of accounts and division of the property left by Rajah Ruttun Singh, *now in charge of the Court of Wards*." Now the only property which could have been in charge of the Court of Wards was the property in Rohilcund. Notwithstanding therefore the large words to which I have referred, viz., "Now there is not the slightest dispute amongst us left unadjusted and unsettled, and there is not a fraction of *such* property which has not been divided amongst us," their Lordships think that the reference made in that wide clause by the words "such property" limits its application to the property described in the commencement of the agreement, namely, the property "now in charge of the Court of Wards." Undoubtedly there is some room for the contention that the words "now in charge of the Court of Wards" were not intended to limit the agreement to property which was really in the Court of Wards, but were inserted by mistake and by misapprehension of the parties who might have thought that the property in Oudh was in charge of the Court of Wards of the district of Bareilly. Their Lordships do not fail to notice that property was described as being in the custody of the Court of Wards in the first agreement, but there the description is not confined to property in the Court of Wards, but the words "and in the province of Oudh" are inserted, apparently for the purpose of showing that the agreement was intended to comprehend lands in that province as well as those in Rohilcund. There are no such words in the agreement of November, and upon the whole their Lordships think that that agreement may properly be confined to the lands in Rohilcund which were really in charge of the Court of Wards.

It will be observed from what has been already said that their Lordships have felt that this document is ambiguous, and this being so, the construction of it may be aided by looking at the surrounding circumstances. If it had appeared that the appellant had had possession for a long number of years of some property which had belonged to Rajah Ruttun Singh in Oudh, and the respondent and those she represents had been in possession of other property which had belonged to the Rajah, it might have been inferred that a partition had been made by agreement, and that the parties were content to hold what they had so agreed to take without any formal partition by a punchait. But upon looking at the circumstances which were relied upon by the respondent's counsel, Mr. Cave, to support that presumption, it appears to their Lordships that they fail to do so. The first circumstance relied on was that in addition to the four houses which are the present subjects of dispute, there was a fifth house which, it was said, had belonged to Rajah Ruttun Singh, and had been in the possession of the appellant and her sister and her sister's husband. But the evidence when examined really fails to make out that that house was a part of the property of Rajah Ruttun Singh. On the contrary, there is a great deal of evidence to show that it was the separately acquired property of Dowlut Singh, the father of the appellant, and was no part of the estate of the Rajah. The title to that house is, at least, left in doubt, and it was for the respondent, if she relied upon the circumstance of the appellant's having the ownership and possession of the house as presumptive proof of the partition, to have shown clearly that it formed part of the property of the Rajah.

The other circumstance strongly relied on was that there had been an

acquiescence of nine years, from the date of the agreement in 1860 to the commencement of this suit, in the possession of the four houses now claimed remaining with the respondent. But again upon investigation their Lordships think that there was no acquiescence from which they could safely presume there had been a partition. It seems that upon the death of the appellant's sister, Rancee Chuttur Kooer, the appellant brought a suit against her husband, Oudh Beharee Lall, to recover from him her sister's $4\frac{1}{2}$ share in the houses now in dispute. That suit was commenced apparently in the year 1866. The defence to it was that Beharee Lall was entitled to the property in another right,—it is not necessary to say what right he set up. The present appellant succeeded in that suit in the Lower Court and also upon appeal in the High Court of the North-West Provinces. Now in that suit she claimed, as against her deceased sister's husband, her sister's share in this very property. It seems incredible if she was aware she and her sister had no right to this property, and that it had gone under a partition to Khyrattee Lall, that she should have instituted that which would have been, so far as regards this property, an entirely useless suit. It is perfectly true that nothing which occurred in the progress of that suit can be evidence against the present respondent, who was no party to it; but the suit is so far material and relevant that the present appellant, having obtained a decree against the sister's husband, Oudh Beharee Lall, endeavored to execute that decree by obtaining possession in due course of law of the houses and was resisted by the present respondent who was then in possession of them. These facts seem to negative anything like acquiescence on the part of the appellant in a supposed partition by which these houses were allotted and assigned to be held in severalty by the respondent or by Khyrattee Lall whom she represents.

Under these circumstances the case simply comes to the question of the right of the appellant under the agreement of July 1860. That agreement assumes that the parties were severally claiming, by virtue of some right of inheritance, the property of the Rajah Ruttun Singh; that there were questions between them which might disturb the rights which each claimed, and it was better instead of a long litigation to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares, and shall be divided according to those shares. A partition according to those shares has never taken place, and the respondent is in possession of the entirety of the houses in Oudh and the Imambara. Unless therefore the title of the present appellant is barred by limitation she has, in their Lordships' opinion, a right to a decree for the shares of those houses assigned to her and her sister whom she now represents by the agreement.

Their Lordships in coming to this conclusion have arrived at an opinion in accordance with that of the Judicial Commissioner from where this appeal comes to Her Majesty. The Judicial Commissioner states that he has no doubt that the agreement of November 1860 did not include the property in Oudh. He says, "I shall have to refer again to the agreement effected by the disputants in July 1860. I deem it necessary to record my concurrence in the ruling of my predecessor in regard to the deed of November 1860. It is clear from the terms of that document that it referred solely to that portion of the property of the late Rajah Ruttun Singh that was situated within the jurisdiction of the Collector of Bareilly. It sets forth that 'Whereas our case regarding rendition of accounts and division of the property left by Rajah Ruttun Singh, now in charge of the Court of Wards, was pending before certain arbitrators, an amicable adjustment has been made and the whole property divided.' The property situated in the province of Oudh and claimed in the present suit was not under the charge of the Court of Wards of the Bareilly District, and could not therefore have been included in the division referred to in this document." So far, therefore, their Lordships entirely agree with the judgment of the Judicial Commissioner. The way the case came before

him ultimately was this,—the Civil Judge of Lucknow having at first decided, contrary to the above view of the Judicial Commissioner, that the agreement of November 1860 did include the Oudh property, and was an estoppel, was overruled by a former Judicial Commissioner, Sir George Couper, who remanded the case for an enquiry as to the possession of the houses. The Civil Judge on this remand seems to have thought he must enquire who had had possession during the last 12 years, and finding that the respondent and her predecessors had been in possession for more than 12 years, he held that the suit was barred by the Statute of Limitations.

The Judicial Commissioner, when the case came before him on final appeal, held that the claim of the appellant was based on the agreement of July 1860, and that limitation only ran from that date; but he thought the limitation of six years was applicable to the suit. The judgment of the Judicial Commissioner was that the case of the appellant rested upon the agreement of July 1860, and that so resting upon a contract the case was within cl. 10 s. 1 Act XIV of 1859, and barred by it, inasmuch as the action was not brought within six years from the date of that agreement. Now their Lordships are of opinion that the 10th is not the clause which is applicable to the present claim, but that the suit is really brought for the recovery of immoveable property, and that the clause which properly applies to it is cl. 12 s. 1. The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case. It therefore seems to their Lordships that the suit is not founded on contract or for a breach of it, but that it is a suit for the recovery of immoveable property "to which no other provision of the Act applies," and so within cl. 12; consequently, in their opinion, the proper limitation of the suit is 12 years, and it has not been contended at the Bar that if that be the period of limitation the present suit is barred.

For these reasons their Lordships, agreeing in the view of the merits of the case taken by the Judicial Commissioner, but differing from him as to the effect of the Statute of Limitations, must humbly advise Her Majesty that his judgment ought to be reversed, and that a decree ought to be made that the appellant is entitled to the possession of the $8\frac{1}{2}$ annas share of the properties in Oudh, the subject in dispute in the suit. The appellant to have the costs in India, and of this appeal.

The 6th February 1874.

Present :

Sir James W. Colville, Sir Montague E. Smith, Sir Robert P. Collier,
and Sir Lawrence Peel.

Municipal debentures—Interest—Quit-rent—Letters—Registration.

*On Appeal from the High Court at Calcutta.**

The Port Canning Land Investment Reclamation and Dock Co., Limited,
versus
A. Smith.

* From the judgments of Peacock, C.J., and Macpherson, J., on appeal from a decision of Phear, J., sitting in the Ordinary Original Civil Jurisdiction of the High Court,

The Port Canning Municipal Commissioners invited loans on debentures convertible into leasehold titles to lands in the town. The Port Canning Land Company subscribed to the loan, declaring their desire to take land in lieu of the debentures. After the debentures were issued a correspondence commenced between the parties with the object of effecting the conversion, in which correspondence the Commissioners intimated to the Company the construction they put upon the Company's tender, viz., that they elected to take land to the full value of their debentures. The Commissioners also intimated to the Company that the latter had selected lots amounting to a part only of their debentures, and required them to select others, giving notice at the same time that they did not consider themselves liable to pay interest. The Company after this proposed to defer exchanging the debentures till their due date, and, if the Commissioners consented, not to call for the interest in the meantime, but agreeing to pay a quit-rent equivalent to the interest. The Commissioners agreed to this and asked the Company to declare the lots which they would receive in commutation. A selection was made but not in accordance with the contract; the lots selected being of more value than the debentures. The Commissioners then proposed that the Company should return the debentures and pay quit-rent upon the additional lots. This was not accepted, but the matter was left in an imperfect state. The Port Canning Land Company subsequently brought an action against the Port Canning Municipality for two years' interest on the debentures:

HELD that the non-acceptance of the proposal as to the additional lots could not affect the previous agreement to exchange debentures then held for equivalent lots: and that such previous agreement had been made involving quit-rent which extinguished the interest.

HELD that the letters did not require registration, for they did not amount to a lease, or an agreement for a lease; but were evidence of a contract of a special character not coming within any of the definitions in the Registration Act.

This is an appeal from a judgment of the High Court of Judicature at Fort William in Bengal. It arises in an action brought by a Land Company, called the Port Canning Land Investment Reclamation and Dock Company, against the defendant, the Chairman and representative of the Municipal Commissioners of the Town of Canning. The action is brought upon some debentures of the Municipality which were given to the Land Company, and the claim in the action is for two years' interest, the interest being payable by half-yearly payments, from the 1st January 1867 to the end of December 1868. The plaintiffs have undoubtedly a perfect *prima facie* case upon the debentures for that interest. The defence set up on the part of the Municipality is that there was an agreement come to between the Land Company and the Municipality by which it was agreed that the debentures should be exchanged for land at the time when the debentures matured, which was a period of five years after their date, and that, meanwhile, the exchange being alleged on the part of the Municipality to have been completely contracted for, a quit-rent should be paid for the land equivalent to the interest which was accruing upon the debentures—the intention of the parties being that the interest should be extinguished by that agreement to pay the quit-rent.

The question in the appeal is whether a complete and perfect agreement was come to between the parties to that effect. The case has been ably argued on both sides, with the result, which very often follows in a case properly argued, of reducing the point to be decided to a very narrow issue. The whole depends upon the correspondence; and the question is whether the agreement relied on by the defendants is established by some of the letters of that correspondence.

The Company was formed, as appears by their prospectus which has been referred to, for the purpose of obtaining land in Port Canning. The Municipality appear to have considerable land in that town, and were desirous of making it a place of trade. They raised money by issuing debentures, but they gave the holders of those debentures the election to exchange them for land. That right of election is found in a notice which was issued by the Municipal Commissioners when they invited tenders for the loans upon these debentures. The 5th Article of that notification is this:—"Debenture-holders are to be entitled to convert their debentures, to the extent of one-half of the entire loan raised, into leasehold titles to lands in the town, within a period of two years from the issues of the debentures, at the rate of Rs. 600 of loan for one beegah of ground. Such privilege of conversion to be given to debenture-holders in order of the dates on which applications for such conversion are received by the Commissioners. The leasehold title so conferred to be for sixty years on a rental of Rs. 30 per beegah per annum." Then

a further option is given:—"Such lease-holders to be further allowed to convert their leasehold into freehold tenures by a cash payment at the rate of Rs. 600 per beegah, provided such privilege be claimed within four years from 1st January next."

The plaintiffs, the Land Company, agreed to subscribe 2½ lacs of rupees and 200 rupees. That subscription was evidently made by them with the intention of exchanging the debentures they would obtain for land; for by a letter of the 13th March 1865, written before the debentures were issued, the Company declared their desire to take land in lieu of them to the full amount of the loan.

Very soon after the debentures were issued a correspondence commenced between the Company and the Municipal Commissioners, with the object of effecting the conversion. The letters on both sides are unbusinesslike. Letters are written and left without an answer, and then a fresh departure is made without reference to preceding letters. That correspondence, in the way in which it has taken place, no doubt imposes some difficulty upon those who have to construe it; but, as I have already said, after the matter has been threshed out, it really appears that the point is a very simple one. The first letter relating to the conversion, after the issue of the debentures, is on the 5th January 1866. It is a communication from the Commissioners to the Company, and is a spur to the Company to exercise their option, if they mean to do it, of taking land. It is this:—"DEAR SIRs,—Mr. Kilburn having applied to have certain lots out of the following numbers assigned to him on freehold title in exchange for debentures, viz., Nos.," — naming several numbers,—"I shall feel obliged by your intimating what lots amongst these numbers your Directors desire to select and retain for the Company, so as to enable me to inform Mr. Kilburn what lots will be available to him for redemption." It seems no answer was given, but there was some intermediate correspondence respecting an alteration in the debentures, which it is immaterial to consider. The next letter is again from the Commissioners to the Company, of the date of the 18th September 1866:—"GENTLEMEN,—I am directed by the Chairman to request that you will give your immediate attention to the following:—On the 13th March 1865 the Port Canning Company through you applied distinctly to have lots assigned to them in lieu of the debentures which are to be given for the amount subscribed by them to the loans. You applied specifically for lots,"—naming them,—and asked for other land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations, to such an extent as may be the equivalent of said amount of loan." "This is a distinct and formal intimation that the Port Canning Company avail themselves of the privilege allowed to debenture-holders by Article V of the published conditions of the loan." The Commissioners thus directly intimate to the Company the construction they put upon their letter, viz., that they had elected to take land to the full value of their debentures. The letter goes on:—"No formal letter was sent to the Canning Company on receipt of their application, placing the specified lots at their disposal; but on the 5th January 1866, the Secretary to the Municipal Commissioners wrote to the Secretaries of the Canning Company, requesting that they would intimate what lots they required among certain numbers specified in the letter, as Mr. Kilburn, another debenture-holder, had applied for lots, and the Commissioners could not tell Mr. Kilburn which of the lots were available until the Canning Company had made their selection. No reply was received from the Canning Company to this request, but in April 1866 the Secretary to Commissioners addressed Mr. W. C. Stewart, acting on behalf of the Canning Company, on the subject. To this letter also no reply was returned." Then they refer to another letter having been written:—"The lots applied for by Port Canning Company in commutation of their debentures have always been considered as transferred and held at the disposal of the Port Canning Company; and it now only remains for the leases to be completed and debentures to be sent

into this office to the value of Rs. 204,928, being the amount of the loan which these lots represent under the 5th Article of the published conditions of the loan." Then the letter goes on to urge the completion of the exchange:—"I am further directed to request that your Company will, without further delay, select such other available lots as may be required to make up the redemption of the entire sum subscribed by them to the loan, and to give notice that the Commissioners repudiate any liability to pay interest on the amount subscribed by the Canning Company, or to repay the loan, except in the shape of grants of land, as applied for by the Company in their letter of the 13th March 1865." There is thus a most distinct intimation on the part of the Municipal Commissioners that they hold and treat the Port Canning Company as having applied for an exchange of the whole of their debentures for land; that the Company have only selected lots which amount to a part of the whole amount of their debentures; that they require the Company to select the other lots and send in their debentures, and expressly give notice that from that time they do not consider themselves liable to pay interest.

Then come the two important letters, which cannot be fully understood without referring to this previous correspondence. The letter of the 20th December 1866 is from Mr. Schiller, who represents the Land Company, to the Commissioners:—"SIR,—With reference to the debentures held by the Canning Company which I agreed to exchange for land,"—thus in answer to the letter the effect of which I have given, which refers to an agreement, this letter also refers to the exchange as a thing agreed on:—"with reference to the debentures held by the Canning Company which I agreed to exchange for land, I now beg to propose that such exchange be deferred till their due date." That proposal, as Mr. Benjamin says, is an application for an indulgence. The Commissioners were pressing for an immediate exchange and that interest should stop, and this is a counter-proposition:—"I know I have agreed to that, but, if you will consent, I wish to have the exchange postponed until the debentures become due." And then comes this proposal of what the Company will do, so that the Commissioners shall be under no loss, and shall not be liable to the interest in the meantime,—“this will involve the payment of interest by the Municipality to the Port Canning Company;”—of course, this would be so; for the debentures being still extant interest would be payable upon them;—"but the latter is prepared to declare now the lots they will receive in exchange for debentures, and to pay a quit-rent thereon equivalent to the interest payable on their debentures. The Municipality will thus lose nothing, and the arrangement will be a convenience to the Canning Company." They really say this:—If you will for our convenience postpone the exchange of the debentures for land till the debentures become due, you shall be no loser; we shall not receive the interest, for we agree to pay you a rent which will be equivalent to it, and therefore one will extinguish the other. That is a distinct proposition. The fair meaning and substance of the whole letter is—we have agreed to take lots to the full amount of the debentures; and if you will consent to the exchange being postponed until the debentures become due, we will not call upon you for the payment of interest in the meantime, and we are now willing to make the selection. But the selection lay with the Company; it might be for their interest to make it then, or it might be more for their interest to make it at a future time. The answer comes on the 14th March 1867 from the Commissioners:—"DEAR SIRS,—With reference to the letter from Mr. Schiller, dated the 20th December 1866, copy of which is on the other side, I am instructed by the Chairman of the Municipal Commissioners of Canning to state that they agree to the proposal contained in that letter." That proposal I have already interpreted, and there is a distinct acceptance of it. Then they add:—"And to request that you will at once declare the lots which your Company will receive in commutation of the debentures taken by your Company, so that the Commissioners may know

exactly the lots which they are bound to hold for the Company." The agreement was perfect,—that there should be an exchange, that the time of exchange should be postponed till the debentures became due, no interest being payable in the meantime, and the Company being at liberty to select the lots they desired to take. Their Lordships think that the latter part of the letter as to the selection of the lots is not a part of the contract requiring further affirmance to bring the parties to a complete agreement, but relates to the execution of that which they had agreed upon. The two following letters, which it was Mr. Cowie's object to make a part of the agreement (his contention being that it was not perfected by the previous ones), appear to their Lordships to be only an attempt to carry it into execution. There is a selection of lots on the part of the Port Canning Company, and an intimation from the Municipal Commissioners that the Company had made a selection which was not in accordance with the contract. The letters are the letter of the 2nd April and the answer of the 22nd August. They really amount to this:—The letter of the Land Company professing to carry out the agreement says:—"We have selected these lots, which are the lots we are willing to take in pursuance of the agreement of exchange for the debentures, and which we think are about the amount of the debentures." The Commissioners' answer is:—"Well, we have no objection to your having those lots, but we are bound to tell you that you cannot have them for the debentures you now hold, because their value is half a lac more than the amount of those debentures, but we have no objection, if you will return debentures and pay quit-rent upon the value of the additional lots, that they shall go to you." That proposal has never been accepted; but the non-acceptance of that proposal, and its being left in an imperfect state, both parties being at liberty to refuse, the one to take, and the other to give in exchange the further quantity of land, cannot affect the previous agreement to exchange the debentures then held by the Company for lots equivalent in value to their full amount. That agreement was already made, and in their Lordships' view all that remained to be settled was the execution of it by the selection of the lots in accordance with the contract. The case is in this view extremely simple. It is an agreement to exchange, where on the one side the thing to be exchanged is already defined and specified, and where that which is to be taken in exchange is to some extent indefinite and requires a further act to ascertain it. Suppose *A* and *B* had agreed to make an exchange of this sort; *A* agrees to give to *B* six cows, specific cows, in exchange for six horses which he is at liberty to select out of the stock then upon *B*'s farm, the selection to be made at a future time; that is a perfect agreement for the exchange, and all that remains is that *A* should select the horses on *B*'s farm. There might be a dispute whether the horses that were upon the farm at the time of the agreement had not been removed, and others substituted; they might differ as to the horses which were intended to be taken in exchange; but that would not affect the agreement, but would be a question of the mode of performance of it.

A question was raised whether the letters did not form an agreement which should have been registered under the Indian Registration Act; but their Lordships think that the High Court was perfectly right in holding that the letters did not require registration. They do not amount to a lease or an agreement for a lease, but are evidence of a contract of a special character, not coming within any of the definitions found in the Registration Act.

On the whole, therefore, their Lordships think that the judgment of the High Court, which reversed the judgment of Mr. Justice Phear, is correct; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

The 27th February 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Act IX of 1859 s. 20—Limitation—Disability—Saving as to minors, &c.

On Appeal from the High Court at Agra.

Mahommed Bahadoor Khan and others

versus

The Collector of Bareilly and others.

Act IX of 1859 s. 20 which provided for suits brought in respect of property forfeited to the Government as the property of rebels, was intended to be of a general nature affecting claims to such property before whatever Court prosecuted, and not only claims prosecuted before the Commissioners established by the Act.

The limitation here enacted cannot be construed as implying any saving with respect to persons under disabilities.

The only question in this appeal, which comes before their Lordships in the shape of a special case, is whether the suit brought by the appellants against the Collector of Bareilly and the purchasers from the Government, to recover certain landed property in Bareilly, is barred by limitation. The appellants claim the property as the heirs of their father, Mahommed Tuffuzool Hossein Khan, who died on the 22nd April in the year 1854. The special case states that it is to be assumed for the purposes of the case that the father of the appellants was on his death entitled to the property sued for. That statement is made only for the purpose of raising the question which is for their Lordships' consideration on the Statutes of Limitation. It appears, however, upon the special case that before and at the time of the death of Mahommed Tuffuzool Hossein Khan, one Khan Bahadoor Khan was in the actual possession of the property. That person became a rebel, and in May 1858 his property was seized by the Government as forfeited on the ground of his rebellion. At the time of their father's death, and of the forfeiture of the property, the appellants were minors. The elder appellant became of age in 1861, and the younger in February 1864. The present suit was brought on the 1st May 1865, and at that time the elder appellant had been, as appears from these dates, of age for four years, and the younger appellant for upwards of a year.

The Act of Limitation which is relied on by the Government is Act IX of 1859. That Act was passed for the special purpose of providing a Court for the adjudication of claims by innocent persons upon the property of rebels which had been forfeited to the Government. It established a special Court, consisting of three Commissioners, and suspended the action of all other Courts in respect of such claims. Special modes of proceeding are established, and various clauses in the Act relate to that special course of procedure. But there are provisions in the Act which relate not merely to the Court so established and the procedure under it, but are of a general character, and apply to the property forfeited in whatever Court the claims may be made regarding it. One of those Clauses is in cl. 16, which provides:—"Whenever any person shall have been convicted of an offence for which his property was forfeited to the Government, no Court has power in any suit or proceeding relating to such property to question the validity of the conviction." Ss. 17 and 18 are also Clauses of a general nature, and so it appears to their Lordships is cl. 20, which contains the limitation on which the Government rely. The Clause is this:—"Nothing in this Act shall be held to affect the rights of parties not charged with any offence for

which upon conviction the property of the offender is forfeited in respect to any property attached or seized as forfeited or liable to be forfeited to the Government; provided that no suit brought by any party in respect to such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates."

It was suggested that this limitation was meant to apply only to claims prosecuted before the Court of Commissioners established by the Act, and it was contended that the Act was of a temporary nature, and that its provisions fell with the purpose for which it was passed. But the Act is not made temporary by any enactment. It was in part repealed by the general repealing statute of 1868, that is, Act VIII of 1868, and the mode of repeal is significant. It is not altogether repealed, for the general Clauses to which I have referred, including cl. 20, are saved from the operation of the repealing Act. The repeal and saving are both found in the schedule to Act VIII. It is clear from their being thus saved that these Clauses were at that time considered by the Legislature to be of a general nature, affecting claims to property which had been forfeited, before whatever Court those claims might be prosecuted.

The words are perfectly plain. No suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of the Act and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment; and that, although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any persons in respect of forfeited property.

Assuming, then, that the case is within the Act, their Lordships will consider the other objections which have been raised. The answer first put forward was that this limitation could be held only to apply to some right, title, and interest—using the words of the ordinary execution Acts—of the rebel himself. Now it is obvious that this cannot be the right construction of the Act. It would be a wholly insensible enactment if it were, because the Act assumes that the interest of the rebel is forfeited, and it is only in respect of claims other than this that this limitation could operate. The Act is declared not to affect the rights of parties in respect of the property seized. "The property" is the thing seized as forfeited, whether it be land or a jewel, and the right referred to is the right of an innocent party, other than the right of the rebel, in that property.

Another contention, which seems to have been the only one urged in the High Court, as far as it appears from the judgment, is, that a saving with respect to parties under disabilities must be taken to be by equitable construction implied in this Clause. Their Lordships however think it is impossible that any Court can add to the statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the general Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it.

It was said that the Clauses in the general statute, Act XIV of 1859, relating to disabilities might be imported into this Act, but this cannot properly be done. Act XIV is a code of limitation of general application. This Act is of a special kind and does not admit of those enactments being annexed to it. It is to be observed that if it could be done it would not assist the appellants, because the limitation of Act IX is one year only, and the saving in favor of minors in s. 11 of Act XIV would not bring them within time, as a year elapsed after they came of age before the bringing of the present suit,

One other objection requires to be noticed, that this Act was not retrospective. Undoubtedly, Mr. Doyne was able to suggest cases in which hardship might arise to persons who would not have a full year to claim before they would be barred under the provisions of this Act, or even where the year might have elapsed between the date of the confiscation and the passing of the Act. Although hard cases may arise, their Lordships consider that the Act is plainly retrospective in its operation, and includes claims to forfeited property which had been confiscated previously to its passing.

Their Lordships are of opinion that the judgment of the High Court is right, and they must humbly advise Her Majesty to affirm it.

Mr. Forsyth.—One of the questions is:—"Whether, if it shall be decided that the appellants or either of them is barred by limitation, the Government respondent shall have any and what costs of this special case?"

After a discussion on this question,—

Sir M. Smith said,—According to the course of their Lordships' decisions the Government are entitled to the costs. Whether they will think that under the circumstances they should enforce payment of them from the respondent is for their consideration.

The 27th February 1874.

Present:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Lessor and lessee—Presumption of fraud.

*On Appeal from the High Court at Calcutta.**

The Administrator-General of Bengal

versus

Anundo Chunder Bose.

No legal presumption of fraud having been practised arises from the mere fact of a lease being obtained from the manager of an estate at an unusually low rate of rent.

This was a suit brought by Mr. Hogg, the Administrator-General of Bengal, and joint executor of the estate of Mr. Henry Adams, deceased, and also in his capacity as attorney for Mrs. Adams, the widow of Mr. Adams, against Anundo Chunder Bose, the holder of a certain mokurruree pottah. The suit seeks to set aside that pottah upon these grounds: first, that it was obtained by the defendant Anundo Chunder Bose, who was a naib of the estate acting under Mr. Shaw, who was agent or attorney for Mrs. Adams, by collusion between the defendant and Mr. Shaw; and secondly, for the reason that Mr. Shaw had no authority to grant any such lease. It was not a suit for reforming the lease, but simply for setting it aside: and the effect of it would be to turn the defendant out of possession, and to put the plaintiffs in it, without any recompense to the defendant of any kind for any improvements he may have made, if he made any.

The facts necessary to make the suit intelligible may be very shortly stated. Mr. Adams, the owner of a considerable tract of land in the Soonderbuns, died in the year 1845, leaving a will, made not long before his death, whereby he devised his estates to his wife for life, with remainder to her children, and appointed her

* From the judgment of Couch, C.J., and Mitter, J., in Special Appeal No. 1016 of 1871, decided on the 20th February 1872,—17 W. R., 301.

and Sir Thomas Turton, who was then acting as Administrator-General of Bengal, joint executors of the will. Mrs. Adams has ever since resided in England, giving authority from time to time to various persons, to Mr. Steers, and Mr. Vos, and Mr. Shaw, at different times, in 1847, 1861, 1862, and 1868, under powers-of-attorney to manage the estate and collect the rents, though not in terms to grant leases. The lease in question was a mokurruree lease granted to the defendant, who was the naib of the estate, in December 1862. He obtained this lease upon the terms of paying no rent at first, but the rent to be increased until it rose to the maximum of ten annas per beegah.

It has been contended that the rate of rent in this case was lower than was usual in leases of a similar character in the neighbourhood, and that the defendant, who acted as a naib, obtained it improperly, and in collusion with Mr. Shaw.

The issues, which it is not immaterial to look at, were these :—“ I. Had the agents who used to be appointed and who were appointed on behalf of Mrs. Adams in the Soonderbun lots left to her by her husband, any authority to make mouroosee settlements? Had the agent, Mr. Shaw, any such authority? ” Then the next is—“ The said agent, Mr. Shaw, created, on the 15th Pous 1269, a mouroosee jumma in favor of the defendant; did he act collusively in settling it at an inadequate rent, or act in a *bond fide* and straightforward manner? ” Then the third issue is—“ After taking the said land did the defendant enhance its value? ” Upon that, their Lordships understand, there is no specific finding; and that may be put out of the question. The fourth issue is—“ Were Mrs. Adams and her agents, subsequently appointed, cognizant of the pottah granted by Mr. Shaw, or not? Did they by their conduct confirm the defendant's jumma, or not? If they did, then, can the plaintiff now bring the present action? ” Those were the issues.

The case in the first instance came before the Subordinate Judge of the 24-Pergunnahs; and their Lordships understand him to have found in favor of the defendant on the first issue :—“ Had the agents authority to make mouroosee settlements? Had the agent, Mr. Shaw, any such authority? ”

With respect to the second issue, namely, whether there was collusion between Mr. Shaw and the defendant, that case was withdrawn, and a totally different case was set up, which is not pointed to by any of these issues. The case set up,—what may be called the substituted case,—was, not that Mr. Shaw and the defendant colluded, but that the defendant, the under agent, imposed upon Mr. Shaw, the superior agent, and induced Mr. Shaw to grant this lease without Mr. Shaw being aware of its contents. Now their Lordships understand the Subordinate Judge to have found that there was no misrepresentation; that the defendant did not impose upon Mr. Shaw.

With reference to the fourth issue,—“ Were Mrs. Adams and her agents, subsequently appointed, cognizant of the pottah granted by Mr. Shaw, or not? Did they, by their conduct, confirm the defendant's jumma, or not? ”—their Lordships understand the Subordinate Judge to have found that they were cognizant of it, and that they did confirm it. It appears to their Lordships that there was evidence upon which all of these findings might have been properly supported.

The case then came before Mr. Beaufort, the Judge of the 24-Pergunnahs, upon appeal to him, the case not being of sufficient magnitude and value to admit of its being taken by way of appeal to the High Court. Mr. Beaufort, as their Lordships understand his decision, did not reverse the finding in point of fact of the Subordinate Judge, that Mr. Shaw granted this lease, acting within the general scope of his authority as agent. He certainly does not find that the lease was granted without authority. Upon the fourth issue,—whether or not this grant was subsequently confirmed by Mr. Shaw and Mr. Steers (who acted with him) with cognizance of the facts,—there is no specific finding on the part of

Mr. Beaufort; but he does not, upon that either, reverse the decision of the Lower Court.

Their Lordships may observe upon this, that that decision does appear to them to be in a great degree confirmed by an ikrar executed in 1866, whereby the former lease to the defendant, in their Lordships' view, must be taken to have been recognized, and by recognition confirmed by Mr. Steers and by Mr. Shaw; and their Lordships understand that it has been further confirmed by the receipt of rent from the defendant to the present time.

The Judge of the 24-Pergunnahs differs from the finding of the Judge of the Court below, and reverses his findings upon these grounds. With respect to the substituted issue, as to whether the defendant imposed upon Mr. Shaw, he finds that the defendant did impose upon Mr. Shaw in obtaining this lease; and he states the ground upon which he comes to that conclusion. These are his words:—"As he obtained it at an unusually low rate and at a russudi jumma, the maximum rate of which is this unusually low rate, I must presume that he fraudulently misled the manager for his own benefit." That, as far as their Lordships are able to understand it, is the ground of Mr. Beaufort's judgment.

Upon this there was a special appeal to the High Court; and the High Court in effect reversed the judgment of Mr. Beaufort, and confirmed the judgment of the Subordinate Judge, upon this ground:—that Mr. Beaufort was not justified in presuming, as he appears to have done, from the mere fact that the land was let at an unusually low rent, that therefore the defendant had obtained it by a fraud practised upon Mr. Shaw.

It appears to their Lordships that the High Court were right in that view that there was no such legal presumption; and that is the main ground, if not the only ground, upon which the High Court appear to have reversed the decision of Mr. Beaufort. They also refer to one matter which is alluded to in the grounds of appeal, namely, that Mr. Beaufort had not dealt with the question of subsequent ratification by Mr. Steers and Mr. Shaw; and their Lordships are unable to say that the remarks which have been made by the High Court on that subject are open to any substantial objection.

On these grounds their Lordships are of opinion that the High Court was justified in point of law in reversing upon special appeal the judgment of Mr. Beaufort; and consequently they think it their duty humbly to advise Her Majesty that the judgment of the High Court be affirmed, and the appeal dismissed.

The 5th March 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Putnee talooks—Sale for arrears of rent—Act X of 1859 s. 105—
Reg. VIII of 1819—Reg. I of 1820.*

*On Appeal from the High Court at Calcutta.**

* From the judgment of Bayley and Phear, J.J., in Regular Appeal No. 188 of 1866, decided on the 7th December 1867,—8 W. R. 507.

Brindabun Chunder Sircar Chowdry and another
versus
 Brindabun Chunder Dey Chowdry and others.

A decree having been obtained by a zemindar for arrears of rent of a putnee talook, it was held that under the description "putnee" and "dur-putnee" the *prima facie* intention was that the tenure called a putnee tenure was transferable by sale, and was one upon which the right to sell for arrears of rent was reserved in the engagements interchanged upon the creation of the tenure. Consequently, according to the effect of Act X of 1859 s. 105, and Reg. VIII of 1819 ss. 8 and 11, and probably also of Reg. I of 1820, the sale of the putnee destroyed all incumbrances created by the putneedar, *e.g.*, a dur-putnee.

This is a suit for possession and mesne profits of a dur-putnee mehal brought against the zemindar. The charge is that the zemindar in collusion with the heirs of Rutnessur Roy, who was said to be merely a benamee holder of the putnee talook, obtained a decree against them for Rs. 5,156 as arrears of rent of the said putnee, and that under that decree he sold the putnee and having purchased it in his own name entered upon the estate of the dur-putneedar, treating the durputnee as having ceased to exist upon the sale of the putnee.

With regard to the fraud their Lordships are of opinion that there is no sufficient evidence to satisfy a Court of justice that there was any fraud or collusion between the zemindar and the heirs of Rutnessur, to allow the zemindar to obtain a decree against Rutnessur for arrears of rent which were not actually due. A strong fact against the supposition of fraud was this, that the zemindar originally sued the dur-putneedars for these arrears of rent. The dur-putneedars in that suit set up as a defence that Rutnessur was the putneedar and that they were merely the dur-putneedars of the mouzah, hence they said, the plaintiffs' claim can be made against Rutnessur or his heirs, and not against us. Now, if the dur-putneedars at that time thought that the action ought to have been brought against the Maharajah of Kishnaghur, for whom they said Rutnessur held the estate benamee, why did they not say so in their defence? They said, Rutnessur is the person liable for these arrears and you must sue him. Upon that the case went to trial in the Collector's Court; and the Judge who tried the case held that Rutnessur was the putneedar, and therefore that the plaintiffs could not sue the dur-putneedars, and he dismissed the suit with costs, whereupon the zemindar brought an action against the heirs of Rutnessur for the arrears of rent, and it is that suit which is now charged as having been brought by collusion between the zemindar and Rutnessur for the purpose of injuring the dur-putneedars by fraudulently obtaining a decree for rent which was not due, and then selling the putnee and avoiding the incumbrance of the dur-putnee.

There being, then, no fraud in the case, the question arises whether upon the sale of the putnee under the decree for rent, it was sold free from the incumbrances which had been created by the putneedar, or, in other words, whether it was sold free from the dur-putnee. That depends upon the construction of s. 105 of Act X of 1859. That Section enacts:—"If the decree be for an arrear of rent due in respect of an under-tenure which, by the title deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force." It has been held, upon the construction of those words, "according to the rules for the sale of under-tenures," that the effect of Regs. VIII of 1819 and I of 1820 is applicable to cases of sales under decrees of rent made under this s. 105; and then the question arises whether this was a sale for an arrear "of rent due in respect of an under-tenure which, by the title deeds or the custom of the country, is transferable by sale."

The plaintiff in his plaint describes the tenure as a putnee talook, and his

own tenure as a dur-putnee, and the point is whether, under the description of "putnee and dur-putnee," it is to be presumed that the putnee tenure was one such as is described as the tenure denominated a putnee by Reg. VIII of 1819. In the preamble of that Regulation—which, as contended for by the learned Counsel, it must be admitted is not an enactment but merely a recital—it is said:—"By the terms of the engagements interchanged it is, amongst other stipulations, provided, that in case of an arrear occurring, the tenure may be brought to sale by the zemindar, and if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be answerable for the demand. These tenures have usually been denominated putnee talooks."

Their Lordships are of opinion that under the description "putnee talook" and "dur-putnee talook" it must be *prima facie* intended that the tenure called a putnee tenure was a tenure transferable by sale and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale. If so, according to the terms of Reg. VIII of 1819 the tenure might not only be brought to sale, but it might be sold free from incumbrances. By s. 8 of Reg. VIII it is enacted:—"Proprietors under direct engagements with the Government shall be entitled to apply in the manner following for periodical sales of any tenures upon which the right of selling or bringing to sale"—not the right of selling or bringing to sale free from incumbrances but—"upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure." Then, by s. 11, the effect of such a sale is stated as follows:—"It is hereby declared that any talook or saleable tenure that may be disposed of at a public sale under the rules of this Regulation for arrears of rent due on account of it, is sold free from all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held."

It appears therefore to their Lordships that this was the sale of a talook transferable by sale and upon which the right to sell for arrears of rent was reserved in the engagements entered into by the parties. Consequently, according to the effect of s. 105 of Act X of 1859 and ss. 8 and 11 of Reg. VIII of 1819, and probably also of Reg. I of 1820, the effect of the sale of the putnee talook was to destroy all incumbrances which had been created by the putneedar, and consequently to destroy the particular incumbrance which is mentioned in the plaint in this suit, namely, the dur-putnee of the plaintiff.

Their Lordships, therefore, think that the suit was not maintainable, and that the learned Judges of the High Court did not probably give sufficient effect to the recital of the preamble of Reg. VIII of 1819 and the enactments of that Regulation, in holding that it did not appear that the putnee was a tenure upon which the right to sell for arrears of rent had been reserved by the contract of the parties.

Under these circumstances it appears to their Lordships that the decision of the High Court was not correct, and they will therefore humbly recommend Her Majesty to reverse that decision and to affirm the decision of the Principal Sudder Ameen, with the costs of this appeal.

The 6th March 1874.

Present :

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

*Confirmation of possession—Declaratory decree—Fraudulent sale—Evidence
of bona fides—Onus probandi.*

*On Appeal from the High Court at Calcutta.**

Tacoordeen Tewarry

versus

Nawab Syed Ali Hossein Khan and others.

In a suit for confirmation of their possession of certain mouzahs, plaintiffs as heirs of a deceased lady also prayed that it might be done after reversal of a summary proceeding and after setting aside a fraudulent and fabricated deed of sale alleged to have been made by her in favor of defendant (her occasional man of business) while living alone and apart from her natural advisers. The first Court decreed the suit, confirming plaintiffs' possession and setting aside the deed. The High Court, holding that plaintiffs had no possession, reversed so much of the decree as confirmed plaintiffs in possession, and gave a declaratory decree concluding that they could not give substantive relief:

HELD that the High Court erred in that conclusion, for the prayer of the plaint that the deeds might be set aside was a prayer for substantive relief.

In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside. But in the case of sales or gifts made by a lady in such a position as that of the lady from whom the defendant claims, the strongest and most satisfactory proof ought to be given by the person who claims that the transaction was a real and *bonâ fide* one, and fully understood by the lady.

This was a suit brought by the respondents against the present appellant, Tacoordeen Tewarry, for a confirmation of their possession of certain mouzahs; and their plaint, which declared that their suit was for that confirmation, also prayed that it might be done after a reversal of a summary proceeding, and, which is the most important part of their prayer, after setting aside a fraudulent and fabricated deed of sale set up by the appellant. The deed which is sought to be impeached is of the date of the 23rd July 1861. The respondents are the heirs of Mussamut Koodrutonissa, a purdanasheen lady, who some time before her death seems to have had some dispute with her relatives, and went to reside in the town of Patna. The appellant, Tacoordeen Tewarry, was living in Patna; and in the course of the evidence given in this suit it was stated by the witnesses on the part of the plaintiffs that Mussamut Koodrutonissa went to live in his house; that she died there; and that he had acted on several occasions as her mookhtar. The deeds which are impeached are a deed of sale of the mouzahs from the lady to Tacoordeen Tewarry, professing to be made in consideration of a sum of Rs. 39,501 (a large part of which, namely, Rs. 17,960, is stated to have been paid to a creditor of the lady), and a mookhtarnamah for the execution of that deed.

When the case came before the Principal Sudder Ameen, evidence was gone into on both sides; on the part of the plaintiffs to show that they were in possession of the property, and also to impeach the validity of the deeds on the ground that they were forged and fabricated and that there had been no real sale from the lady to the appellant. The appellant went into evidence to show that he had been in possession of the property subsequently to the date of the alleged deed during the lifetime of the lady, and had continued in possession up to the time of the suit, and also to show that the deeds were really executed and

* From the judgment of Seton-Karr and Mitler, J.J., in Regular Appeal No. 427 of 1866, decided on the 13th August 1867,—8 W. R. 341.

that the consideration-money had passed. Upon a review of the evidence on both sides, the Principal Sudder Ameen came to the conclusion that the plaintiffs were in possession of the property and that the deeds were fabricated; and he made a decree confirming the plaintiffs in the possession, and directing that the deeds should be set aside. The appellant appealed to the High Court, and that Court disagreed with the Principal Sudder Ameen as to his finding upon the possession of the property. They thought that upon the whole of the evidence the respondents had not proved their possession, and, in fact, that the possession was with the appellant. Being of that opinion, they reversed so much of the Principal Sudder Ameen's decree as confirmed the plaintiffs in their possession, holding that they had no possession which could be the subject of confirmation. The High Court then went into the consideration of the substance of the dispute,—namely, whether the deeds were genuine deeds or not. In approaching that question they seem to have assumed that they could only deal with it by way of declaration, and they came to the conclusion that they had power to declare the title to the estate, but could not give any substantive relief. Their Lordships think that they erred in coming to that conclusion; the plaintiff prayed that the deeds might be set aside, which is a prayer for substantive relief, and the Principal Sudder Ameen was quite right when he came to the conclusion on the facts that the deeds ought to be set aside in making a decree to that effect. However, the form in which the High Court considered the question does not really alter the substance of their decision. They, after a full and careful review of the evidence, came to the same conclusion as the Principal Sudder Ameen,—namely, that these deeds had not been executed by the lady.

It was contended by Mr. Bell that the High Court ought not to have thrown the onus of supporting the deeds upon the appellant; and perhaps the mode in which the High Court treat this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside; but the Court seem to have regarded this suit as if it were an action of ejectment brought by the appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the appellant to show a better title. But although the Judges do not quite correctly state the principle of fixing the onus, their judgment is substantially right, because the plaintiffs did not put their case before the Principal Sudder Ameen simply upon their title as heirs, and throw it upon the appellant to prove a better title, but they did by evidence challenge the validity of the deeds. They called witnesses to show the circumstances under which this lady lived, and to challenge proof of the consideration having passed which the deed alleges to have been given. It may be that the evidence is weak, but the appellant accepted the onus which that evidence *prima facie* cast upon him; and he went into his whole case, and gave the evidence that he thought would best support it. Upon a review of that evidence, the High Court came to the conclusion that it was utterly insufficient to establish the validity of the deeds under the circumstances of the case.

Now the circumstances of the case are that this lady was a purdanasheen living apart from her relations; whether in the house of the appellant or not, may not be distinctly proved, but certainly in a place where she was without those natural advisers which a lady, when she was going to part with apparently the whole of her property, ought to have around her. She, whilst thus alone and unprotected, is supposed to have made a deed in favor of a person who, on some occasions, acted as her man of business. According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one, and fully understood by the lady whose property is dealt with.

So far from giving satisfactory evidence on these points, the appellant has failed to produce that which clearly was within his power, and which ought to have been given even in an ordinary case of a sale that is at all impeached. It is alleged that the deed of sale was executed by the lady herself, and also by a mookhtar called Mookondee Lall, who had a mookhtarnamah from her for that purpose. The mookhtarnamah is filed, and appears upon this record; but Mookondee Lall, the mookhtar who is supposed to have executed this deed, it not produced as a witness. Again, the execution of the mookhtarnamah is supposed to have been verified by the Nazir and three witnesses, the Nazir having afterwards reported to the Principal Sudder Ameen who registered the document. The Nazir and those three witnesses have not been called. And further, the writer of the deed of sale himself, who was present according to the evidence at the time when the deed was executed, is also kept out of the witness-box. The deficiency of this important evidence is attempted to be supplied by the testimony of witnesses who say they were present at the execution, but who, as compared with those who would have been the authentic witnesses of the transaction, are not at all fit to be relied upon. Their Lordships also agree with the High Court that there is no trustworthy evidence of the payment of the purchase-money, either by satisfying the alleged claim of a creditor of the lady, or otherwise.

The case on the part of the appellant was attempted to be supported by the evidence of proceedings which had taken place in the lifetime of the lady in rent-suits, and in a suit in which there was a contest between the lady and her relatives. Documents in those suits referred to the sale; and authenticity is endeavored to be given to the transaction in consequence of the lady herself having recognized it. But there is an entire absence of satisfactory proof that those documents, which are said to contain confirmatory evidence of the transaction, were executed by the lady, or that, if she did execute them, their contents were known to her.

On the whole, therefore, their Lordships entirely agree with the substance of both the decisions below that these deeds are not genuine and ought to be set aside.

Their Lordships think that the decree of the Principal Sudder Ameen was correct in form as well as in substance. The High Court, acting on their opinion that they could only make a declaration of title, whilst professing to confirm (except as to the possession) the Principal Sudder Ameen's decree, really vary its terms by inserting a general declaration that the plaintiffs are the rightful owners of the property, instead of the specific order that the deeds should be set aside. They reversed the decision of the Principal Sudder Ameen with regard to the possession,—a reversal in which their Lordships concur,—and added what follows in their formal decree, “and that so much of the decree of the said Court as declares that the said plaintiffs are the rightful owners of the said property be confirmed.” Their Lordships think that as the plaint had prayed for substantive relief, namely, that the deeds should be set aside, the more correct form of decree is in the terms of that prayer.

Their Lordships will, therefore, humbly advise Her Majesty to vary the decree of the High Court by striking out so much thereof as purports to confirm the decree of the Principal Sudder Ameen, and to order that in lieu thereof so much of the last-named decree as ordered the deed of sale and the mookhtarnamah to be cancelled and set aside be affirmed.

The 14th March 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
and Sir Robert P. Collier.

*Invalid lakheraj—Resumption—Polliam—Regs. XXV and XXXI of 1802,
Madras Code.*

On Appeal from the High Court at Calcutta.

The Collector of Trichinopoly

versus

Lukkamani and the Zemindar of Marungapuri.

HELD that Reg. XXV of 1802 of the Madras Code did not either give to, or take away from, the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The object of Reg. XXXI of 1802 of the Madras Code was merely the protection of the revenue from invalid lakheraj grants, and to provide for the mode of trying claims to hold lands exempt from payment of revenue. It was not intended to confer upon Government any title which did not then exist, or to assert that, according to the usages of the country, there was no private right to lands :

HELD that there is no long uniform current of decisions to show that every polliam not permanently settled is necessarily only a tenure for life or at the will of Government.

The nature and object of the suit in which these appeals were preferred are clearly stated in the judgment pronounced by the High Court at Madras (Record 190).

To make the case intelligible it may be shortly stated that the suit was brought in the Civil Court of Trichinopoly by Lukkamani, the first widow of Tirumalai Puchaya Naiker, the late zemindar of Marungapuri, to recover, as his heiress, amongst other things, the villages attached to the zemindaree. The suit was brought against the Collector of Trichinopoly as the agent of the Court of Wards in charge of the zemindaree, on behalf, and as the guardian, of Rangakristna Mutha Veera Puchaya Naiker, a minor, who was the half-brother of the deceased zemindar, and who, after his death, had been recognized by the Government as the zemindar. At the time of the late zemindar's death, he and his half-brother, the minor, were members of an undivided family, and consequently, if the estate was hereditary, and the minor was legitimate, he was the heir of the deceased zemindar (9 Moore's Indian Appeals, 66).*

The principal defences set up by the Collector were—

1. That no istemraree sunnud had been granted for the zemindaree, and that it was an unsettled polliam ; that after the death of the late zemindar the right to nominate a successor to him was vested in the Government ; that the Government had granted the zemindaree to the minor, Rangakristna ; and that this being an act of State, could not be questioned by any Municipal Court.

2. That, even if an istemraree sunnud had been granted, and the polliam had been settled, the minor, as the undivided half-brother of the deceased zemindar, would be the rightful heir thereto.

The widow disputed the legitimacy of the minor, and the following were the principal issues laid down for trial :—

1. Whether the Court was competent to entertain the suit ?
2. Whether the half-brother of the deceased zemindar was his legal heir, or whether the plaintiff herself was entitled to succeed to the zemindaree ?
3. Whether the minor was the half-brother of the deceased zemindar ?

Subsequently, the minor, having attained his full age, was admitted as a supplemental defendant in the suit; but the first defendant, the Collector, was also allowed to be heard in defence. Whereupon the first defendant, the Collector, having been examined as a witness, the Judge held that it was conclusively proved that the zemindaree was an unsettled polliam, and that the right of succession having been declared by the highest authority to be vested in Government and not in the line of lineal succession, it followed that that right could not be called in question in that Court. He, therefore, found the first issue in favor of the first defendant, and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court and made only the second or supplemental defendant, the half-brother, respondent. Whereupon the Collector presented a petition to the High Court stating that it was contended on the part of the appellant that the zemindaree was not an unsettled one, and consequently that the Government had no right to interfere with the succession thereto on the death of the zemindar, and that the Government was interested in the decision of that question; he therefore prayed that he might be made a party to the suit and allowed on behalf of Government to defend the appeal.

On the 17th June 1870, the petition of the Collector was dismissed (p. 187).

Another petition to the same effect was subsequently presented by the Collector (p. 188), the Government offering to forego all claim to costs. Whereupon it was ordered that the application should be admitted on condition that, in the event of the appeal being dismissed with costs, no more than the costs of one respondent should be allowed against the appellant.

Thus it appears that the Collector who was originally a defendant merely as agent of the Court of Wards and as guardian of the minor zemindar Rangakristna, became substantially a party to the suit on behalf of and as representing the interests of Government. The appeal came on to be heard before the High Court who, at the close of the arguments on the first day of the hearing, were of opinion, for the reasons specified in their judgment, that, upon the case presented by the record returned to the Court, the decree of the Zillah Court could not stand, and they adjourned the further hearing of the appeal (Record, p. 191, l. 42); afterwards, having obtained all the evidence which the parties were able to adduce with respect to the proprietary right of the late zemindar, and having heard the case fully argued, they delivered judgment (p. 192).

In the first place, they held that the Government proceedings admitting the minor to the succession did not amount to an act of State, which debarred the cognizance of the suit by a Municipal Court.

The correctness of their decision upon that point has not been disputed in the present appeal.

They then (p. 192, l. 16) proceeded to consider the question whether the estate of the late zemindar was hereditary, or whether he had merely an estate for life. Upon that point they delivered a very able and elaborate judgment, in which they held that the polliam was an ancestral hereditary estate. (Record, p. 204, l. 10.)

They said (p. 205):—

“With respect to the proprietary right possessed by the late zemindar, there is now before the Court the whole of the evidence which the parties have been able to adduce, and we have had the advantage of hearing the case ably argued. The question for determination is, whether he had vested in him an hereditary estate, which passed on his death to his heir in the order of legal succession, as the plaintiff contends, or an estate for life, on the termination of which the right to dispose of the property reverted to the Government, as the defendants contend. The villages and lands mentioned in the plaint form one of the Manapuri polliams, but the estate and the holder of it have been commonly given the designations used in the plaint, of zemindaree and zemindar; it is however a

conceded fact that no istemraree sunnud granting the estate under Reg. XXV of 1802 has ever existed; and the positions advanced on both sides, stated summarily, are on behalf of the plaintiff, that there is sufficient evidence from which to draw the inference that the property had been permanently assessed; but, if not, that the tenure by which the polliams not permanently assessed are held had not attached to it as an essential incident the limit of the life of the holder, but that, both historically and by judicial authority, the tenure is rather shown to be in its nature hereditary; that it may be either here hereditary or for life, according to the nature of the grant creating it, and that in the present case the evidence proved the polliam to have been held as an hereditary estate."

Then, after reviewing the authorities, the evidence, and the arguments of Counsel, they proceeded:—

"Upon the whole, we are of opinion that it has been established as strongly as a claim of this nature can be expected to be proved that the polliam in dispute is an ancestral hereditary estate which has devolved through several generations in the ordinary course of legal succession. Almost everything tending to this conclusion that could reasonably be looked for, it seems to us, exists, save the grant of a sunnud under Reg. XXV of 1802; and that is not, in our judgment, made by law indispensable, except to render the revenue assessment permanent. It follows that the right of succession contested in the present suit depends upon the question raised by the second issue in the suit, whether the second defendant is the legitimate brother of the late Polligar, Tirumalai Puchaya Naiker. If so, he is the rightful heir to all the property claimed in the plaint, no division having taken place between him and his deceased brother. But if illegitimate, he has no right to any portion of it. No additional issue is necessary."

An issue was then directed to try whether the half-brother was legitimate or not.

It is admitted that the villages and lands mentioned in the plaint are, as pointed out by the High Court, one of the Manapuri polliams, and that no istemraree sunnud, granting the estate under Reg. XXV of 1802 of the Madras Code, has ever been issued.

The case has been very elaborately and ably argued on both sides, and their Lordships, having carefully considered all the regulations and authorities which have been cited, are clearly of opinion that the decision of the High Court is correct.

It was contended by the learned Counsel for the Collector appellant that in the Presidency of Madras the Government had reserved to itself and had, by legislative enactments, asserted its right to all lands of every description, and Regs. XXV and XXXI of 1802 of the Madras Code were referred to as having that effect.

It was recited in the preamble of the former of those two Regulations that the assessment of land revenue had never been fixed, and that the zemindars and others had no security for the continuance of a moderate land tax; *that for the attainment of an increased revenue it had been usual for Government to deprive the zemindars and to appoint persons on its own behalf to the management of the zemindaries, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever*; that it was obvious that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population, and wealth, and diminishing the security of personal freedom and of *private property*, and that the British Government, impressed with a deep sense of the injuries arising to the "State and to its subjects, from the operation of such principles, had resolved to remove from its administration so fruitful a source of uncertainty and disquietude, to grant to zemindars and other landholders, their heirs and successors, a *permanent property* in their land in all time to come, and

to fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances."

It was then enacted by s. 2 that, in conformity with these principles, *an assessment should be fixed on all lands liable to pay revenue to Government: and in consequence of such assessment the proprietary right of the soil should become vested in the zemindars or other proprietors of land and in their heirs and lawful successors for ever*; and it was further enacted by s. 3 that when the conditions of the permanent settlement of the revenue should have been adjusted, a sunnud-i-milkeut-i-istemrar or deed of *permanent property* should be granted on the part of the British Government to all persons being or constituted to be zemindars or proprietors of land.

Laying out of consideration for the present the words of the preamble, which form no part of the enactment of the Regulation (see Dwarris on Statutes, p. 655), it is clear that the affirmative words of s. 2 "that, in consequence of the assessment the *proprietary right* of the soil shall become vested in the zemindars, &c.," did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away an existing right (see Coke's 2nd "Institute," p. 200; "Dwarris on Statutes," p. 637). There are no words declaring that no proprietary right then existed, or should thereafter be deemed to exist, except in Government in any lands not permanently settled; and in their Lordships' opinion it was not the intention of the Legislature to pass such an enactment.

The words "proprietor of land," as used both in the Bengal Code of 1793 and in the Madras Code of 1802, have a technical signification (see the definition in Bengal Reg. VIII of 1793 ss. 5, 6, and 7; and Reg. XXVII of 1802, Madras Code, s. 2). They refer to "zemindars, independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government;" and the words "proprietary possession," as used in the recital of Reg. XXV of 1802, must also be read in a similar sense as meaning the possession and rights of a proprietor in the technical sense in which that word is used, viz., the person who pays the revenue immediately to Government. (See Regulation I of the Madras Code, ss. 14 and 16.)

There are frequently many valuable tenures existing between the zemindar and the ryots, or actual cultivators of the land. If the Regs. XXV and XXXI of 1802 were to be read in the sense contended for on the part of the Collector appellant they would have the effect of vesting in Government, not only all hereditary estates, but all sub-tenures, whether for life or otherwise, and whether created by the native Governments before the territories came under the Government of the East India Company or not.

The words of the recital "the *implied* right and the *actual* exercise of the *proprietary possession*" are, to say the least of them, very ambiguous. But whatever may be the real meaning of those words, the recital clearly was not intended to amount to more than a declaration that it had been usual for Government, in order to enforce an increased revenue, to deprive or dispossess the zemindars, and to take the management of the zemindaries into the hands of their own officers; or, in other words, that they were in the habit of taking khas possession of the zemindaries of those zemindars who neglected to pay any increased amount of revenue assessed upon them.

A similar course seems to have been adopted in Bengal up to the time of the permanent settlement (see Reg. I of 1793), and to have been continued at the time of that settlement, with respect to every zemindar who might decline to engage for the jumma proposed to be permanently settled upon his estate. (See Reg. VIII of 1793 s. 43, Bengal Code.)

Further, the usage recited was limited to the purpose of obtaining an increased revenue; and it was by means of the usage that the Government was said to have reserved to itself the implied right, &c. The words are "*thereby reserving to the ruling power the implied right, &c.*" The preamble recognized the right of private property when it stated that the then existing mode of administration was injurious "*by diminishing the security of private property.*" It did not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The language of the recital applied as much to zemindars in their lifetime as it did to the heirs of zemindars upon their deaths. If the words were to have the unlimited construction and effect contended for, the Regulation would have justified Government in depriving or dispossessing the deceased Polligar in his lifetime, and in transferring the zemindaree to a new holder, to the same extent as it would have justified them in dispossessing his heirs after his death. Such a construction would go far beyond the claim set up by the Collector in the suit, viz., that the deceased zemindar had only a life estate which reverted to Government and was at their absolute disposal after his death; nay, it would do more, it would render every landowner in the Presidency, except those who claimed under a permanent settlement, liable to be dispossessed or deprived of his estate, and to have it transferred to a new holder at the will of Government.

The preamble to Reg. XXXI of 1802, which, as before observed, was not an enactment, is as follows:—Whereas the ruling power of the Provinces now subject to Fort St. George has, in conformity to the ancient usage of the country, reserved to itself and has exercised *the actual proprietary right of lands* of every description, and whereas consistently with principle all alienations of land, except by the consent of the ruling power, are violations of that right; and whereas considerable portions of land have been alienated by the unauthorised encroachment of the present possessors, by the clandestine collusion of local officers, and by other fraudulent means: and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description, it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being badshai or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose.

The Act, s. 2, then proceeds to render valid all grants for holding lands exempt from the payment of public revenue which had been made before certain dates, and to leave to the determination of Government all doubts respecting the validity of other grants of that nature.

The words "has reserved to itself and has exercised the actual proprietary right of lands of every description," used in the above preamble, are not precisely the same as those used in the preamble of Reg. XXV, but they evidently have reference to the same usage, viz., the custom of dispossessing zemindars and taking their zemindaries into the khas possession of Government for the purpose of realizing the public revenue from time to time assessed upon them. The object of the Reg. XXXI of 1802 was merely the protection of the revenue from invalid lakheraj grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which did not then exist. The words "alienations of lands" referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. It is clear that the Regulation never intended to assert that, *according to the usages*

of the country there was no private right to lands, for in rendering valid all lakheraj grants made prior to a certain date, and declaring that the holders should continue to enjoy the same free from the payment of revenue, there was this proviso, that the lands had not *escheated* to the State since those dates.

It was urged, in support of the Collector's appeal, that there was a long course of judicial decisions, from 1813 to the present time, showing that Polligars had merely a life-interest in their polliams.

The first case cited was No. 13 of 1813, 1st Madras Select Decrees, p. 78. In that case the plaintiff had never had the possession of the zemindaree. His claim had been repeatedly brought to the notice of Government, and had been rejected. The permanent settlement had been entered into with the defendant, and a sunnud-i-milkeut-i-istemrar granted to him by Government, under the provisions of Reg. XXV of 1802. This case was not decided upon the mere words of the recital of Reg. XXV of 1802, but upon the enactment in s. 2, and it was held that the Government having *permanently* settled with the defendant, *and granted him a sunnud*, he had acquired a title under that Regulation, and that the plaintiff could not recover the estate. The decision, however, whether right or wrong (probably right under the law as it then stood), was decided before the passing of Reg. IV of 1822, by which it was enacted that Regs. XXV, XXVIII, and XXX of 1802 were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and left them to recover in the established Courts of justice *their rights* if infringed (an enactment similar in effect to that contained in the Bengal Regulations relating to the permanent settlement in that Presidency). (See No. 8 of 1793, Bengal Code, s. 30.)

Reg. IV of 1822 expressly recognized the fact that landholders had actual rights which they might recover if infringed.

In the case cited (No. 13 of 1813), a case was referred to (Appeal No. 9 or 1813), in which a talookdar's rights were asserted and enforced against a zemindar, which is quite at variance with the contention that the property in lands of every description belonged to and was vested in Government. It is true it was stated by the Court in No. 13 of 1813 that it was plainly deducible from Reg. XXV of 1802 that, previously to the fixing of the permanent assessment, succession to zemindaree tenures was not governed *exclusively* by the law of inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures in such manner as might be considered most expedient for the purpose of realizing the public revenue due from the lands, and that it was clear therefore that, in rejecting the claims of the plaintiff, whatever might be the specific grounds of such rejection, and in granting the zemindaree to the original defendant, the British Government exercised a right which, according to the declared usages of the country, was vested in the ruling power. It was to correct opinions such as those that Reg. IV of 1822 was passed.

The next case was No. 11 of 1846, p. 141. In that case there had not been any permanent settlement or any sunnud granted by Government. The zemindaree had been made over to the father of the plaintiff and defendant after the district came into the possession of the East India Company, and it continued in his possession to the year 1811, when, upon his death, it was made over to his eldest son. The Court said that the respondent held under a title which the Government, in the exercise of the right vested in them by the usage of the country, had conferred upon him.

One of the Judges who decided the last case was also one of those who decided No. 13 of 1813, evidently putting the same construction upon Reg. XXV of 1802 as he had done in No. 13 of 1813.

Case No. 14 of 1817 is subject to similar remarks. The Court, of which two of the Judges were the same as those who decided the former case, acted upon similar deductions from Reg. XXV of 1802.

All those cases were decided prior to Reg. IV of 1822, and were probably some of the decisions which induced the Legislature to pass the Regulation.

Their Lordships do not consider that the cases cited from the Madras Select Decrees are binding authorities in support of the contention that Government has a right to deal with the polliam in the present case, or any other polliam, according to arbitrary will independently of the rights of the parties, or in support of the position that the absolute right to every polliam not permanently settled is vested in Government, or that the tenure is for life only, and that upon the death of the Polligar the estate reverts to Government.

Many of the cases cited in argument are of no greater weight or authority than that which is the subject of the present appeal. They are modern authorities, and there is no long uniform current of decisions sufficient to show that every polliam not permanently settled is necessarily only a tenure for life, or at the will of Government.

In the case of *Naraguntty Lutchmeedavamah v. Vengama Naidoo* (9 Moore's Indian Appeals, 67; * and in that of the Collector of Madura, *v. Veeracamoo Ummal, Id.*, 446); the polliams were treated as hereditary, the question in each being as to the person entitled to succeed as heir. In the latter case, the Government of Madras claimed to be entitled by escheat for want of male heirs, thereby admitting that the estate was hereditary; but it was held that females were not precluded from inheriting a polliam, thereby deciding that it was hereditary. It did not appear in any of those cases that the polliam had been permanently settled, or that a sunnud had been granted in respect of it under Reg. XXII of 1802. They show that a polliam may be hereditary though not permanently settled under Reg. XXV of 1802.

Their Lordships are of opinion that each case must depend upon its own particular circumstances; that a polliam may be hereditary, and that the position laid down by the High Court (page 200, line 30) is correct. There they say:—

“The existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property.”

Their Lordships are also of opinion that the finding of the High Court upon evidence adduced that the polliam in dispute is an ancestral hereditary estate is also correct.

It does not at all follow from the application made to Government for the recognition of the minor that he had not an hereditary estate. It was extremely common in Bengal before the acquisition of the Dewanny where a tenure was in fact hereditary from father to son to take out a new sunnud upon each descent (14 Moore's Indian Appeals, 256, *Kooldeep Narain Singh v. The Government and others*).† So also it appears that upon a transfer of title to lands in Calcutta, either by alienation or descent, a fresh pottah was given to the new holder; but that was merely a fiscal regulation and the pottah formed no part of the holder's title (*Freeman v. Fairlie*, 1 Moore's Indian Appeals, 346).

The Collector in his written statement alleged that the polliam was unsettled, and that after the death of the late zemindar the right to appoint a successor was vested in the Government, and that accordingly the Government had granted the said zemindaree to the minor defendant. No grant from the Government was produced. That which is called a sunnud was not a grant creating a new right but a mere recognition or acknowledgment of an existing title. See the proceedings of the Madras Government (No. 17A, Record, p. 23).

From this document it appears that, upon the death of the late Polligar, the Collector sent a report to the Court of Wards stating among other things as follows:—

* 1 W. R. P. C. 30., 1 Suth P. C. R. 460.

† See p. 491 *ante*.

"The deceased zemindar, on the day previous to his death, addressed to me a petition, requesting me to *recognize* his brother as his successor to the estate, and to appoint his cousin to manage the affairs of his estate during the minority of his brother.

"The tahsildar was deputed to ascertain the wishes of the widows of the deceased on this point, and to afford information regarding the property left by the zemindar. The tahsildar submitted a statement obtained from the widows, from which it appears that they earnestly request a compliance with the request contained in the petition addressed to me by their husband, but with this modification, that the cousin should conduct the affairs of the estate under the direct control of the first-mentioned widow. The widows admit the genuineness of the petition.

"The deceased left no will. The estate consists of the Marungapuri zemindaree and certain meerassee lands, the assessment of which amounts to Rs. 2,528-8-10."

The above report was submitted by the Court of Wards to Government with a recommendation that the Collector be *authorized to recognize* the brother of the deceased (the defendant in the suit) as zemindar of Marungapuri, and to take charge of the estate. They added—assuming that the family is undivided, as is probably the case,—*the brother of the deceased would be the legal heir to the zemindaree, irrespective of the petition or consent of the widows.* Upon that report the Government passed an order, dated September 17th 1864, that the Court's proposal is approved.

It also appears that after the death of the father of the late Polligar, Tirumalai, the Collector reported that the deceased left one son Tirumalai, *the heir to the estate*, and one son, the present defendant, a little boy by his fifth wife, then three years of age, and he recommended that Tirumalai should be recognized and invested as Polligar in the room of his father (Record, 32). Upon which the Government ordered that Tirumalai should be recognized and placed in charge of the estate.

In England, proof of the possession of land or of the receipt of rent from the person in possession is *prima facie* evidence of a seisin in fee.

In India the proof of possession or receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zemindaree. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions, from ancestor to heir (see 14 Moore's Indian Appeals, 256).^{*} There is no difference in this respect between a polliam and an ordinary zemindaree. The only difference between a polliam or zemindaree which is permanently settled and one that is not is that, in the former, the Government is precluded for ever from raising the revenue; and in the latter, the Government may or may not have that power.

The history of the polliams of Southern India is well known. It is to be found in the fifth Report of the Select Committee from the House of Commons on the Affairs of the East India Company, presented in 1812, a work of great research, and in the Madura Manual, compiled by Mr. Nelson of the Madras Civil Service, by order of the Government of Madras.

The account given in the fifth Report was adopted in the judgment pronounced by Lord Kingsdown in the case above quoted, in which it was held that a polliam was an ancestral estate in the nature of a raj.

Looking at the evidence in the cause with reference to the tenure of the polliam in question, their Lordships have no doubt that the High Court arrived at a correct conclusion, and that the polliam is an ancestral hereditary estate.

The question as to the legitimacy of the minor defendant, and his right to inherit, if the estate of his brother was an estate of inheritance, was found by the

^{*} See p. 491 *ante*.

High Court in his favor, and that decision has already been upheld by their Lordships in the widow's appeal. The legitimacy of the minor having been upheld, the suit of the widow was properly dismissed, for whether the estate was one of inheritance or one merely for the life of her deceased husband, with a right on the part of the Government, on his death, to appoint a successor, the widow could have no right to succeed. The decree of the High Court was correct, and even if the point raised by the Collector on the part of the Government were decided in his favor, the decree dismissing the widow's suit must still be upheld. Their Lordships have already stated that they will humbly recommend Her Majesty that the decree of the High Court be affirmed with costs.

As the point raised by the Collector was one of importance, and necessary to be decided with reference to the costs of the Collector's appeal, their Lordships have heard that question argued; and having fully considered the very able and elaborate arguments of the learned Counsel on both sides, they have arrived at the conclusion that beyond all doubt the decision of the High Court was correct, and they will therefore humbly recommend Her Majesty, with reference to the Collector's appeal, that the decree be affirmed and the appeal dismissed with costs.

The 23rd March 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith,
Sir Robert P. Collier, and Sir Lawrence Peel.

Hindoo widow—Accumulations of income.

On Appeal from the High Court at Allahabad.

Mussamuts Gonda Kooer and Sawitree Kooer,
widows of Chowdry Pudum Singh,

versus

Kooer Oodey Singh.

The ruling in *Soorjamonce Dossee v. Denobundhoo Mullick*, that the widow was entitled absolutely in her own right to all such interest and accumulations as, since the death of her late husband, had arisen from the one-fifth part of the accumulations which she had before been declared entitled to hold and enjoy as a Hindoo widow in the manner prescribed by Hindoo law, was held not to apply to a case where the widow was presumed to have intended to make her purchases as accretions to her deceased husband's property.

This suit originated thus :—

Chowdry Mohur Singh in 1862 brought a suit in the nature of an ejectment, claiming the whole of the property, real and personal, of Chowdry Hem Singh, deceased, as his heir, against Chowdry Pudum Singh, who claimed to hold it as Hem Singh's adopted son. This suit came by appeal before this Board, which held that the adoption of Pudum Singh had not been proved. The following is an extract from the judgment* delivered in the appeal on the 14th March, 1869 :—

" Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit that the appellant is not the duly adopted son of Hem Singh, and that on the death of Khoosal Kooer (the widow of Hem Singh), Mohur Singh, the father of the respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of Hem Singh, of which his widow died possessed. And they will recommend to Her Majesty that, with this declaration, the cause be remitted to the High Court of Agra, to make such enquiries as shall be necessary to ascertain :—1. What share of the estate of Hem Singh the said Mohur Singh was entitled to; and, 2. What part of the property claimed by the plaintiff was the estate of Hem Singh."

* 12 W. R. P. C. 6 : and p. 224 *ante*.

The enquiries thus directed form the subject-matter of the present suit. As to the first, no question now arises, and the second alone has to be dealt with.

The issue on this subject, which the High Court of North-Western Provinces, in order to give effect to Her Majesty's order, settled and sent for the trial by the Lower Court, is in these terms:—

“What part of the property claimed by the plaintiff was the estate left by Hem Singh, or added thereto by his widow by the outlay of his profits.”

It appeared that Hem Singh, who died in 1834, had inherited some property and had purchased some; and further that his widow, after his death, had purchased a good deal of property. The property in dispute consisted wholly of houses and lands.

Khoosal Koor left by will all the property which she had power to dispose of to Pudum Singh.

The right of the present plaintiff Koor Oodey Singh, who represents his late father, to all the property inherited or purchased by Hem Singh, was not denied; the only question arose as to that purchased by his widow.

It was contended, on behalf of Pudum and of those who represented him, that his mother had made the purchases in question from property which she had derived from her father, that, consequently, it was her own, and that she had power to dispose of it by will. It was contended on behalf of Koor Oodey Singh, that such purchases had been made from the profit or accumulations of the property of Hem Singh, and this was treated as the only question between the parties in the Court of the Principal Sudder Ameen, and in the High Court.

The Principal Sudder Ameen came to no distinct conclusion on this question, and both parties made objections to his judgment.

The High Court for the North-Western Provinces thus express themselves on the question.

“With respect to the averment that Khoosal Koor had acquired a portion of the property by means of her own, it is sufficient to remark that there is no proof on the record as to the mode in which she obtained the fund for any such purchases, and that the presumption is that she made them from the proceeds of her husband's estate. If her father, said to have been wealthy, had given her the means of making purchases, more clear evidence that he did so should be forthcoming. Nor do we find that any such averment was distinctly made when the suit was heard originally. This being so, we are of opinion that the defendant's objection should be dismissed.”

This judgment has been appealed against by the two widows of Pudum Singh, who have been permitted to institute this appeal, a settlement having been come to between the plaintiff and the son of Pudum Singh.

It has not been here contended that the High Court was wrong in finding as a fact that the purchases were made by the widow out of the proceeds of her husband's estate. But a question has been raised at their Lordships' Bar which does not appear to have suggested itself either to the parties or to the Judges in the Courts below.

It has been argued that, assuming the purchases to have been made by the widow out of the proceeds of her husband's estate, nevertheless, they do not form increments to that estate, but belong to the widow absolutely and are at her absolute disposal, either by gift in her lifetime or by will. It has been further argued that, even if the presumption be that such purchases are increments to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate, and to treat them as made in her own right, whereupon she acquires the power to dispose of them and that such intention is proved in this case. The principal authority relied upon by the appellant was *Sreemutty Soorjeemony Dossee v. Denobundoo Mullick*, 9 Moore's Indian Appeals, p. 123,* where it was declared by this Board, varying the decree of the late Supreme

* 4 W. R. P. C. 114; 1 Suth. P. C. R. 291.

Court at Calcutta, that the widow was entitled absolutely in her own right to all such interest and accumulations as, since the death of her deceased husband, had arisen from the one-fifth part of the accumulations which she had before been declared entitled to hold and enjoy as a Hindoo widow in the manner prescribed by Hindoo law.

Although the decree in that case as so altered made a distinction between the principal funds to which the widow was entitled as heiress of her husband, and the accumulations of income which had arisen therefore since his death, and in terms treated her right to the latter as absolute and unqualified, it is nevertheless to be observed that there were no questions in that case as to any conflicting rights between her heirs and the reversionary heirs of her husband. The case, moreover, was governed by the law of Bengal, and the accumulations of income, to which the widow was declared absolutely entitled, were the produce of a reserve fund. Their Lordships cannot, therefore, regard this case as a conclusion, or even a direct authority upon the questions raised on this appeal.

In the present case their Lordships are of opinion that Khoosal Koor, who always maintained the validity of her son's adoption as heir to her deceased husband and treated him as entitled to succeed to her husband's property, must be presumed to have intended to make her purchases as accretions to that property; nor do they see any evidence to rebut this presumption. It is true that she made a will in her son's favor, but it contains no specific gift of the property in question, and might well have been intended to apply to any property of her own which may have belonged to her as her stridhana. That the property in question was understood by Pudum Singh himself to be part of Hem Singh's estate is shown by the pleadings in the original suit, in which he claimed it as the adopted son and heir of Hem Singh. It therefore becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate to herself and to sever from the bulk of the estate such purchases as she had made, with the view of conferring them on her adopted son. Their Lordships accordingly see no sufficient ground for reversing the judgment appealed against, and will humbly advise Her Majesty that that judgment be affirmed and the appeal dismissed with costs.

The 8th May 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and
Sir Lawrence Peel.

Champerty—Mofussil courts—Immoral contract.

On Appeal from the High Court of Judicature at Madras.

Chedambara Chetty

versus

Runga Krishna Muthu Vira Puchaiya Naiker.

In consonance with the principles laid down by the High Court of Calcutta in several decisions, the Lords of the Privy Council HELD that, although the law of Champerty was not applicable to the mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family affairs, by an agreement between him and

the real heirs that if he should establish their claim he should be entitled to a share of their estate; and that such an agreement could not be enforced, being something against good policy and justice, something tending to promote unnecessary litigation, and something that in legal sense is immoral.

In this case the appellant sued the respondent, who was the zemindar of Marungapury, to recover the amount alleged to be due upon the bond marked A, and set out at page 10 of the record. The material portion of the bond is this:—"With reference to the dealings which you had heretofore held with Lekamani and others, widows of my elder brother Tirumalai Poochai Naiker, the late zemindar, on account of their maintenance and Court costs as per a loan bond for Rs. 20,000 and an agreement for Rs. 10,000, the accounts being adjusted up to date, the sum which was found due by them, and which alone was assigned to be paid by me, is Rs. 67,000. As I have undertaken to pay you the same, I hereby bind myself to pay you the said sum of Rs. 67,000 within the 30th September of the current year, and get back this bond and the bond and agreement above referred to. On failure to pay the money within the above prescribed time, I bind myself to pay you on demand the said sum of Rs. 67,000, with interest at half per cent. per mensem, and receive back this and aforesaid bonds." The bond and the agreement referred to are Exhibit B, at page 11, and Exhibit C, at page 12 of the record. Their effect will be afterwards stated.

The respondent was the younger brother of the late zemindar, or polligar, of Marungapury. He seems to have been treated as heir presumptive by his brother. Immediately upon his brother's death he was recognized by the authorities as the zemindar; and, being a minor, he and his estate were placed under the guardianship of the Court of Wards. It is stated in the judgments, and, if the record in the former suit which has been recently before the Court is looked at, it amply appears that the widows themselves also recognized in the first instance this boy as the heir. And even without going out of the record, it appears upon what is strictly in evidence in this case that for two years they acquiesced in his recognition by the Government as heir and received at the hands of the Collector, who was exercising the power of the Court of Wards, certain sums by way of maintenance. In December 1866 a change came over them. The plaintiff in this suit then came upon the stage, and the agreement which is marked B was executed on the 21st day of that month. It is an agreement of a very singular nature, and the material portions of it are these:—"As with reference to the moneys to be borrowed of you by executing loan bonds in view to meet the expenses incidental to suing out (our claims) in the Revenue and Civil Courts, and before the superior authorities respecting our zemindaree, which is now held by the Court of Wards in their management on behalf of another, to whom it is intended to be transferred, and to meet our maintenance expenses, we have agreed of our own free-will to repay on demand the amount so borrowed of you, with interest at the rates provided for in such bonds, and in consideration of the aid you propose to give us in money, and in exertions towards establishing our title to the said zemindaree, to pay you as allowance and gratuity, immediately after the zemindaree is granted to us, one lac of rupees out of the incomes thereof, and a moiety of the surplus proceeds that may be transferred to us by the Court of Wards; you shall accordingly prosecute the claims, and shall, immediately after the said zemindaree is granted to us, have the zemindaree under the management of your own agent, disburse the maintenance amounts due to us as per agreement, the peishcush (revenue), and the establishment charges, and pay yourself from the surplus proceeds the lac of rupees above agreed to be paid to you; and we shall redeem the zemindaree from your agent's management only after the said amount has been fully paid to you." After this comes this material passage:—"In the meantime we shall not transgress the directions of your agent in the matter either of the said claim"—that is, of the suit to be brought—"or of our household affairs, &c., or of the management of the zemindaree. If, on the contrary, we fail so to

conduct ourselves, we agree of our free-will to pay you at once, without any objection, from out of our assets and those of our heirs, the principal and interest due on the loan bonds, the allowance of one lac of rupees agreed above to be paid, and the amount forming a moiety of the surplus proceeds remaining with the Court of Wards on that day. We further agree not to execute any bonds in the matter of this claim or debts to anybody other than yourself." It appears then that these ladies having changed their mind, and determined to claim the estate as the heirs of the late zemindar, for that purpose put themselves wholly into the power and into the hands of the plaintiff; that they agreed to pay him on demand the moneys to be advanced with interest at the rates to be provided for in the bonds which the agreement contemplated they would give the plaintiff for the advances when made; that they further agreed that if they succeeded in the suit they would pay him a lac of rupees and a moiety of the surplus collections, mortgaging the zemindaree to secure those payments; that they would do nothing in the suit or otherwise without his consent; and that if they violated the agreement they should at once become liable to pay both the principal and interest due on the loan bonds, and also the lac of rupees and the amount of the surplus collections remaining with the Court of Wards on that day.

Under this stringent agreement, the suit No. 30 of 1868 was instituted in their names; but it is impossible to read the agreement and to know anything of the manner in which litigation is conducted in India without seeing that although the suit was carried on in the name of the ladies, the whole management of it was committed to the plaintiff, and that he was, as was represented in the argument, the real *dominus litis*. It further appears that but one bond was executed by the widows under this agreement, viz., the bond which is dated the 26th May 1867, and purports to be a bond for securing the repayment of the sum of Rs. 20,000 (the amount of the plaintiff's advances up to that time), with interest at 12 per cent. per annum. The principal, if not the only, question raised in the suit by the widows was the legitimacy of their husband's younger brother. The family being a joint Hindoo family, he, if legitimate, was unquestionably entitled to the zemindaree as the heir preferable to the widows. A further question was, however, raised by the Collector who defended the suit as guardian of the minor zemindar, viz., whether the polliam was an hereditary estate at all, or one the succession to which, upon the death of the actual polligar, was determinable by Government. The suit being in that state, the boy, having attained the age of 18, which is the age fixed by the Regulations for the majority of a zemindar, was put by the Court of Wards into possession of his estate, and made a formal defendant; and immediately upon, or very shortly after that, the transactions which are in question in this suit took place. We find the dates given in the judgment of the Judge, Mr. Davidson, and there is no doubt about them. The defendant was installed as zemindar on the 23rd July; on the 2nd August 1869 he had notice that he had been made supplemental defendant to the suit. The suit was fixed for hearing on the 16th; and on the 11th, in anticipation of that hearing, certain Commissioners were sent to Marungapury by the Court in order to examine the widows, who, of course, were purdah women. The widows seem then to have become desirous of settling and compromising their suit, and the terms upon which they were willing to compromise were finally embodied in a razeenamah. Those terms, however, did not include any subsidiary arrangement to be made in respect of the money which was due from them to the plaintiff; the razeenamah only expressed that they were willing to consent to the dismissal of their suit upon the terms of their having assigned to them certain villages by way of maintenance, and each party paying his own costs.

As to what took place on the 11th and the subsequent days there is a considerable conflict of testimony; but their Lordships, adverting to what was said by Mr. Davidson, the Judge, as to the credit due to the witnesses on either side, and

particularly as to the manner in which the zemindar gave his evidence, and to the fact that the finding of the learned Judge has been adopted by the superior Court, have no doubt that it is their duty, upon any matter of fact upon which the testimony is conflicting, to adopt the finding of the Zillah Judge. It must, therefore, be taken as found that on the 12th, when the first negotiation for the compromise took place, there were present on that occasion not only the vakeels and agents of the nominal parties to the suit, but certain persons acting on behalf of or as agents for, the appellant; that the latter then contended that the compromise could not be carried into effect without their principal's consent; that a large sum of money was due from the ladies to him; that something was to be paid to him in respect of his interest under the agreement; and that it lay upon the zemindar to make those payments. It must further be taken to be found that although Lekamani, the principal widow, stated that the sum due to the plaintiff was small, his agents made use of threats to the respondent to the effect that unless he would make himself liable for moneys to the amount of Rs. 62,000, the consent of the plaintiff to the compromise would be refused, that the case would go on, and would probably terminate in the loss of his zemindaree. Their Lordships cannot doubt that such threats were used; that the note for Rs. 62,000 was given by the respondent in consequence of them; and that that note was not given, as it has been once or twice represented in the argument, to Lekamani, or anybody on Lekamani's behalf, but was given to Rungaiengar, who was one of the persons acting on behalf of the plaintiff.

The note having been thus given and obtained on the 12th, the razeenamah was signed by Lekamani, and the respondent on the 13th. In the meantime a messenger had been sent from Marungapury to bring the plaintiff from Shivagunga, where he seems to have resided. It is stated that he was sent for on the 11th, but that he did not arrive until the evening of the 14th. On the 15th there was a further transaction; he asserted that Rs. 62,000 was not a sufficient satisfaction of his claims, and that he must have Rs. 67,000. As to what then took place there is again a considerable conflict of evidence. It is sworn by him and by his witnesses that some examination of his accounts was made; that by the account so rendered it appeared that he had actually advanced to the ladies Rs. 58,000, although a bond had been taken for only Rs. 20,000; that he estimated the compensation to be allowed for the further benefit which, if the suit had been successful, he might have derived under the agreement B, at the sum of Rs. 13,000 odd; that the Rs. 67,000 were compounded of those two sums; and that the respondent voluntarily executed the bond A for that amount. On the other hand, the case made for the respondent (which is deposed to both by him and his witnesses) is that there was no rendering of accounts at all; that there was merely a demand for Rs. 67,000 instead of the Rs. 62,000; and that the plaintiff himself then renewed the threats which had been previously made by his agents.

Some, but not all, of the witnesses say that he threatened, if his demand was not acceded to, not only to go on with the pending suit, but also to sue on the note of hand for Rs. 62,000. All, however, speak to threats to the effect that he would go on with the suit; that he would carry it through all the Courts up to this board; and that the result to the young zemindar would probably be the loss of his zemindaree and the ruin which had fallen upon other zemindars: they also swear that the respondent in vain asked for time to consult the Collector who had so recently been his guardian, and that, under the pressure so put upon him, he was induced to execute the bond for Rs. 67,000.

Their Lordships have already said that when the evidence is conflicting they must adopt the view which was taken of it by the Judge, Mr. Davidson. They must, therefore, hold not only that the respondent acted under the pressure of the threats deposed to, but, upon the material question whether any accounts were rendered, that there was no accounting at all; that the sum for which the bond

was given was an arbitrary sum fixed by the plaintiff as the amount for which he would be content to allow the arrangement between the widows and the zemindar to be carried out. It may be observed that the bond as drawn out is not altogether consistent with the story told by the plaintiff himself, since on the face of it the Rs. 67,000 would appear to be the balance found to be due in respect of advances, for maintenance, and for costs; whereas, upon the statement and admission of the plaintiff himself, it included the sum of Rs. 13,000 and odd as a compensation for that contingent advantage which he was to derive under the agreement B, in the event of the success of the suit.

It may be well to state what afterwards took place before considering the legal effect of these transactions. On the 16th August the suit came on for hearing; the razeenamah was then presented, but Mr. Norton, who had been Counsel for the Collector, as guardian of the infant, and who appeared on that day as Counsel for the zemindar, now adult, before the razeenamah was filed and acted upon, prayed for an adjournment. That was granted, and on the 31st August the case came on for final hearing. Mr. Norton then, as Advocate-General, acting for the Collector alone and not for the zemindar, raised the question which was lately before their Lordships and was then finally decided,—viz., that the estate was not hereditary; that the nomination of the infant zemindar as the next zemindar was an act of state with which the Municipal Court had nothing to do; and upon that plea, which must now be taken to be unsustainable, the Judge dismissed the plaintiff's claim, directing her to pay all the costs. Lekamani then appealed against that decision. No doubt she might have acquiesced in the title of the zemindar, and they might have privately carried out the arrangements supposing they were to be carried out, upon which they had previously agreed. However, she saw fit to appeal; but by her appeal she sought only that the decree instead of being the decree that was made, should be a decree framed in consonance with the razeenamah. In this she did not go beyond her rights. The respondent appeared upon the appeal by his Counsel, and treated the razeenamah as a thing altogether gone, and by which he was no longer bound. The High Court seems to have considered that that was so, and that the razeenamah was to be out of the case. They dealt with the ground upon which the suit had been dismissed, and finally decided, in a very elaborate judgment, which has since been confirmed by Her Majesty in Council, that there was nothing in that ground; that the estate must be taken to be an hereditary estate: and that the succession to it was to be determined by the Civil Courts according to the ordinary law of inheritance. They then gave the widow time to consider whether she would press her suit, and have the case remanded in order that the issue as to the legitimacy of the respondent might be regularly tried. The widow elected to have that issue tried. The case was remanded, and the respondent was found to be legitimate. The widow afterwards appealed against that decision to Her Majesty in Council, and her appeal upon that point was dismissed. Therefore the question of the legitimacy was fought out between the parties to the bitter end.

Now upon the transactions which took place between the 11th and 16th August, several questions have been raised. The issues settled in this suit were in effect whether there was any consideration for the bond, and whether the bond had been obtained by such undue pressure and threats as were sufficient to vitiate the contract.

And the principal questions which have been argued at the bar are, first, whether there was sufficient consideration for the bond; next, whether, if there were, there had not been a failure of that consideration; and thirdly, whether the plea impeaching the bond on the ground of pressure and threats could be supported.

Upon the first point their Lordships will assume, at all events for the sake of argument, that if the transaction had been between parties dealing with each

other at arms' length, and unaffected by any of the circumstances on which the third plea is founded, there would have been a sufficient legal consideration to support the bond.

Assuming, however, that there was a real substantial debt due to the appellant from the women on an agreement to which no objection could have been taken ; that there was a *bond fide* arrangement by which the widows were to have their suit dismissed ; and that one term of that arrangement was that they should be relieved of the debt due to the plaintiff,—their Lordships must observe that they agree with the Judges of the High Court in holding that the transaction would hardly amount to what is called a "novation." It was not a transaction by which the widows were altogether released from the debt which they had incurred to the plaintiff, nor was the plaintiff's position altered by reason of his having lost his remedy against them. It appears upon the face of the bond that he was to retain his securities against them until the bond was satisfied ; and that the contract on his part was, in fact, rather an agreement to abandon his remedy against them on the payment of the Rs. 67,000 than an actual abandonment at the time of the transaction.

The question which has been raised as to the failure of consideration, if it were necessary to determine it, might present some difficulty. It is quite clear that the respondent never got the benefit of that for which he stipulated ; that circumstances prevented the razeenamah from being acted upon ; and that in the events which afterwards took place, he was exposed to have his title questioned and carried up to the Court of ultimate appeal, just in the same way as it would have been litigated had the razeenamah never been executed. On the other hand, there is, no doubt, a good deal of truth in the argument of Mr. Mayne to the effect that the failure of consideration was in some degree due to the respondent himself ; and that if, when the widow had appealed from the first decision in her suit, and claimed the benefit of the razeenamah, he had joined in also asking for the benefit of the razeenamah, the whole transaction might have been carried out as the parties had originally intended it should be. It is, however, unnecessary to decide this question, since it appears to their Lordships that the respondent is entitled to succeed on the other issue settled in this suit.

What was really the position of the parties ? Here was a man who had originally nothing at all to do with this family. All the members of the family appear at first to have been agreed that this young boy was the true heir to the zemindaree. The widows afterwards, then, either of their own mere motion, or at the instigation of the plaintiff or his agents, determined to dispute that title. They next deprived themselves of all freedom of action with respect to the suit which they thought fit to bring, by giving the interest and the powers which are given by the agreement B to the plaintiff.

With respect to the law of champerty, or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The statute of champerty, being part of the statute law of England, has of course no effect in the mofussil of India ; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts in England. On the other hand, the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably, the true principle is that stated by Sir Barnes Peacock in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bond fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. Now, looking at all the facts of this case, their Lordships think

it is extremely doubtful whether the plaintiff could have recovered on this agreement if the question had arisen between the widows and the plaintiff after he had got the estate for them ; whether, upon the principles laid down by Chief Justice Peacock and cited by Mr. Justice Kemp in the case in the 13th Weekly Reporter, the Courts might not have refused to enforce such an agreement. The principle laid down by the learned Judge was that although the law of champerty was not a law applicable to the mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family affairs, by an agreement between him and the real heirs that if he should establish their claim he should be entitled to a share of the estate. Nor, in holding that such an agreement could not be enforced, would the Courts, as it seems to their Lordships, be running counter to what was decided by this Committee in the case of *Fischer v. Kamala Naicker*,* for the judgment there assumes that if the agreement is something against good policy and justice, something tending to promote unnecessary litigation, something that in the legal sense is immoral, it cannot be supported. But it is not necessary for their Lordships to decide a question which has not arisen, viz., what would have been the rights of the appellant as against the widow. It is sufficient for them to say that they are dealing with a person who had got up, or at all events intervened in, a suit with which he had no necessary concern ; who had made himself *dominus litis* in that suit, and had acquired over the plaintiffs in it the power of preventing them from doing what they felt to be right and just ; and from interested and corrupt motives was exercising that power. The zemindar must be taken to have been the legitimate heir ; and even if the widows had *bond fide* entered into the litigation to dispute that legitimacy, it is perfectly clear that at the time when this transaction took place they had come to a better mind, and had satisfied themselves that the right thing as regarded the boy and as regarded the family was to acquiesce in his title, to admit his legitimacy, and to allow him to remain zemindar.

Their Lordships think it would be contrary to every sound principle of justice and of policy to permit a person who had acquired this sort of irregular interest in a suit,—and a power which cannot be safely conceded to any speculator,—to make his power of preventing a family arrangement so just and proper from being carried into effect, the means of extorting a large sum of money from the person whose title had been unjustly challenged. The case, however, does not rest here. The transaction was not one entered into between two persons, each of whom was capable of taking care of himself. Here was a boy of 18 without proper counsel or assistance, for such of his servants as gave him any advice thought with him that he should do nothing until he could see the Collector ; and his vakeel, who is represented as his legal adviser in the matter, disowns having given him any counsel, and has been treated as having failed in his duty in refusing that counsel. There is, moreover, clear evidence that he was threatened with the consequences of not immediately acquiescing in the plaintiff's demand ; that these threats were addressed by a powerful man to a boy, and were therefore likely to disturb his mind and render him incapable of acting as a free agent. Whoever has had to do with litigation in India must know that such threats are of far greater weight there than they would be in this country. This suit was one in which the legitimacy of the respondent was called in question ; and the person threatening was a person conversant with law-suits,—a person of great wealth and great power ; and we all know how easy it is in India, upon such an issue as that, to get up any amount of false evidence, and that it is not because a man has a true case that he is sure to bring it to a successful issue. Their Lordships think the Judges of the High Court have rather understated the case when they treated the threats as threats only of consequences perfectly legal ; for (putting aside the threat as to

* 3 W. R. P. C. 33 ; 1 Suth. P. C. R. 395.

suing on the note for Rs. 62,000, which is not so satisfactorily proved as the others) they think that the threats proved may well be taken to be threats of carrying on the litigation against the respondent *per fas aut nefas*. In any case they were threats which overcame his free-will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed was due, to execute the bond extorted from him.

That being their Lordships' view, they think that the Court below was right in holding that the bond cannot stand against the respondent. It is not necessary to go into the question which has been argued on both sides as to the power of the Court to make the bond stand as a security for what may really have been advanced. It is not necessary to consider whether in a suit brought to enforce a fraudulent deed against a person from whom something is justly due, a Court of justice ought to exercise the power of saying that such a deed shall stand as security for what is really due; because in this case, but for the bond which was thus extorted from him, nothing was ever due from the respondent to the appellant, and there existed no privity of contract between them.

Upon these grounds their Lordships think that the decisions of the Courts below, now under appeal, were right, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal with costs.

The 12th May 1874.

Present :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Ancestral property—Liability for debts—Execution sale—Purchaser's rights.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Girdharee Lall and another

versus

Kantoo Lall and others ;

and

Muddun Thakoor

versus

Kantoo Lall and others.

Ancestral property which descends to a father under the Mitacshara law, is not exempted from liability to pay his debts because a son is born to him, unless the debt is illegal or has been contracted for an immoral purpose, in which case the son may not be under any pious obligation to pay it.

A purchaser of joint ancestral property under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale in execution.

This is a suit brought by Baboo Kantoo Lall, the son of Bhikharee Lall, and by Mussamut Doolaro Koonwaree, on behalf of Mahabeer Pershad, the minor son of Lalla Bujrung Sahye, the said Kantoo Lall and Mahabeer Pershad being grandsons of Moonshree Kunhya Lall, deceased, against a number of different defendants,

* From the judgment of Kemp and E. Jackson, *J.J.*, in Regular Appeals No. 114 of 1867 and No. 44 of 1869, decided 16th April 1868.—9 W. R. 469.

who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate. The first appeal arises out of the suit so far as it related to the first set of defendants, Baboo Girdharee Lall and Runjeet Pandey, to recover possession of Talooka Nawalgaman and Akha Amanut Sarcar in Pengunnah Chayen, and to set aside a deed of sale which was executed by the fathers of the two plaintiffs, dated the 28th July 1856. The fathers are both made defendants in the suit; and it is stated by one of the witnesses, and is probably the fact, that Bhikharee Lall, the father of Kantoo Lall, is in reality the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers, and to recover possession of the whole property,—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit. The High Court set aside that decision and awarded to the plaintiff, Kantoo Lall, one-half of his father's share,—that is, one-half of an 8-anna share; but as to the other plaintiff, Mahabeer Pershad, the minor son of Bujrung Sahye, they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

The property is situated in the Mithila district, and is governed by the Mithila law, which is very similar to the law administered under the Mitacshara. With reference to the Mitacshara upon this point, it may be well to read from the 11th Moore's Privy Council Cases, p. 89, a portion of the judgment which was delivered by Lord Westbury in the case of *Approvier v. Rama Subba Aiyar** before the Judicial Committee. He says:—"According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to a particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court 12 Weekly Reporter, Full Bench Cases, p. 5, this suit was brought by Kantoo Lall and Mahabeer Pershad, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitacshara law, recover an undivided share of ancestral property sold by his father (12 Weekly Reporter, Civil Rulings, 478). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the plaintiff was not entitled to recover any portion of the estate as regards the first two defendants.

It appears that the deed of sale was executed on the 28th July 1856. At

* § W. R. P. C. 1; 1 Suth. P. C. R. 657.

that time a decree had been obtained against Bhikharee Lall at the suit of Byjnath Chuckerbutty, upon a bond executed by Bhikharee in his favor, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was therefore necessary to raise money to pay the debt of Bhikharee Lall, the father, and to get rid of the execution, whatever the effect of it might be.

The property descended from Kunhya Lall, who died in the year 1250. The eldest of the two plaintiffs, Kantoo Lall, was not born until 1251. So that upon the death of Kunhya Lall, the property descended to Bhikharee Lall and Bujrung Sahye as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1251, before the deed of sale was executed, Kantoo Lall was born, and, by reason of his birth, under the Mithila law, he had acquired an interest in this property.

Now it is important to consider what was the interest which Kantoo Lall acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been referred to in argument of Hunoomanpersaud Panday *v.* Mussamut Babooee Munruj Koonweree * (6 Moore's Indian Appeal Cases), Lord Justice Knight Bruce, who delivered the judgment of the Privy Council, says at page 421 :—"Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, as indeed the case above cited from the 6th volume of the decision of the Sudder Dewanny Adawlut, North-Western Provinces, incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to show that ancestral property which descends to a father under the Mitacshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce :—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a Court of Justice; there was nothing to show that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion either that the bond or the decree was obtained benamee for the benefit of the father, or merely for the pur-

* See p. 29 ante.

pose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved that the purchase-money for the estate was paid into the bankers of the fathers and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue ; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bond fide* purchaser who gave value for the estate and to recover possession of it with mesne profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years ; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase-money, the sale would not be wholly void.

It appears, therefore, to their Lordships that the plaintiffs are not entitled to set aside the deed of sale ; that the judgment of the Principal Sudder Ameen with regard to it was correct ; and that the High Court were mistaken in upsetting that decision, and awarding to the plaintiff one-fourth of the estate, as being one-half of the share of his father.

In addition to the case in the Privy Council, there is a case in the Sudder Court of Mussamut Junnuk Kishoree Koonwar *v.* Rughoonundun Sing, reported in the Bengal Sudder decisions of 1861 ; in which it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose. The passage is at page 222. It is there said :—"The sales for the reversal of which the present suit is brought divide themselves into three classes : first, sales made by order of Court in execution of decrees ; second, sales made privately to satisfy decrees and bonds ; and third, sales made simply in order to raise money for some purpose or another. Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts under Hindoo law can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the plaintiff has been unable to show that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these), immoral, and such as under Hindoo law the son would not be liable for."

It appears, therefore, to their Lordships that the plaintiff certainly is not entitled to set aside this deed ; and if he were so entitled, it is very doubtful whether he has any particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide anything with regard to that point, inasmuch as they hold that the plaintiff is not entitled to set aside the deed of sale.

The second appeal is by Muddun Mohun Thakoor. He is the fourth defendant in the suit which was brought against him to recover possession of 5-anna share in Mouzahs Rajpore and Allinuggur, &c. It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers ; that a Court of justice had given a decree against them in favor of a creditor ; that the Court had given an order for this particular property to be put up for sale under the execution, and therefore it appears to their Lordships that he was perfectly justified within the principle of the case which has already been referred to, in 6th Moore's Indian Appeal Cases, in purchasing the property, and paying the purchase-money *bond fide* for the purchase of the estate. At page 423 of the report, Lord Justice Knight

Bruce says :—"The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bond fide* purchased the estate under the execution, and *bond fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant. It appears to their Lordships, therefore, that, the decision of the Principal Sudder Ameen as regards this portion of the case was also correct.

Under these circumstances their Lordships will humbly recommend Her Majesty that the judgment of the High Court, so far as it relates to the two portions of the estates purchased by the appellants in these two appeals, respectively be reversed, and that the decision of the Principal Sudder Ameen with regard to them be affirmed, and that the respondents do pay to the appellants respectively their costs in the High Court, and their costs of these appeals.

APPENDIX I.

The 20th July 1855.

Present:

Rt. Hon. T. P. Leigh, Lord Justice Knight Bruce, Sir Edward Ryan,
and Lord Justice Turner.

Dower—Mahomedan widow (Right of, to take possession of husband's effects in satisfaction of her claim)—Right of suit (without previous demand)—Limitation (Reg. III of 1793 s. 14).

On Appeal from the Sudder Court at Agra.

Ameeroonnissa and others

versus

Mooradoonnissa and others.

Where in a deed of dower it was not mentioned that any property was pignored for the dower, and the dower was not demanded during the lifetime of the husband (a Mahomedan of the Imameeah sect), the widow was held entitled to take possession of her husband's effects by virtue of her claim for dower to the amount of her dower, and to alienate a part of them in satisfaction of the same.

Upon a true construction of this settlement it was held that the widow had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately or in his lifetime, and that consequently limitation under Reg. III of 1793 s. 14 did not apply.

Knight Bruce L.J.—Syed Moostafa, a Mahomedan in good circumstances, died on the 4th October 1808, in the North-west Provinces, intestate, without child or descendant, but a female, the principal defendant, Mooradoonnissa, lived in his house and passed as his wife, and now claims dower as his widow, and two young men, named Gholam Abbas and Sooltan Ali, the sons of Moshun Ali, in a sense members of his family, were living with him, and who appear to have been brought up by Razeeah Begum, the first wife of Syed Moostafa, and claimed to be treated as adopted sons, although no power of adoption is known to the Mahomedan law. In these circumstances, the lady who lived with the deceased appears to have entered at his death into possession of his property in the neighbourhood of the place where he died, and she was treated by the local authorities as administratrix. As a Mahomedan widow, she would be entitled to a fourth part of the deceased's estate, the other three parts going to his heirs.

The two sons of Moshun Ali, for reasons not apparent, afterwards set up a claim to the property, as descendants of Syed Moostafa, and contested the title of the widow, denying the fact of her marriage with the deceased. This led to quarrels and litigation, which ultimately, in 1842, ended in a compromise between them, upon terms sufficiently advantageous to these young men. By this arrangement they agreed to divide the property of the deceased in equal moieties, half to go to the widow and half to them.

Shortly after this compromise there arose the claim which has led to the present appeal. That claim was set up by Syed Abdoolla, the full brother and heir-at-law of Syed Moostafa, and he brought his suit in the year 1843, in the Zillah Court of the Principal Sudder Ameen of Moradabad against the respondent, Mooradoonnissa, and others, seeking to obtain possession of the zemindaries and other real and personal estate of the deceased, and for mesne profits; and by his plaint he charged Mooradoonnissa with not being the wedded wife of the

deceased; and made other allegations which, as far as it appears to their Lordships, had better have been omitted. The respondent, by her answer, set up her marriage with the deceased, and insisted upon her rights as his widow, and alleged that she held a deed of dower executed on her marriage, whereby the deceased settled upon her Rs. 46,000, and that she held the property as a lien for such dower. The reply impeached the deed as a forgery, and denied the marriage. Evidence was gone into, and the Principal Sudder Ameen, by his decree, decided against the claimant. An appeal was made from this decision to the Sudder Dewanny Adawlut, when Mr. Taylor, the presiding Judge,* after consulting the Mooftee attached to the Court as to the law relating to dower, came to the same conclusion and dismissed the claim. The present appeal is against that decree, and has been heard *ex parte*. The case has been here argued with great zeal and ability. There are four points upon which the case depends. First marriage or no marriage; second, whether the alleged deed of dower is genuine or a forgery; third, the effect of Regulation of Limitation III of 1793 s. 14, upon the deed of dower, which, as it created a debt demandable and payable immediately, it is said, was a demand that was barred, more than twelve years having elapsed; and fourthly, the appellant urges that the decision is erroneous, and that there ought not to have been a total dismissal of the suit, as the plaintiff was the heir-at-law, and that there ought to have been an account taken of the deceased's estate, as he was entitled to the residue, after payment of the dower to the widow.

With regard to the marriage, much need not be said. The question is, did a marriage take place? Now the evidence is so very strong that, after the case had been gone into, it was suggested that it was scarcely possible to resist the fact of the marriage. She must therefore be taken to be the widow.

The question of dower is less clear. The deed is dated the 26th July 1818, and considering the position of the respondent, Mooradoonnissa, at that time a dancing girl, the sum of Rs. 46,000 for dower seems excessive: but then there must be taken into consideration the circumstances of Syed Moostafa. He had no family, was advanced in life, and appears to have formed a very strong attachment for this young woman, and therefore it is not improbable that he should make a very liberal provision for her by way of settlement. Seven witnesses are examined, and speak to this deed, and every one of them must be grossly perjured if there was no marriage; two of them are attesting witnesses. The deed is proved to be holograph of the husband, and as he was a man well acquainted with business, and his handwriting well known in the neighbourhood,

* The following were the points upon which Mr. Taylor consulted the Mooftee:—

"If in a deed of dower it be not mentioned that any property is pignored for the dower—if from the record of the case, the marriage and the settlement by dower be proven—can the wedded wife, according to Mahomedan law applicable to the Imameeah sect, take possession of her husband's effects by virtue of her claim for dower, supposing the effects to be less in value than the amount of the dower, and can she alienate any part of them?"

The *futwa* of the Mooftee was as follows:—"in the Moofateah-ool-Sherayeh and its commentary, books which treat of the Mahomedan law applicable to the Imameeah sect, and are works of great authority, it is distinctly declared that, if any person have a claim against another, and the debtor deny the debt, the creditor is competent to take the debtor's property which is of the same description as the debt consists of. For example, if the debtor's property consists of cash, and the debt be also for cash, the creditor is justified in taking just so much of the property as is equal to the debt. If the matter of the debt and the debtor's property be of different kinds, for example, if the debtor's property be immoveable, and the debt be for cash, the creditor is justified in taking so much of the property, the value of which covers the debt, or he may sell it and apply the proceeds to the liquidation of the debt, but in no case is it lawful to take more than the debt. It is not necessary to have recourse to the public authorities in order to enable the creditor to take the debtor's property in payment of the debt, but it is better to apply to the authorities. Thus, under the authority of the above doctrines, the wedded wife referred to in the Court's question is competent to take the effects of her husband in kind, to the amount of her dower, in satisfaction thereof, or she may take the value of such effects to the amount of her dower, without resorting to the Courts. In no case, however, is she justified in taking more than the amount of her claim. Whatever remains over is divided among the heirs, according to Mahomedan law, first satisfying claims which take the preference of inheritance."

if any doubt existed, proof of forgery could have been given, but it is not attempted to be established by evidence that is not his handwriting. The instrument itself, when produced, is found to be partly obliterated and defaced by wet and age, but a copy of the instrument from the registry of the Cazeer is brought forward. This deed does not appear to have been registered during the lifetime of the husband; but their Lordships assume that the rules required by law were complied with by the Cazeer. If it was a forgery, it is a great probability that a different time would have been selected, and all the circumstances seem to favor the likelihood of such a transaction having taken place. With regard to the marriage, it may be improbable, we admit, that a marriage had taken place at the sacred time alleged; but if no marriage had taken place, these persons would not have selected that time, and alleged it to have taken place at that time. This deed of dower was, however, never brought forward during the intermediate time when the disputes arose between the respondents and these two young men. There was a perfect silence during that time, and the excuse for not producing it is not very satisfactory, but it must be remembered that a copy was on the registry in 1839. I cannot say what reason actuated the respondent, Mooradonnissa, or her advisers, in preventing the deed being produced; but that fact is not sufficient to raise a presumption of fraud, and to outweigh the direct evidence of the witnesses, and more particularly when a stamp of the value required for such a deed is proved to have been sold to the deceased a short time previous to the date of the deed, which makes the evidence, we think, preponderate in favor of the deed; and considering that it is a mere question of fact, upon which no difference of opinion existed in the Courts below, it would require a strong case to justify us in reversing their decrees, and therefore, we think, the marriage and deed must be held to be established.

Then there arises the question as to the operation of the Regulation of Limitation III of 1793. It was contended that the form of the deed by the Mahomedan law was to make the dower exigible immediately, not only due but at once demandable, and that twelve years, the period of limitation, expired in 1830, during the lifetime of the husband. Upon this point a very great difficulty arises. It was never pleaded in the original proceedings by the plaintiff before the Principal Sudder Ameen, the objection was only taken in the Sudder Dewanny Court; and considering that it is an objection by the plaintiff against the defendant, that might perhaps be a ground for refusing to entertain it. Now s. 14 of the Regulation in question prohibits the Civil Courts from hearing or determining any suit whatever, "if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he directly preferred his claim within that period for the matters in dispute, to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he should not proceed in the suit; or shall prove that either from minority, or other good and sufficient cause, he had been prevented from obtaining redress." This may probably be a case fit to be dealt with under the concluding part of this Regulation; there may be such "good and sufficient cause," but their Lordships do not desire to put their decision on that point. The terms of the deed are "when demanded by my wedded wife." In this country various cases have arisen with regard to obligations payable on demand; a promissory note, not payable on demand, is payable immediately. It is important, however, in some cases of negotiable securities, that the demand be made within a reasonable time; in other cases that the demand should be made immediately, and in some without any demand at all. *Carter v. Ring* (3 Camp. 459), *Gibbs v. Southam* (5 Barn. and Ad. 911), *Simpson v. Routh* (2 Barn. and Cr. 682.) In the latter case Mr. Justice

Littledale lays it down that, in the case of a bond with a penalty to pay a certain sum on demand, an express demand must be made before the action can be maintained. So in an action on a promise to pay a collateral sum on request. These authorities show that there may be cases where an action would not lie except where a request or demand is made, and others where such demand is not necessary. It is quite unnecessary that it should be any demand here. The deed of dower or settlement by the husband in favor of his wife, and the intention of the parties, was that the wife was to have, as a dowry, the sum of Rs. 46,000; and it is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument; it would be full of danger to the happiness of married life; and we think, upon the true construction of this settlement, she had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately, or in his lifetime. Their Lordships are therefore of opinion that the Regulation does not apply as a bar to her claim, and that such defence entirely fails.

Lastly, there remains the question of the distribution and administration of the deceased's estate. No such relief is asked by the plaintiff. The claim made by the plaintiff is as sole heir against the defendants, charging them with collusion in keeping him out of possession. He does not claim in the alternative, that if the marriage of the respondent, Mooradoonnissa, and the deed of dower are proved, then that he may have his share of the estate. It is possible it might have been competent to the Court below, in their discretion, to have entertained such a question, but it was a matter of discretion for the Judge of the Sudder Dewanny Adawlut. Independently of this, Mooradoonnissa was in possession, by the consent of the local authorities, a possession very analogous to that of an executrix here. That fact, however, is not sufficient to decide the point of right, but the plaintiff has not asked for an account. Again, he has burdened the record with a number of unnecessary parties who ought not to have been there, and that would have created very considerable inconvenience in taking accounts. He has also excluded all the moveable estate, and that portion of the immoveable estate of which he himself obtained possession. We are of opinion, therefore, that the Judges before whom the case has been heard in India took the right and convenient course in dismissing his suit, and leaving him to bring another suit to obtain an account; that, no doubt, was the effect of their decisions, though not in terms.

Under these circumstances their Lordships will add a recommendation in their humble report to Her Majesty, that the dismissal of the appeal be without prejudice to the appellant's right to bring a suit for an account and administration of the deceased's estate consistent with the establishment of the marriage and the deed of dower. Costs, if any, incurred in India by reason of the appeal, must be paid by the appellants.

APPENDIX II.

[The case of *Mussumut Jariutool Butool v. Mussamut Hosseinee Begum*, which was intended to have been here inserted, has already been printed. See page 56 *ante*.]

APPENDIX III.

The 14th December 1841.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, Dr. Lushington, and Sir Edward Hyde East.

Mahomedan law of succession—Intestacy—Family custom—Impartibility—Reg. IV of 1793 s. 15—Reg. XI of 1793—Reg. X of 1800.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rajah Deedar Hossein

versus

Ranee Zuhooroonnissa.

Although the circumstance that the zemindary in dispute had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it, and gave great countenance to the supposition that such a custom existed, yet it was held that the family usage could not exempt this zemindary from the operation of Reg. XI of 1793, which provided that if, after a certain date, any zemindar died without a will, &c., and left two or more heirs entitled (either according to Hindoo or Mahomedan law) to succeed to a portion, such heirs should succeed.

Reg. X of 1800 was held not to apply to undivided zemindaries in which a custom might prevail that the inheritance should be indivisible, but only to the jungle mehals of Mynapore and other entire districts where local custom prevailed.

According to the true construction of Reg. IV of 1793 s. 15, the Mahomedan law of succession applicable to each sect (Sheeah or Soonnee) ought to prevail as to litigants of that sect.

Mr. Baron Parke.—Their Lordships have now to pronounce their opinion upon an appeal from a final decree upon a review of the Sudder Dewanny Adawlut of Bengal pronounced on the 12th August 1822. The case was argued before us on three days. We have fully considered it, and are prepared to advise Her Majesty to affirm that decree.

The suit was instituted in January 1815, for the recovery of the moiety of the zemindary of Pergunnah Soorjapore, to which the appellant claimed to be entitled on the death of his brother Akbar, who died 28th September 1813, leaving the respondent his widow and three children. This zemindary had formerly belonged to the appellant's father, Fookurooddeen Hossein, who died in the possession of it in December 1793. After his death this appellant and his brother, then minors, were in joint possession of the zemindary, and so continued after their majority in 1799 or 1800 until the demise of Akbar.

The respondent was put into possession by the Collector, after some proceedings instituted by the appellant to prevent it; and the appellant was put to commence his action, which he did in the Provincial Court of Moorshedabad in January 1814.

The appellant rested his claim in that action upon three grounds, *first*, a *wussee-yut* or will of the late Rajah his father, alleged to have been executed by him on the 25th January 1793, by which he directed that one of his sons (not naming which) should take the whole zemindary, and on his death that it should devolve on the survivor; *secondly*, an *ikrarnamah* between the appellant and his brother stated to have been executed by both on the 26th September

1810, by which, after referring to the *wusseeyutnamah* and the alleged rule of the family that the zemindary should be undivided, they agreed to hold it during their joint lives without division, and on the death of one, the survivor to take the whole; and *thirdly*, the appellant insisted that, by the family rule, the zemindary was indivisible, and ought to belong to him to the exclusion of his brother's other heirs.

The respondent, besides denying the appellant's right, claimed under a deed of gift alleged to have been executed by Akbar a short time before his death, and to be in consideration of his marriage-settlement, and under another to his three daughters. These deeds, the appellant contended, were forged.

Much evidence was gone into on both sides, and several decisions were made by the native Courts. On the 27th August 1817, the Judge of the Provincial Court decreed against the plaintiff, being of opinion that the respondent had proved the validity of the deeds of gift. In February 1820, there was an appeal to the Sudder; one of the Judges, Mr. Goad, was of opinion that the respondent had not proved the deeds of gift under which she claimed, but that the documents of the appellant were fabricated, and the family rule not proved, and he thought that the decree should be reversed, and that it should be referred to the Mahomedan law officers to ascertain into how many *salems* or shares the zemindary ought to be divided, and to whom they should be allotted, according to the *Furraiz* or law of succession. The case was then referred to Mr. Courtney Smith, who thought that the alleged family rule was made out, and the appellant entitled to recover on that ground, being of opinion that the documents, the will and the *ikrarnamah*, were not proved, nor the deeds of gift.

There being this difference of opinion, Sir James Colebrooke, another Judge of the Sudder, gave his decision upon the case. He concurred with Mr. Smith as to the invalidity of the deeds of gift, and he intimated a strong suspicion of the *wusseeyut*, though he thought the *ikrarnamah* genuine, and he also considered that the family rule was made out.

There was then a petition for a review, which was granted. On that review, Mr. Leycester, the Chief Judge, was of opinion that the family rule was not proved; that the *wusseeyut* was not established, and the *ikrarnamah* void if that document was genuine, and the deed of gift he thought was fabricated. His decision therefore, was that the property must be divided according to the *Furraiz*.

Mr. Dorin, the Officiating Judge, thought the *wusseeyut* a forgery, the *ikrarnamah* not proved, and the deed of gift invalid; and that though the zemindary might have been formerly subject to a rule that it should be undivided, the two brothers had done away with that rule; and since the Regulations of 1793, it was divisible according to the *Furraiz*, and both the litigating parties being of the Sheeah sect, according to whose rules of succession a brother cannot inherit to a brother having daughters, he gave his decision against the appellant's claim altogether.

The appellant presented a petition, objecting that the Sheeah rules of succession have never been adopted by the Courts of Hindoostan; which, with a counter-petition, were considered by all the Judges; and finally, on the 12th August 1822, the three Judges concurred that the appellant's claim should be dismissed; that he should be answerable for the *wasilat* (collections or profit) of the period during which the appellant was in possession; that he should pay the whole costs of the former decision, and one-fourth of that. The appeal is from that decision.

Their Lordships feel no difficulty in concurring with the great majority of the Judges in the opinion that the deeds of gift, under which the respondent claims, are fabricated, and that the *wusseeyut* and *ikrarnamah* are open to so much suspicion that the claim of the appellant, so far as it is founded upon or

confirmed by them, must fail. The absence of the original *wusseeyut* from the place where it ought to have been if it had been a genuine instrument, its non-production, the conflicting accounts given of its contents, and the failure of the appellant to bring it forward at an earlier period, and particularly in opposing registration of the respondent's deed before the Collector, when it would at all events have prevented that officer from letting the respondent into possession,—leave little doubt in the minds of their Lordships that the instrument was never executed by the deceased Rajah, now that the evidence is insufficient to support it. If the *wusseeyut* was forged, the *ikrarnamah*, which recites it, must have been forged also. But without going so far, it is enough to say that the nature of the evidence in support of it, and the conduct of the appellant in not producing this instrument before the Collector, leave their Lordships in so much uncertainty as to its authenticity, that they consider that they ought not to attach any weight to it as supporting the appellant's claim.

Two grounds, therefore, on which the appellant has rested his claim having failed, it now becomes necessary to dispose of the third, that principally insisted upon in the argument before us, viz., the supposed family custom that the zemindary had never been separated, but devolved entire on every succession, and that such custom was still in force.

If the existence of the custom in point of fact, at the death of the father, was the question to be determined by their Lordships, they would have entertained some doubt upon it; for the circumstance that the zemindary had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it, and gives great countenance to the supposition that such a custom existed. But supposing that were so, their Lordships are clearly of opinion that the family usage cannot exempt this zemindary from the operations of Reg. XI of 1793. That Regulation provides that, after the 1st July 1794, if any zemindar shall die without a will, &c., and leave two or more heirs who, by the Mahomedan or Hindoo law (according as the parties may be of the former or latter persuasion), may be respectively entitled to succeed to a portion, such heirs shall succeed. This being a claim to succeed to Akbar who died long after July 1794, not to Rajah Fookurooddeen who died before, the succession must be governed by this Regulation. The proviso, s. 5, did not affect this case, for that was introduced to avoid any retrospective operation of the previous clause, and to prevent any claim by the co-heirs under it, to succeed to an estate which had then devolved entire or should devolve entire before the 1st July 1794.

It was, however, contended on the part of the appellant, that the regulation of 1793 was repealed, with respect to this zemindary, by another regulation made on the 1st December 1800, Reg. X, which, referring to the prior regulation of 1793, recites that a custom having been found to prevail in the jungle mehals of Midnapore, and other districts, by which the succession to landed estates invariably devolved to a single heir without the division of the property, and the custom having been long established and founded on certain circumstances of local convenience which still exist, the Governor-General enacts that the Regulation of 1793 shall not supersede or affect any such established usage which may have obtained in the jungle mehals of Midnapore or other districts, and that in the mehals in question the local custom of the country shall be guided by it in the decision of all claims which may come before them in the inheritance of landed property situated in those mehals. But it is clear to their Lordships that this Regulation did not apply to undivided zemindaries in which a custom might prevail that the inheritance should be indivisible, but only to the jungle mehals, and other entire districts, where local custom prevails.

The construction contended for, viz., that every individual zemindary in which the custom had been that it should descend entire was exempted, would repeal

the Regulation of 1793 altogether; whereas it is clear that it was intended to be partially repealed only.

Their Lordships, therefore, have arrived at the conclusion that, on the death of Akbar, his interest in the zemindary devolved, according to the Mahomedan law of succession, to several heirs.

The only remaining question is, whether the law of succession is to be that which prevails amongst the *Soonnees* or *Sheeahs*, the rule as to each sect being different, and both the litigant parties belonging to the latter. If the law of the *Sheeah* sect is to prevail, the plaintiff has no title, as a brother cannot succeed.

By Reg. IV of 1793 s. 15, it is provided "that in suits regarding succession inheritance, marriage, and caste, and all religious usages and institutions Mahomedan laws with respect to Mahomedans, and Hindoo laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions."

According to the true construction of this Regulation, in the absence of any judicial decisions or established practice limiting or controlling its meaning, the Mahomedan law of succession applicable to each sect ought to prevail; as to litigants of that sect it is not said that one uniform law should be adopted in all cases affecting Mahomedans, but that the Mahomedan law, whatever it is, shall be adopted. If each sect has its own rule according to the Mahomedan law, that rule should be allowed with respect to litigants of that sect. Such is the natural construction of this Regulation, and it accords with the just and equitable principle upon which it was founded, and gives effect to the usages of each religion, which it was evidently its object to preserve unchanged. We feel no doubt, therefore, that we ought to interpret the Regulation of 1793, to adopt the usage or law of each sect unless there be a course of judicial decision or established practice to the contrary.

As to judicial decision there is none: and the only precedent bearing upon this question is in favor of the application of the *Sheeah* law. It is the case of *Wujih-on Nissa Khanum v. Mirza Husun Ali* (1 Macnaghten, 266), in which it was proposed by the Court as a question to the Mahomedan Law Offices, what would be the distribution according to the law of either sect; and their direction implies that the Soonnee law was not the established rule of decision in all cases in our Courts of justice. As to the practice, we have availed ourselves of the means of consulting several gentlemen of great experience in the administration of justice in the Indian Courts, and we cannot find that there is any course of practice with respect to all Mahomedan successions at variance with this construction. It is true that the Soonnee law has generally prevailed, because the great majority of the Indian Mahomedans are Soonnees, there being very few families of the *Sheeah* sect, except those of the reigning princes, which will account for the prevalence of the Soonnee doctrines in the Courts; but there is no practice which excludes the application of the *Sheeah* law to the rights of persons professing the tenets of that sect. The natural and equitable construction of the Regulations must therefore prevail.

For these reasons, the advice which their Lordships will give to her Majesty is that the judgment of the Sudder Dewanny Adawlut must be affirmed; and their Lordships do not think it right to make any alteration in that part of the decree which relates to costs. That part, however, which directs the appellant to account to the defendant for the proceeds of the moiety of the zemindary whilst he was in possession, must be altered. He must bring the amount in Court to be paid to those who are heirs according to the *Sheeah* law of succession and their representatives, and the decree of the Court below, with that modification, is to be affirmed with costs.

100

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

Stanford Law Library



3 6105 062 855 684

